

**ITEM 3
TEST CLAIM
FINAL STAFF ANALYSIS**

Education Code Sections 313, 60810, 60811, 60812
Statutes 1997, Chapter 936, Statutes 1999, Chapter 78, Statutes 1999, Chapter 678,
Statutes 2000, Chapter 71

California English Language Development Test (00-TC-16)

Modesto City School District, Claimant

Table of Contents

Executive Summary/Staff Analysis	1
Exhibit A	
<i>California English Language Development Test (CELDT)</i> , test claim and attachments, June 13, 2001 (and 7/17/01 amended declaration)	101
Exhibit B	
Department of Finance comments submitted August 31, 2001	247
Exhibit C	
Claimant comments submitted October 4, 2001	253
Exhibit D	
Letter from SixTen and Associates submitted June 7, 2004.	265
Letter from SixTen and Associates submitted June 23, 2004.	271
Exhibit E	
Draft Staff Analysis for CELDT test claim, issued July 28, 2004	299
Exhibit F	
Assembly Floor analysis, Assembly Bill No. 748 (1997-1998 Reg. Sess.) as amended September 4, 1997.	321
<i>McLaughlin v. State Board of Education</i> (1999) 75 Cal.App. 4th 196.....	324
Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2, California State Department of Education, August 26, 1987.	345
<i>Lau v. Nichols</i> (1974) 414 U.S. 563.	371
<i>Castaneda v. Pickard</i> (5th Cir. 1981) 648 F. 2d 989, 1014.	377
<i>Teresa P. v. Berkeley Unified School Dist.</i> (1989) 724 F. Supp. 698.	403
<i>Keyes v. School Dist. No. 1</i> (D. Colo. 1983) 576 F. Supp. 1503.	422
<i>Yamaha v. State Board of Equalization</i> (1998) 19 Cal. 4th 1.	440
Exhibit G	
Department of Finance comments submitted August 27, 2004.....	457

**ITEM 3
TEST CLAIM
FINAL STAFF ANALYSIS**

Education Code Sections 313, 60810, 60811, 60812
Statutes 1997, Chapter 936, Statutes 1999, Chapter 78, Statutes 1999, Chapter 678,
Statutes 2000, Chapter 71

California English Language Development Test (00-TC-16)

Modesto City School District, Claimant

EXECUTIVE SUMMARY

The test claim statutes require the Superintendent of Public Instruction (SPI) to develop an examination for English-learner pupils. The result is the California English Language Development Test (CELDT), which has the following purposes: "(1) To identify pupils who are limited English proficient; (2) To determine the level of English language proficiency of pupils who are limited English proficient; (3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English."¹ A separate test claim statute requires English-learner pupils be tested upon enrollment and annually until they are redesignated as English proficient.

Staff finds that the test claim legislation's English-language assessment provisions do not impose state-mandated activities because their requirements are in preexisting federal law, as detailed below. Alternatively, English-Language assessment is not a new program or higher level of service because it was already required by state law.

Therefore, staff finds that Education Code sections 313, 60810, 60811, and 60812, as added or amended by Statutes 1997, chapter 936, Statutes 1999, chapters 78 and 678, and Statutes 2000, chapter 71, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and deny the test claim.

¹ Education Code section 60810, subdivision (d).

STAFF ANALYSIS

Claimant

Modesto City School District

Chronology

- 06/13/01 Claimant Modesto City School District files test claim with the Commission on State Mandates (Commission)
- 07/17/01 Claimant files an amended declaration with the Commission
- 08/31/01 Department of Finance (DOF) files comments on test claim with the Commission
- 10/04/01 Claimant files response to DOF's comments
- 09/03/03 MCS Education Services files notification that it is seeking authorization to act as claimant representative, and requests to be added to the mailing list
- 09/05/03 Paul Minney files notice of withdrawal as claimant representative and requests to be removed from the mailing list
- 06/03/04 Commission files notice to sever Title 5, California Code of Regulations sections 11510 - 11517 from 03-TC-06, *California English Language Development Test II (CELDT II)* and consolidate them with 00-TC-16, *California English Language Development Test (CELDT)*
- 06/09/04 Keith Petersen, claimant representative for CELDT II test claim, files objection to severance and consolidation
- 06/25/04 Keith Petersen files appeal of the decision to sever and consolidate, and motion to consolidate both CELDT and CELDT II test claims.
- 07/01/04 Commission rescinds decision to sever Title 5, California Code of Regulations sections 11510 - 11517 from 03-TC-06, CELDT II and consolidate them with 00-TC-16, CELDT
- 07/28/04 Commission issues draft staff analysis
- 09/09/04 Commission issues final staff analysis and Proposed Statement of Decision

Background

A. Test Claim Legislation

The legislative history of Assembly Bill No. 748 (Stats. 1997, ch. 936) outlined the challenge posed by English-learner pupils as follows:

Approximately 1.3 million students enrolled in California's public K-12 system are English learners (also called "limited-English-proficient," or LEP pupils). This

amounts to approximately 20% of the K-12 population. English learners also make up approximately 40% of the population in the first two grades of school. Approximately 78% of English learners statewide speak Spanish as their primary language, and roughly 4% of English learners speak Vietnamese as their primary language.²

The CELDT was instituted for the following reasons:

- (1) To identify pupils who are limited English proficient.
- (2) To determine the level of English language proficiency of pupils who are limited English proficient.
- (3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.³

Statutes 1997, chapter 936 requires the Superintendent of Public Instruction (SPI) to review existing tests that assess English-language development (of limited English proficient or L.E.P. or English-learner pupils) for specified criteria, and to report to the Legislature with recommendations. If no existing test meets the criteria, the SPI is required to explore the option of a collaborative effort with other states to develop a standardized test or series of tests and authorizes the SPI to contract with a local education agency to develop the test or series of tests or to contract to modify an existing test or series of tests (§ 60810).⁴ It also requires the State Board of Education (SBE) to approve standards for English-language development for pupils whose primary language is other than English (§ 60811).

Statutes 1999, chapter 78 amended section 60810 to require the SPI and SBE to release a request for proposals for the development of the test no later than August 15, 1999, and select a contractor by September 15, 1999, for the test to be available for administration during the 2000-01 school year. It also amends section 60811 to require the SPI to develop the standards for English-language development by July 1, 1999.

Statutes 1999, chapter 678 added section 313 to require English-learner pupils be tested upon enrollment and annually until they are redesignated as English proficient. Section 60812 was also added to require the SPI to post the test results on the Internet. Finally, the bill included the statement:

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.⁵

² Assembly Floor analysis, Assembly Bill No. 748 (1997-1998 Reg. Sess.) as amended September 4, 1997, page 3.

³ Education Code section 60810, subdivision (d).

⁴ Statutory references are to the Education Code unless otherwise indicated.

⁵ Statutes 1999, chapter 678, section 4.

Statutes 2000, chapter 71 amended section 313 to clarify that the English-language assessment must be conducted at a time appointed by the SPI, and clarifies that districts are authorized to test more than once.

B. Prior and Preexisting State Law

The Chacon – Moscone Bilingual Bicultural Education Act of 1976 (§§ 52160-52178), as amended,

[S]et forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs [sic] was to increase fluency in the English language for L.E.P. students. Secondly, the 'programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, ...' (§ 52161.)⁶

The Chacon - Moscone Act's sunset provision was enacted in 1987 (§ 62000.2, subd. (d)), but funding continued "for the intended purposes of the program." As stated in one of the sunset statutes, "The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative...." (§ 62002). The sunset statute also provided for termination of bilingual education categorical funding, as follows:

[I]f the [SPI] determines that a school district or county superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the [SPI] may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year.⁷

Thus, "even after the Act's provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002."⁸ In 1987, the California Department of Education (CDE) issued a program advisory on how the sunset statutes affected bilingual education.⁹ The advisory outlined the funding requirements for bilingual education, including spending funds for the general purposes of the program and identification and allocation formulas.

In 1998, the voters adopted Proposition 227 (§§ 300 - 340, not including § 313). It requires all public school instruction be conducted in English, and requires English-

⁶ *McLaughlin v. State Board of Education* (1999) 75 Cal.App. 4th 196, 203-204.

⁷ Education Code section 62005.5.

⁸ *McLaughlin v. State Board of Education*, *supra*, 75 Cal.App. 4th 196, 204.

⁹ Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2, California State Department of Education, August 26, 1987.

learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year.¹⁰ The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.¹¹ Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English.¹²

The regulations implementing Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300 – 11316) cover topics such as how to determine whether the pupil is English proficient, duration of services, reclassification, monitoring, documentation, annual assessment, census, advisory committees, parental exception waivers, community-based English tutoring, and notice to parents or guardians.¹³

Statutes 1999, chapter 678, the test claim statute that added section 313, included a statement that it was supplementary to rather than amendatory of Proposition 227.¹⁴

C. Preexisting Federal Law

Title VI of the Civil Rights Act (42 U.S.C. § 2000d) prohibits discrimination under any program or activity receiving federal financial assistance.

The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal educational opportunity for national origin minority students. It states, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ ... ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

The term "appropriate action" used in that provision indicates that the federal legislature did not mandate a specific program for language instruction, but rather conferred substantial latitude on state and local educational authorities in choosing their programs to meet the obligations imposed by federal law. *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F. 2d 1030, 1040.

¹⁰ Education Code section 305.

¹¹ *McLaughlin v. State Board of Education*, *supra*, 75 Cal.App. 4th 196, 217.

¹² Education Code section 305.

¹³ These were pled as part of Test Claim 03-TC-06, *California English Language Development Test II*.

¹⁴ "The Legislature finds and declares that this act provides an assessment mechanism that is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227, approved by the voters at the June 2, 1998, primary election)." Statutes 1999, chapter 678, section 3.

Federal cases, however, have interpreted section 1703 (f) to require testing students' English-language skills.¹⁵

According to *Castaneda v. Pickard*, "...proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."¹⁶ The *Castaneda* court also devised a three-part test to determine whether a program complies with section 1703 (f):

First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. ... [S]econd ... would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. ... Finally ... [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.¹⁷

In *Keyes*, the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "flawed by the failure to adopt adequate tests to measure the results of what the district is doing. ... The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy."¹⁸

In 1994, Congress enacted the Improving America's School's Act (IASA) that required an annual assessment of English proficiency." In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. NCLB requires states, by school year 2002-2003, to "provide for an annual assessment of English proficiency ... of all students with limited English proficiency..." (20 U.S.C. § 6311 (b)(7)). One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371).

¹⁵ *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989; and *Keyes v. School Dist. No. 1* ((D. Colo. 1983) 576 F. Supp. 1503).

¹⁶ *Castaneda v. Pickard*, *supra*, 648 F. 2d 989, 1014.

¹⁷ *Id.* at pages 1009-1010.

¹⁸ *Keyes v. School Dist. No. 1*, *supra*, 576 F. Supp. 1503, 1518.

D. Related Test Claims

A separate test claim, 03-TC-06, *California English Language Development Test II*, pleads the other statutes¹⁹ and regulations²⁰ related to the California English Language Development Test. The CELDT II claimant alleges activities such as parent notices, language census, determination of primary language, assessment of language skills, census review and correction, designation of pupils as limited English proficient, reports to CDE, and reclassification of pupils.

In March 2004, the Commission adopted its Statement of Decision on *High School Exit Examination (HSEE)*, 00-TC-06 (2004). The decision includes a finding on California Code of Regulations, title 5, section 1217.5, which requires school districts to evaluate pupils to determine if they possess sufficient English-language skills at the time of the HSEE to be assessed with the test. Because former Education Code section 51216 already required English-language assessments, the Commission found that section 1217.5 constitutes a reimbursable mandate only for the activity of determining whether an English-learner pupil has sufficient English-language skills to be tested.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

- A) Field testing the CELDT as required by the CDE;
- B) Initial assessment of all K-12 students with a home language other than English;
- C) Annual assessment of all students not classified as English proficient using the CELDT;
- D) Adherence to all requirements and performance of all activities detailed in the CELDT Test Coordinator's Manual or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements;
- E) Training district staff regarding the test claim activities;
- F) Drafting or modifying policies and procedures to reflect the test claim activities; and
- G) Any additional activities identified as reimbursable during the parameters and guidelines phase.

Claimant responds to DOF's comments (summarized below) that the CELDT is not federally mandated. Claimant contends that the following activities represent reimbursable state-mandated activities: (1) initially assess every K-12 student with a home language

¹⁹ Education Code sections 48985 and 52164 - 52164.6. Statutes 1977, chapter 36, Statutes 1978, chapter 848, Statutes 1980, chapter 1339, Statutes 1981, chapter 219, Statutes 1994, chapter 922.

²⁰ California Code of Regulations, title 5, sections 11300 - 11316. Test claim 03-TC-06 also includes the title 5 regulations (§§ 11510 - 11517) for the CELDT, such as parental notification, record keeping, test security, and district and test site coordinators' duties.

other than English, and (2) annually assess all students not classified as English proficient. Claimant argues that the state has gone beyond the requirements found in federal law, imposing a state mandate for the CELDT. Specifically, claimant asserts:

While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, these requirements does [sic] not preclude reimbursement for the activities and costs imposed upon school districts by the test claim legislation. Moreover, Title VI, and its regulations, as well as OCR, [Office of Civil Rights of the U.S. Department of Education] do not specify how states and school districts must comply with the Civil Rights Act of 1964. ...

Claimant points out that before enactment of the test claim legislation, school districts had a choice as to which assessment instrument the district would use to determine students' English proficiency and subsequent placement in appropriate classes. According to OCR, assessments must include some objective measure of the student's English-language ability, but does not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. Claimant states that CELDT is not required under federal law.

According to claimant:

Federal law only requires state and local educational agencies to ensure that all students have equal access to a state's core curriculum. This goal can be accomplished in countless ways, through numerous different assessments. California has chosen *one* assessment that *all* school districts must use, the CELDT. [Emphasis in original.] ... Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment [the CELDT] ... represents costs imposed upon school districts by the state. The state, not Title VI or the OCR, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law.

Staff notes that claimant did not plead activities regarding reclassification of pupils from English learner to English proficient. Therefore, this analysis makes no findings on Education Code section 313, subdivision (d), regarding reclassification procedures.²¹

Claimant did not file comments on the draft staff analysis.

²¹ It is likely that reclassification would be analyzed in test claim 03-TC-06, *California English Language Development Test II*, as one of the activities pled pursuant to California Code of Regulations, title 5, section 11303.

State Agency Position

DOF filed comments in August 2001, stating the following regarding the activities claimant pled: First, field-testing is embedded in the testing and not separate from it. Second, federal law also requires students to be assessed for English proficiency. Districts should incur savings as the state is providing funding to the CDE to cover the costs of test development, distribution and related costs previously borne by school districts. CELDT's inclusion of reading and writing implements federal requirements. The OCR enforces Title VI of the Civil Rights Act of 1964, and has stated that assessment of non-English proficient pupils should include reading, writing, and comprehension. OCR has stated that oral language testing only is inadequate, so this is a federal and not a state mandate. Third, regarding annual assessment, OCR has stated that maintaining pupils in an alternative language program longer than necessary to achieve the program's goal could violate anti-segregation provisions of Title VI regulations. Further, the OCR has stated that exit criteria employed by the district should be based on objective standards, such as standardized test scores. Thus, schools that do not repeatedly assess their non-English speaking students in a timely manner using a standardized test may violate federal law. Thus, annual assessment is not a state mandate. Fourth, adherence to CDE or publisher manuals should be offset by the current per pupil district apportionment²² to the extent these activities exceed the previous requirements. Fifth, as to training and policies and procedures, any marginal costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

In August 2004, after the draft staff analysis was issued, DOF submitted comments agreeing with the analysis. No other state agency commented on the test claim.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution²³ recognizes the state constitutional restrictions on the powers of local government to tax and

²² Although not stated by DOF, the state budget apportioned \$5 per pupil for the English Language Development Test during Fiscal Years 2002-2003, and 2003-2004.

²³ Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

spend.²⁴ “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”²⁵ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.²⁶ In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.²⁷

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.²⁸ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.²⁹ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”³⁰ Finally, the newly required activity or increased level of service must impose costs mandated by the state.³¹

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.³² In

²⁴ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

²⁵ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²⁶ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

²⁷ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) ___ Cal.4th ___ [16 Cal.Rptr.3d 466, 477] (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

²⁸ *San Diego Unified School Dist., supra*, ___ Cal.4th ___ [16 Cal.Rptr.3d 466, 475]; reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

²⁹ *San Diego Unified School Dist., supra*, ___ Cal.4th ___ [16 Cal.Rptr.3d 466, 477]. *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835.

³⁰ *San Diego Unified School Dist., supra*, ___ Cal.4th ___ [16 Cal.Rptr.3d 466, 477].

³¹ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

³² *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."³³

Issue 1: Does the test claim legislation impose state-mandated activities on school districts within the meaning of article XIII B, section 6?

The issue is whether any of the following statutes constitute state-mandated activities that are subject to article XIII B, section 6.

A. Duties of the Superintendent of Public Instruction (§§ 60810 subs. (a) (c) & (d), 60811 & 60812)

These sections require the SPI to develop the test, create standards for English-language development, and post test results on the website. They also specify the criteria for the SPI-developed test. Because these provisions do not mandate school districts to perform an activity, sections 60810 - 60812 (except § 60810, subd. (b)) are not subject to article XIII B, section 6.

B. Initial and annual assessment (§§ 313 & 60810 subd. (b))

Subdivision (b) of section 313 requires the SPI to develop procedures for conducting English-language assessment and reclassification. Subdivisions (a) and (c) of section 313 require school districts to assess English-language proficiency for English-learner pupils, and subdivision (c) requires the CELDT to be administered to English-learner pupils upon initial enrollment and annually thereafter until the pupil is redesignated as English proficient. Subdivision (b) of section 60810 specifies the subjects to be tested, such as:

English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English. (§ 60810, subd. (b)).

Staff finds that English-language assessment provisions of section 313 and 60810, subdivision (b), do not constitute a state-mandate on two independent grounds. First, the English-language assessment requirements of Education Code sections 313 and 60810, subdivision (b), do not impose state-mandated activities because their requirements are in preexisting federal law, discussed below. Second, English-Language assessment is not a new program or higher level of service because it was required by prior and preexisting state law, as discussed in issue 2 below.

Preexisting Federal Law Requires English-language Assessment

If an activity is required by federal law, it does not impose state-mandated duties.³⁴ In *City of Sacramento v. State of California*,³⁵ local governments sued for subvention of

³³ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

costs for implementing a 1978 statute that required extending mandatory coverage under the state's unemployment insurance law to state and local governments and nonprofit corporations. The California Supreme Court held that the state statute implemented a federal mandate within the meaning of article XIII B, section 9, subdivision (b), of the California Constitution,³⁶ and therefore does not impose a state mandate.

Similarly, in *Hayes v. Commission on State Mandates*, the court held that the federal Education of the Handicapped Act (EHA) is a federal mandate.³⁷ Citing the *City of Sacramento* case, the *Hayes* court held, "state subvention is not required when the federal government imposes new costs on local governments." *Hayes* also held,

To the extent the state implemented the act [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such ... are state mandated and subject to subvention.³⁸

Claimant argues that although federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, this does not preclude reimbursement. Claimant asserts that Title VI of the EEOA and its regulations do not specify how states and school districts must comply with the Civil Rights Act of 1964.

Staff disagrees. Section 1703 (f) of the EEOA, as interpreted by the *Castaneda* and *Keyes* cases cited below, requires states and school districts to conduct English-language assessments to comply with Title VI of the EEOA.

The EEOA (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. The provision at issue is, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ ... ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

³⁴ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1581.

³⁵ *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 70.

³⁶ "Article XIII B, section 9 (b), defines federally mandated appropriations as those 'required for purposes of complying with mandates of...the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.'" *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 70.

³⁷ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1592.

³⁸ *Id.* at page 1594.

In *Castaneda v. Pickard*,³⁹ the Fifth Circuit Court of Appeal interpreted section 1703 (f) of the EEOA in examining English-learner programs of the Raymondville, Texas Independent School District. The court devised the three-part test cited on page 6 above in determining whether the district's program complies with section 1703 (g).⁴⁰ According to *Castaneda*, "...proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."⁴¹ The court also stated:

Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred.⁴²

Moreover, in *Keyes v. School Dist. No. 1*,⁴³ the court held a Denver school district violated section 1703 of the EEOA, in part because of the district's,

...failure to adopt adequate tests to measure the results of what the district is doing. ...The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"⁴⁴

Castaneda and *Keyes* affirm that a language assessment test such as the CELDT is required to comply with the EEOA, or more specifically, 20 U.S.C. § 1703 (f). Staff finds it persuasive that *Castaneda* is relied on by CDE as authority for various English-

³⁹ *Castaneda v. Pickard*, *supra*, 648 F. 2d 989.

⁴⁰ *Id.* at pages 1009-1010.

⁴¹ *Id.* at page 1014; Accord, *Teresa P. v. Berkeley Unified School Dist.* (1989) 724 F. Supp. 698, 715-716.

⁴² *Castaneda v. Pickard*, *supra*, 648 F. 2d 989, 1014.

⁴³ *Keyes v. School Dist. No. 1*, *supra*, 576 F. Supp. 1503.

⁴⁴ *Id.* at page 1518.

language learner education regulations,⁴⁵ and *Keyes* and *Castaneda* were relied on in a CDE program advisory⁴⁶ regarding the minimum school districts duties in light of the 1987 sunset of the bilingual education statutes.⁴⁷ CDE's interpretation of the law in this area is entitled to deference.⁴⁸

As stated above, in *Hayes* the court ruled that to the extent the state implements federal law by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention.⁴⁹ However, there is no evidence that the state implemented federal law by choosing to impose any newly required acts. The Legislature included the following statement enacted as part of Statutes 1999, chapter 678 (that added section 313).

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.⁵⁰

This statement is evidence of legislative intent to comply with, but not exceed, federal requirements for assessing English-learner pupils. Specifically, it indicates that the state has not chosen to implement federal law by imposing any requirements on school districts beyond the requirements of 20 U.S.C. § 1703 (f) and the cases cited above.

Therefore, staff finds that sections 313 and 60810, subdivision (b), do not impose state-mandated duties on school districts within the meaning of article XIII B, section 6 because preexisting federal law requires testing.

Issue 2: Does the test claim statute impose a new program or higher level of service on school districts subject to article XIII B, section 6?

Staff also finds, as alternative grounds for denial, that English-language assessment is not a reimbursable state mandate because it is not a new program or higher level of service.

⁴⁵ For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

⁴⁶ Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, pursuant to Education Code sections 62000 and 62000.2, California State Department of Education, August 26, 1987, pages 17-18.

⁴⁷ Education Code sections 62000.2 and 62002.

⁴⁸ *Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1, 6-7.

⁴⁹ *Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th 1564, 1594.

⁵⁰ Statutes 1999, chapter 678, section 4.

To determine if the “program” is new or imposes a higher level of service subject to article XIII B, section 6, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.⁵¹

In rebuttal comments, claimant argues that while assessments must include some objective measure of the student’s English-language ability, they do not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. In the test claim, claimant cited prior law as Education Code section 52164.1 and California Code of Regulations, title 5, section 4303, arguing that although language assessment was required under prior law, the CELDT is a new instrument. Claimant also argues that the CELDT requires assessing students in grade 2 in reading and writing as well as listening and speaking, whereas section 52164.1 did not require reading and writing skills to be assessed for pupils in grades 1 and 2.

Staff does not rely on section 52164.1 or section 4303 of the title 5 regulations because of their 1987 sunset provisions.⁵² As to claimant’s argument regarding a school district losing the option of which assessment it may choose, that is not a reason to find a reimbursable mandate. In *County of Los Angeles v. Commission State Mandates* (2003) 110 Cal. App. 4th 1176, 1194, the court held that a loss of flexibility does not rise to the level of a state- mandated reimbursable program.

Before enactment of the test claim statute, language assessments were required on request by the pupil or parent, and were required to obtain a diploma. (Former § 51216, subs. (a) & (b), which were not part of the bilingual education act that sunset in 1987.) Also, annual testing was alluded to in section 305 (enacted as Proposition 227, effective June 1998) that states:

[A]ll children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

⁵¹ *San Diego Unified School Dist.*, *supra*, __ Cal.4th __ [p. 18]; *Lucia Mar Unified School Dist. v. Honig*, *supra*, 44 Cal.3d 830, 835.

⁵² Education Code section 62000.2, subdivision (d). Also, section 62002 states, “The funds shall be used for the intended purposes of the program, but *all relevant statutes and regulations* adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5.” [Emphasis added.] Section 62002.5 concerns parent advisory committees and school site councils.

It is necessary to test annually to determine the pupil's progress in the immersion program, and to determine if the pupil needs longer than one year in sheltered English immersion.

A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."⁵³ A higher level of service also requires specific actions on the part of the school district.⁵⁴

There is nothing in the record to indicate that the CELDT is a higher level of service than the school districts' assessments under prior law.

Moreover, before the test claim statute was enacted, the voters enacted Proposition 227 in 1998.⁵⁵ In CDE's regulations on Proposition 227, CDE interpreted the initiative to require English-language assessments. California Code of Regulations, title 5, section 11301,⁵⁶ subdivision (a) states:

For purposes of "a good working knowledge of English" pursuant to Education Code Section 305 and "reasonable fluency in English" pursuant to Education Code Section 306 (c), an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments.

This regulation was operative July 23, 1998, well before the January 2000 effective date of section 313 (Stats. 1999, ch. 678). Therefore, because English-language assessment required by the test claim statute is not a new program or higher level of service, staff finds that it is not a reimbursable state-mandated program.

CONCLUSION

Staff finds that Education Code sections 313, 60810, 60811, and 60812, as added or amended by Statutes 1997, chapter 936, Statutes 1999, chapters 78 and 678, and Statutes 2000, chapter 71, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and deny the test claim.

⁵³ *San Diego Unified School Dist.*, *supra*, __ Cal.4th __ [16 Cal.Rptr.3d 466, 477].

⁵⁴ *Long Beach*, *supra*, 225 Cal.App.3d 155, 173.

⁵⁵ Proposition 227 was effective June 3, 1998. Section 313 of the Education Code was enacted by Statutes 1999, chapter 678, effective January 1, 2000.

⁵⁶ This regulation was pled as part of Test Claim 03-TC-06, *California English Language Development Test II*.

PAGES 17-100 LEFT BLANK INTENTIONALLY

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
(916) 323-3562

FOR OFFICIAL USE ONLY RECEIVED JUN 13 2001 COMMISSION ON STATE MANDATES
TEST CLAIM NUMBER: <i>00-TC-16</i>

TEST CLAIM FORM

LOCAL AGENCY OR SCHOOL DISTRICT SUBMITTING CLAIM

Modesto City School District

CONTACT PERSON

Paul C. Minney, Esq.
Attorney for Mandated Cost Systems, Inc.

TELEPHONE NO.

(916) 646-1400

ADDRESS

SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP
7 Park Center Drive
Sacramento, California 95825

REPRESENTATIVE ORGANIZATION TO BE NOTIFIED

Mandated Cost Systems, Inc.
Attn.: Steve Smith, CEO
2275 Watt Avenue, Suite C
Sacramento, California 95825

THIS TEST CLAIM ALLEGES THE EXISTENCE OF A REIMBURSABLE STATE MANDATED PROGRAM WITHIN THE MEANING OF SECTION 17514 OF THE GOVERNMENT CODE AND SECTION 6, ARTICLE XIII B OF THE CALIFORNIA CONSTITUTION. THIS TEST CLAIM IS FILED PURSUANT TO SECTION 17551(A) OF THE GOVERNMENT CODE.

IDENTIFY SPECIFIC SECTION(S) OF THE CHAPTERED BILL OR EXECUTIVE ORDER ALLEGED TO CONTAIN A MANDATE, INCLUDING THE PARTICULAR STATUTORY CODE SECTION(S) WITHIN THE CHAPTERED BILL, IF APPLICABLE.

Statutes of 1997, Chapter 936 (AB 748) Education Code Sections 313, 60810, 60811, and 60812
Statutes of 1999, Chapters 78 (AB 1115) and 678 (SB 678)
Statutes of 2000, Chapter 71 (SB 1667)

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

NAME AND TITLE OF AUTHORIZED REPRESENTATIVE

Paul C. Minney, Attorney

TELEPHONE NO.

(916) 646-1400

SIGNATURE OF AUTHORIZED REPRESENTATIVE

DATE

Paul Minney

June 13, 2001

Modesto City School District
426 Locust Street
Modesto, California 95351
Telephone: (209) 576-4011
Facsimile: (209) 576-4184

Paul C. Minney, Esq.
SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP
7 Park Center Drive
Sacramento, California 95825
Telephone: (916) 646-1400
Facsimile: (916) 646-1300

Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant
Modesto City School District

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In Re Test Claim:

Modesto City School District

CSM No. _____

Statutes of 1997, Chapter 936 (AB 748)
Statutes of 1999, Chapter 78 (AB 1115)
Statutes of 1999, Chapter 678 (SB 638)
Statutes of 2000, Chapter 71 (SB 1667)

Education Code Sections 313, 60810, 60811,
and 60812

*California English Language Development Test
(CELDT)*

California English Language Development Test (CELDT)

Table of Contents

I. TEST CLAIM EXECUTIVE SUMMARY	
A. SUMMARY OF THE TEST CLAIM LEGISLATION.....	1
B. OVERVIEW OF MANDATES LAW.....	1
C. QUESTIONS PRESENTED	
1. "PROGRAM".....	2
2. "NEW PROGRAM \ HIGHER LEVEL OF SERVICE".....	2
3. "COSTS MANDATED BY THE STATE".....	3
D. CONCLUSION.....	3
II. TEST CLAIM ANALYSIS	
A. SUMMARY OF THE TEST CLAIM LEGISLATION.....	5
B. ANALYSIS	
1. "PROGRAM".....	6
2. "NEW PROGRAM \ HIGHER LEVEL OF SERVICE".....	7
3. "COSTS MANDATED BY THE STATE".....	13
C. CONCLUSION.....	16
III. CLAIM REQUIREMENTS	
A. AUTHORITY FOR THE CLAIM.....	18
B. ESTIMATED COSTS RESULTING FROM THE MANDATE.....	18
C. APPROPRIATIONS.....	18
D. CLAIM CERTIFICATION.....	19
E. AUTHORIZATION TO ACT AS REPRESENTATIVE.....	20
F. DECLARATION OF LYNN JAMISON.....	21
IV. EXHIBITS	
A. STATUTES OF 1997, CHAPTER 936 (AB 748).....	TAB A
B. STATUTES OF 1999, CHAPTER 78 (AB 1115).....	TAB B
C. STATUTES OF 1999, CHAPTER 678 (SB 638).....	TAB C

D. STATUTES OF 2000, CHAPTER 71 (SB 1667).....TAB D

E. EDUCATION CODE SECTIONS 313, 60810, 60811, AND 60812..... TAB E

F. EDUCATION CODE SECTION 52164.1 AND
TITLE 5, CALIFORNIA CODE OF REGULATIONS, SECTION 4303 TAB F

G. *CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST*
TEST COORDINATOR'S MANUAL; MARCH 25, 1997
CALIFORNIA DEPARTMENT OF EDUCATION LETTER; AND
1996-97 COORDINATED COMPLIANCE REVIEW TRAINING GUIDE..... TAB G

H. 20 UNITED STATES CODE SECTIONS 1703, 1720, AND 8801.....TAB H

TEST CLAIM EXECUTIVE SUMMARY

SUMMARY OF THE TEST CLAIM LEGISLATION

Statutes of 1997, Chapter 936 (AB 748), enacted on October 12, 1997 and operative on January 1, 1998, Statutes of 1999, Chapter 78 (AB 1115), enacted and operative on July 7, 1999 as an urgency measure, Statutes of 1999, Chapter 678 (SB 638), enacted on October 10, 1999 and operative on January 1, 2000, and Statutes of 2000, Chapter 71 (SB 1667), enacted and operative on July 5, 2000 as an urgency measure (the test claim legislation), made several amendments to the Education Code. Among other things, the test claim legislation: (1) empowered the Superintendent of Public Instruction to designate or create a single test to determine students' English language proficiency; (2) requires school districts to initially assess every student with a home language other than English in kindergarten through grade 12; and (3) requires school districts to annually assess all students not classified as English proficient.

OVERVIEW OF MANDATES LAW

For the Commission to find that the test claim legislation imposes a reimbursable state mandated program, the legislation: (1) must be subject to article XIII B, section 6 of the California Constitution, or in other words, the legislation must impose a "program" upon local governmental entities; (2) the "program" must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service; and (3) the newly required program or increased level of service must be state mandated within the meaning of Government Code section 17514.

QUESTIONS PRESENTED

1. **Does the Test Claim Legislation Impose a "Program" Upon School Districts Within the Meaning of the Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the California English Language Development Test (CELDT)?**

Short Answer: YES. The test claim activities are deemed necessary to ensure that students, whose home language is not English, have access to the state's core curriculum. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Furthermore, the test claim legislation only applies to public schools and as such imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, these activities constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

2. **Does the Test Claim Legislation Impose a "New Program" or a "Higher Level of Service" Upon School Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution by Requiring Districts to Administer the California English Language Development Test (CELDT)?**

Short Answer: YES. These activities are in excess of the requirements outlined in prior law, which required school districts to assess students at initial enrollment. Prior law provided for numerous assessment instruments from which school districts could chose. Districts would then perform assessments upon students' initial enrollment in school. Before the enactment of the test claim legislation, school districts were not required to use the CELDT exclusively, assess students in varies program, and annually perform an assessment. Therefore, these activities impose a "new program" or "higher level of service" upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

3. **Does the Test Claim Legislation Impose "Costs Mandated by the State" Upon School Districts Within the Meaning of Government Code Section 17514?**

Short Answer: YES. Although federal law requires educational agencies to ensure that all students have equal educational opportunities, federal law is silent as to how the state and local educational agencies must achieve this. This test claim presents the same fact pattern as the *Behavioral Intervention Plans* test claim, where the Commission found costs mandated by the state when the federal law provided broad, general guidance and the state imposed very detailed requirements upon school districts. This is the same scenario under the test claim legislation. The state is imposing a very detailed program, the CELDT, upon school districts not outlined or required under federal law. Therefore, the test claim legislation does impose costs mandated by the state upon school districts within the meaning of Government Code section 17514.

CONCLUSION

The following activities represent reimbursable state-mandated activities imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

- A. Field-testing of the CELDT as required by the California Department of Education;
- B. Initial assessment of all students with a home language other than English in kindergarten through grade 12 using the CELDT; (Ed. Code, §§ 313 and 60810.)
- C. Annual assessment of all students not classified as English proficient using the CELDT; (Ed. Code, §§ 313 and 60810.)
- D. Adherence to all requirements and performance of all activities detailed in the *CELDT Test Coordinator's Manual* or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements.
- E. Training district staff regarding the test claim activities;

- F. Drafting or modifying policies and procedures to reflect the test claim activities; and
 - G. Any additional activities identified as reimbursable during the Parameters and Guidelines phase.
-

TEST CLAIM ANALYSIS

SUMMARY OF THE TEST CLAIM LEGISLATION

Statutes of 1997, Chapter 936 (AB 748), enacted on October 12, 1997 and operative on January 1, 1998, Statutes of 1999, Chapter 78 (AB 1115), enacted and operative on July 7, 1999 as an urgency measure, Statutes of 1999, Chapter 678 (SB 638), enacted on October 10, 1999 and operative on January 1, 2000, and Statutes of 2000, Chapter 71 (SB 1667), enacted and operative on July 5, 2000 as an urgency measure (the test claim legislation), made several amendments to the Education Code. Among other things, the test claim legislation: (1) empowered the Superintendent of Public Instruction to designate or create a single test to determine students' English language proficiency; (2) requires school districts to initially assess every student with a home language other than English in kindergarten through grade 12; and (3) requires school districts to annually assess all students not classified as English proficient.

In order for a statute or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the language: (1) must impose a "program" upon local governmental entities; (2) the program must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service; and (3) the newly required "program" or "increased level of service" must be state mandated.

The court has defined the term "program" to mean programs that carry out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a program is "new" or imposes a "higher level of service," a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim

legislation.¹ To determine if the new program or higher level of service is state mandated, a review of state and federal statutes, regulations, and case law must be undertaken.²

ANALYSIS

1. Does the Test Claim Legislation Impose a "Program" Upon School Districts Within the Meaning of the Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the California English Language Development Test (CELDT)?

The test claim legislation amended sections of the Education Code, which require school districts to perform the following activities:

1. Initially assess every student with a home language other than English in kindergarten through grade 12; (Ed. Code, §§ 313 and 60810.)
2. Annually assess all students not classified as English proficient; and (Ed. Code, §§ 313 and 60810.)
3. Follow all requirements and perform all activities detailed in the *CELDT Test Coordinator's Manual* or any manual issued by the CDE or the test publisher related to CELDT procedures and requirements.³

The California Supreme Court in *County of Los Angeles v. State of California*, defined "program" as:

"Programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."⁴

The California Appellate Court in *Carmel Valley Fire Protection District v. State of California*, found the following regarding the *County of Los Angeles* "program" holding:

¹ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

² *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594; Government Code sections 17513, 17556.

³ The *CELDT Test Coordinator's Manual* is attached as Exhibit G.

⁴ *County of Los Angeles, supra* (1987) 43 Cal.3d 46, 56.

"The [Supreme] Court concluded that the term 'program' has two alternative meanings: 'programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' (Citation omitted.) [O]nly one of these findings is necessary to trigger reimbursement."⁵ (Emphasis added.)

The test claim legislation clearly passes both tests outlined by *County of Los Angeles* and reiterated in *Carmel Valley*. First, the test claim activities are deemed necessary to ensure students, whose home language is not English, have access to the state's core curriculum. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public.⁶ Second, the test claim legislation only applies to public schools and as such imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, the test claim activities constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

2. Does the Test Claim Legislation Represent a "New Program" or a "Higher Level of Service" Within the Meaning of Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the California English Language Development Test (CELDT)?

To determine if a required program is "new" or imposes a "higher level of service," a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.⁷

⁵ *Carmel Valley Fire Protection Dist.*, *supra* (1987) 190 Cal.App.3d 521, 537.

⁶ *Long Beach Unified School Dist.*, *supra* (1990) 225 Cal.App.3d 155, 172 (The court found that although numerous private schools exist, education in the state is considered a peculiarly governmental function and public education is administered by local agencies to provide a service to the public. Based on these findings, the court held that public education constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.)

⁷ *Lucia Mar Unified School Dist.*, *supra* (1988) 44 Cal.3d 830, 835 (The court found legislation that shifts activities from the state to a local entity represents a "new program" especially when the local entity was not required to perform the activities at the time the legislation was enacted. The court concluded that under these circumstances the activities are "new" insofar as the local entity is concerned.)

Prior Law: English Language Assessments

Education Code section 52164.1 provides broad authority for the Superintendent of Public Instruction to prescribe, with approval of the State Board of Education, those assessment tests that can be administered at the school site level to determine pupils' language skills. Specifically, section 56124.1 provides:

"The superintendent, with the approval of the State Board of Education, shall prescribe census-taking methods, applicable to all school districts in the state, which shall include, but need not be limited to, the following:

"(a) A determination of the primary language of each pupil enrolled in the school district. . . .

"(b) An assessment of the language skills of all pupils whose primary language is not English. . . . This assessment, which shall be made as pupils enroll in the district, shall determine whether such pupils are fluent in English or are of limited English proficiency."⁸

Title 5, California Code of Regulations, section 4303 also provides:

"(a) All pupils whose primary language is other than English who have not been previously assessed or are new enrollees to the district shall have their English language skills assessed within 30 school days from the date of initial enrollment.

"(b) The census of English learners required for each school district shall be taken in a form and manner prescribed by the Superintendent in accord with uniform census-taking methods.

"(c) The results of the census shall be reported by grade level on a school-by-school basis to the Department of Education not later than April 30 of each year."⁹

On March 25, 1997, the California Department of Education (CDE) issued a letter to all county and district superintendents of schools entitled the "Designation of Instruments for Use in the Census of Limited-English-Speaking Pupils, 1997-1998."¹⁰ The letter outlines the

⁸ Education Code section 52164.1 is attached as Exhibit F.

⁹ Title 5, California Code of Regulations, section 4303 is attached as Exhibit F.

¹⁰ The March 25, 1997 letter from the California Department of Education to all county and district superintendents of schools is attached as Exhibit G.

instruments approved by the Superintendent of Public Instruction for use in the census. Those instruments included the following:

- Basic Inventory of Natural Language (BINL) – for grades K-12;
- Bilingual Syntax Measure I (BSM I) – for grades K-2;
- Bilingual Syntax Measure II (BSM II) – for grades 3-12;
- IDEA Oral Language Proficiency Test (IPT);¹¹
- Language Assessment Scales (LAS);¹²
- Quick Start in English (QSE) – for grades K-6; and
- Woodcock-Munoz Language Survey – for preschool-12.

The 1996-97 Coordinated Compliance Review Training Manual provides the following concerning the assessment of a student's language skills:

“[Compliance means] [e]ach student with a home language other than English on the [Home Language Survey] has been assessed within 30 school days of initial enrollment in English comprehension, speaking, reading, and writing. English comprehension and speaking proficiency have been assessed using a state-designated instrument. Each district has established a process by which reading and writing assessments are to be made, including specification of criteria, instruments, procedures, and standards appropriate to each grade level. For purposes of initial identification, English reading and writing assessments are optional for all students in grades K-2. They are also optional for students in grades 3-12 who are identified as [Limited English Proficient] on the basis of English comprehension and speaking skills alone.”¹³

Current Requirements: The Test Claim Legislation

Test Claim Legislation Activity: Initially assess every student with a home language other than English in kindergarten through grade 12.¹⁴ The test claim legislation requires schools

¹¹ The IPT included four different levels depending on the pupil's age, grade level, and proficiency. See Exhibit G for specific designations.

¹² The LAS included seven different levels depending on pupil's age, grade level, and proficiency. See Exhibit G for specific designations.

¹³ Relevant portions of the 1996-97 Coordinated Compliance Review Training Guide are attached as Exhibit G.

¹⁴ See Education Code sections 313 and 60810 attached as Exhibit E.

to assess students in kindergarten and grade 1 in listening and speaking.¹⁵ Students in grades 2 through 12 must be assessed in listening/speaking, reading, and writing.¹⁶ The listening/speaking portion of the CELDT must be administered on a one-to-one basis and be recorded for scoring.¹⁷

The test claim legislation imposes numerous new activities upon school districts when compared to those outlined in prior law. On the surface it may appear that school districts are performing the same tasks as required under prior law. However, a closer examination of prior and current law evidences that this is not the case. Prior law, while requiring school districts to administer an assessment of students in grades K-12 within 30 days of initial enrollment, did not provide for the CELDT as a testing instrument that school districts could use to make these assessments. *The CELDT is a new instrument never used by school districts to assess students' language abilities.* In this respect, school districts must engage in additional activities related to training, receipt, administration, scoring, and return of the CELDT, among others.

The test claim legislation also requires school districts to administer portions of the CELDT to students that were not required to receive such assessments under prior law. Prior law required school sites to assess students in kindergarten through grade 2 in listening and speaking *only*. The CELDT requires the assessment of students in grade 2 to include reading and writing *as well as listening and speaking*.¹⁸ Furthermore, as outlined in the 1996-97 Coordinated Compliance Review Training Guide, the English reading and writing portions of *any* assessment instrument used by a school district was not a requirement for those students in grades 3-12 if, on

¹⁵ *Id.* at section 60810; subdivision (b).

¹⁶ *Ibid.*

¹⁷ See *CELDT Test Coordinator's Manual* attached as Exhibit G.

¹⁸ Education Code section 60810, subdivision (b).

the basis of English comprehension and speaking skills alone, they were designated as Limited English Proficient. No such option is found under the CELDT – *all students in grades 2-12 must be assessed in English reading and writing with no exceptions.*¹⁹

Therefore, the activities associated with initially assessing every student with a home language other than English in kindergarten through grade 12 represent a new program or higher level of service imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Annually assess all students not classified as English proficient.²⁰ The test claim legislation requires schools to assess students in kindergarten and grade 1 in listening and speaking.²¹ Students in grades 2 through 12 must be assessed in listening/speaking, reading, and writing.²² The listening/speaking portion of the CELDT must be administered on a one-to-one basis and be recorded for scoring.²³

Prior law, while requiring annual monitoring of a student's academic progress, did not require annual English language assessments as is now the case under the test claim legislation and the CELDT. Under prior law, a student assessed in second grade, could conceivably enter tenth grade in no shape to pass state-required English classes. Therefore, the student would be required to take additional courses, not counted toward the state-required course requirements for graduation, thereby potentially delaying graduation. The Legislature wanted to avoid this scenario through the enactment of the test claim legislation and the CELDT.

¹⁹ *Ibid.*

²⁰ See Education Code sections 313 and 60810 attached as Exhibit E.

²¹ *Id.* at section 60810, subdivision (b).

²² *Ibid.*

²³ See *CELDT Test Coordinator's Manual* attached as Exhibit G.

Education Code section 313 provides:

“Commencing with the 2000-01 school year, the [CELDT] shall be conducted upon initial enrollment, and annually, thereafter, during a period of time determined by the Superintendent of Public Instruction and the State Board of Education. The annual assessments shall continue until the pupil is redesignated as English proficient. . . .”

Since prior law did not require annual assessments of English learners as is now required under the test claim legislation and the CELDT, the requirement to annually assess all students in kindergarten through grade 12 is a new activity.

Therefore, the activities associated with annually assessing every student not classified as English proficient in kindergarten through grade 12 represent a new program or higher level of service imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Follow all requirements and perform all activities detailed in the *CELDT Test Coordinator's Manual* or any manual issued by the CDE or the test publisher related to CELDT procedures and requirements.

These activities are imposed upon school districts by the test claim legislation through the implementation of the CELDT. As outlined above, prior law did not provide for the CELDT as an option that school districts could use to assess students' English proficiency. These activities are downstream requirements imposed upon school districts to properly implement the test claim legislation. Moreover, since the CELDT is the only test sanctioned by the Superintendent of Public Instruction and the State Board of Education, all activities that are included in the *CELDT Test Coordinator's Manual*, and any other manual distributed by CDE or the test publisher related to CELDT procedures and activities, impose reimbursable state-mandated activities upon school districts. Therefore, these activities represent a new program or a higher level of service

imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

3. Does the Test Claim Legislation Impose "Costs Mandated by the State" Upon School Districts Within the Meaning of Government Code Section 17514?

Government Code section 17556 provides several exceptions to reimbursement. Specifically, section 17556 provides that the Commission shall not find costs mandated by the state if it concludes that the test claim legislation:

- (1) Was issued in response to a specific request by a local governmental entity;
- (2) Implements a court mandate;
- (3) Implements federal law;
- (4) Can be financed through a fee or assessment charged by a local governmental entity;
- (5) Provides for offsetting savings that result in no net costs to local governmental entities or includes additional revenue specifically intended to fund the costs of the mandate in an amount sufficient to fund the mandate;
- (6) Implements a ballot proposition; or
- (7) Creates a new crime or infraction, eliminates a crime or infraction, or changed the penalty for a crime or infraction related to the enforcement of the crime or infraction.

The Test Claim Legislation: Costs Mandated by the Federal Government?

Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if:

"(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

20 United States Code section 1703 outlines the federal requirements related to equal educational opportunities for all students regardless of race, color, sex, or national origin.

Specifically, section 1703 provides:

"No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by -

".....

"(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."²⁴

20 United States Code section 1720 provides:

"For the purposes of this part [20 USCS §§ 1701 et seq.] -

"(a) The term 'educational agency' means a local educational agency or a 'State educational agency' as defined by section 801(k) of the Elementary and Secondary Education Act of 1965."²⁵

20 United States Code section 8801 provides:

".....

"(19) Local educational agency

"(A) The term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools."²⁶

While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, these requirements does not preclude reimbursement for the activities and costs imposed upon school districts by the test claim legislation.

²⁴ 20 United States Code section 1703 is attached as Exhibit H.

²⁵ 20 United States Code section 1720 is attached as Exhibit H.

²⁶ 20 United States Code section 8801 is attached as Exhibit H.

This test claim is not unlike the *Behavioral Intervention Plans* (CSM-4464, BIP) test claim heard and decided by the Commission in September of 2000. In the BIP test claim, the Commission found that:

“[A]lthough the [Individuals with Disabilities Education Act] paints the special education landscape with broad strokes, *the specificity in the test claim legislation and implementing regulations do not fit onto the canvass.*”²⁷ (Emphasis added.)

The same can be said concerning the CELDT test claim. Although the Equal Educational Opportunities and Transportation of Students Act paints the educational opportunity landscape with broad strokes, the specificity in the test claim legislation does not fit onto the canvass.

Before the enactment of the test claim legislation, school districts had a choice as to which assessment instrument the district would use to determine students' English proficiency and subsequent placement in appropriate classes. The test claim legislation took away any discretion school districts had under prior law related to assessments and now requires districts to use a single new test without exception. Furthermore, the implementation and use of the CELDT is not required under federal law. Federal law only requires the state and local educational agencies ensure that all students have equal access to the state's core curriculum. This goal can be accomplished in countless ways, one of which is the assessment of English learners.

Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment, as is the case with the test claim legislation, represents costs imposed upon school districts by the state. In *Hayes v. Commission on State Mandates*, the court held that when reviewing federal and state laws that appear to impose costs upon local agencies the Commission:

²⁷ Statement of Decision adopted on September 28, 2000 and effective September 29, 2000 for the *Behavioral Intervention Plans* test claim (CSM-4464) at page SOD-16.

"[M]ust focus upon the costs incurred by local school districts and whether those costs were imposed on local districts by federal mandate or by the state's voluntary choice in its implementation of the federal program."²⁸ (Emphasis added.)

In this case, the state is voluntarily imposing a program upon school districts related to the CELDT. Federal law provides very broad direction to state and local educational agencies related to equal educational opportunities, while the state is mandating a very specific program not required under federal law, which is exactly what the Commission found under similar circumstances in the BIP test claim.

State, not federal law, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law. Therefore, the test claim legislation imposes costs mandated by the state within the meaning of Government Code section 17514.

CONCLUSION

The following activities represent reimbursable state-mandated activities imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

- A. Field-testing of the CELDT as required by the California Department of Education;
- B. Initial assessment of all students with a home language other than English in kindergarten through grade 12 using the CELDT; (Ed. Code, §§ 313 and 60810.)
- C. Annual assessment of all students not classified as English proficient using the CELDT; (Ed. Code, §§ 313 and 60810.)
- D. Adherence to all requirements and performance of all activities detailed in the *CELDT Test Coordinator's Manual* or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements.

²⁸ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595.

- E. Training district staff regarding the test claim activities;
- F. Drafting or modifying policies and procedures to reflect the test claim activities; and
- G. Any additional activities identified as reimbursable during the Parameters and Guidelines phase.

AUTHORITY FOR THE TEST CLAIM

The Commission on State Mandates has the authority pursuant to Government Code Section 17551, subdivision (a), to hear and decide a claim by a local agency or school district that the local agency or school district is entitled to reimbursement by the state for costs mandated by the state as required by article XIII B, section 6 of the California Constitution. Modesto City School District is a "school district" as defined in Government Code section 17519. This test claim is filed pursuant to Title 2, California Code of Regulations, section 1183.

ESTIMATED COSTS RESULTING FROM THIS MANDATE

It is estimated that Modesto City School District will incur costs in excess of \$200.00 to comply with the requirements outlined in the *California English Language Development Test (CELDT)* Test Claim.

APPROPRIATIONS

No funds are appropriated by the test claim legislation for reimbursement of these new costs mandated by the state sufficient to cover the costs of the mandate and there is no other provision of law for recovery of costs for these activities.

CLAIM CERTIFICATION

I certify under penalty of perjury by my signature below that the statements made in this document are true and correct of my knowledge, and as to all other matters, I believe them to be true and correct based on information or belief.

Executed on June 13, 2001 at Sacramento, California, by:

SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP



PAUL C. MINNEY, ESQ.

Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Modesto City
School District

AUTHORIZATION TO ACT AS REPRESENTATIVE
FOR MODESTO CITY SCHOOL DISTRICT'S TEST CLAIM

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST (CELDT)

I, Deborah S. Bailey, hereby authorize Paul C. Minney (or designee) of the Law Office of SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP to act as the representative and sole contact of Modesto City School District in this Test Claim. All correspondence and communications regarding this Test Claim should be forwarded to:

Paul C. Minney, Esq.
SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP
7 Park Center Drive
Sacramento, California 95825
Telephone: (916) 646-1400
Facsimile: (916) 646-1300

Dated: June 13, 2001

DEBORAH S. BAILEY
Associate Superintendent of
Business Services

Modesto City School District
426 Locust Street
Modesto, California 95331
Telephone: (209) 576-4011
Facsimile: (209) 576-4184

Paul C. Minney, Esq.
SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP
7 Park Center Drive
Sacramento, California 95825
Telephone: (916) 646-1400
Facsimile: (916) 646-1300

Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant
Modesto City School District

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In Re Test Claim:
Modesto City School District

CSM No. _____

DECLARATION OF LYNN JAMISON

*California English Language Development Test
(CELDT)*

I, Lynn Jamison, make the following declaration and statement. As Director of State and Federal Programs, I have knowledge of Modesto City School District's English Language Development testing program. I am familiar with the provisions and requirements of Statutes of 1997, Chapter 936, Statutes of 1999, Chapter 678, and Statutes of 2000, Chapter 71, which require school districts to perform the following activities:

Test Claim of Modesto City School District

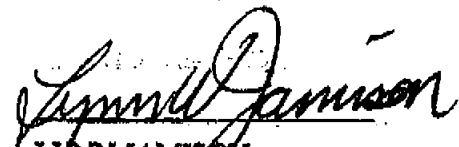
California English Language Development Test (CELDT)

1. Administer the California English Language Development Test (CELDT) to appropriate pupils in kindergarten through grade 12 within 30 days of enrollments and on an annual basis;
2. Receive, review, distribute, collect, and return test materials as required by state law and the test contractor;
3. Designate and train district and school site testing coordinators for the CELDT;
4. Training district and school site staff regarding the test claim activities; and
5. Drafting or modifying policies and procedures to reflect the test claim activities.

I am informed and believe that before the test claim legislation there was no responsibility for the claimant to engage in the activities set forth above. It is estimated that the claimant will/has incurred significantly more than \$200.00 to implement these new activities mandated by the state for which the claimant has not been reimbursed by any federal, state, or local agency, and for which it cannot otherwise obtain reimbursement.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on June 13, 2001 in Modesto, California.



LYNN JAMISON
Director of State and Federal
Programs

Assembly Bill No. 748

CHAPTER 936

An act to add Chapter 7 (commencing with Section 60810) to Part 33 of the Education Code, relating to pupil testing.

[Approved by Governor October 12, 1997. Filed
with Secretary of State October 12, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

AB 748, Escutia. Bilingual education: assessment of language skills.

Existing law establishes the Bilingual-Bicultural Education Act of 1976 (act), which became inoperative on June 30, 1987. Existing law specifies that if the Legislature does not enact legislation to continue that act, among other acts, the funding for the bilingual-bicultural program shall continue for the general purposes of the program but all relevant statutes and regulations regarding the use of the funds are not operative except those regarding the establishment of a schoolsite council and its functions and responsibilities. The act specifies that its purposes are to require school districts to offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools and to provide adequate supplemental financial support to achieve that goal.

This bill would require the Superintendent of Public Instruction to review existing tests that assess the English language development, as specified, of pupils whose primary language is a language other than English and to determine if those tests, among other things, have sufficient range to assess, as specified, the English language development of pupils in kindergarten and grades 1 to 12, inclusive, provide sufficient information about pupils at each grade level to determine levels of proficiency, have psychometric properties of reliability and validity deemed adequate by technical experts, are capable of administration to pupils with any primary language other than English are capable of administration by classroom teachers, and yield scores that allow comparison of a pupil's growth over time, can be tied to readiness for various instructional options, and can be aggregated for use in the evaluation of program effectiveness. If any existing test or series of tests meets these criteria, the bill would require the superintendent, with approval of the State Board of Education, to report to the Legislature on its findings and recommendations. If no suitable tests exist, the bill would require the superintendent to explore the option of a collaborative effort with other states to develop a test or series of tests and would authorize the superintendent, with approval the State Board of Education, to

contract with a local education agency to develop a test or series of tests or to contract to modify an existing test or series of tests. The bill would require the superintendent to identify or develop the test or series of tests by January 1, 1999, and to report, as specified, to the Legislature on the progress being made in that regard.

This bill would require the State Board of Education to approve standards, as specified, for English language development for pupils whose primary language is a language other than English.

This bill would provide that funding for the purposes of this measure is contingent on an appropriation in the annual Budget Act.

The people of the State of California do enact as follows:

SECTION 1. Chapter 7 (commencing with Section 60810) is added to Part 33 of the Education Code, to read:

CHAPTER 7. ASSESSMENT OF LANGUAGE DEVELOPMENT

60810. (a) (1) The Superintendent of Public Instruction shall review existing tests that assess the English language development of pupils whose primary language is a language other than English. The tests shall include, but not be limited to, an assessment of achievement of these pupils in English reading, speaking, and written skills. The superintendent shall determine which tests, if any, meet the requirements of subdivisions (b) and (c). If any existing test or series of tests meets these criteria, the superintendent, with approval of the State Board of Education, shall report to the Legislature on its findings and recommendations.

(2) If no suitable test exists, the superintendent shall explore the option of a collaborative effort with other states to develop a test or series of tests and share test development costs. If no suitable test exists, the superintendent, with approval of the State Board of Education, may contract with a local education agency to develop a test or series of tests that meets the criteria of subdivisions (b) and (c) or may contract to modify an existing test or series of tests so that it will meet the requirements of subdivisions (b) and (c).

(3) The superintendent shall identify or develop the test or series of tests by January 1, 1999, and shall report to the Legislature regarding the progress being made in identifying or developing the test or series of tests by June 1, 1998. The report shall include recommendations to the Legislature regarding the implementation of the test or series of tests at the local level, including required resources.

(b) The test or series of tests developed or acquired pursuant to subdivision (a) shall have sufficient range to assess pupils in kindergarten and grades 1 to 12, inclusive, in English reading, speaking, and written skills, except that pupils in kindergarten and

grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English.

(c) The test or series of tests shall meet all of the following requirements:

(1) Provide sufficient information about pupils at each grade level to determine levels of proficiency ranging from no English proficiency to fluent English proficiency with at least two intermediate levels.

(2) Have psychometric properties of reliability and validity deemed adequate by technical experts.

(3) Be capable of administration to pupils with any primary language other than English.

(4) Be capable of administration by classroom teachers.

(5) Yield scores that allow comparison of a pupil's growth over time, can be tied to readiness for various instructional options, and can be aggregated for use in the evaluation of program effectiveness.

(6) Not discriminate on the basis of race, ethnicity, or gender.

(7) Be aligned with the standards for English language development adopted by the State Board of Education pursuant to Section 60811.

(d) The test shall be used for the following purposes:

(1) To identify pupils who are limited English proficient.

(2) To determine the level of English language proficiency of pupils who are limited English proficient.

(3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

60811. The State Board of Education shall approve standards for English language development for pupils whose primary language is a language other than English. The standards shall be comparable in rigor and specificity to the standards for English language arts adopted pursuant to Section 60605 in speaking, reading, and written communication.

SEC. 2. Funding for the purposes of Chapter 7 (commencing with Section 60810) of Part 33 of the Education Code as enacted by this act is contingent on an appropriation in the annual Budget Act. It is the intent of the Legislature that funds appropriated for the purposes of contracting for the development of tests pursuant to paragraph (1) of subdivision (a) of Section 60810 of the Education Code shall constitute moneys applied by the state for the support of school districts for the purposes of Section 8 of Article XVI of the California Constitution.

Assembly Bill No. 1115

CHAPTER 78

An act to amend Sections 2558.45, 8203.3, 8447, 8482.3, 8660, 8661, 8662, 8663, 8664, 8666, 8667, 8668, 8669, 8669.1, 11020, 11021, 37252, 37252.5, 37253, 41203.1, 42238, 42238.1, 42238.145, 42239, 42239.1, 42247.5, 44235, 44579.1, 45125, 46300, 47612, 47763.5, 47771.5, 48664, 52084, 52086, 53031, 56195.1, 56836.06, 56836.08, 56836.15, 60605, 60640, 60643, 60810, 60811, and 84750 of, to amend the heading of Chapter 3 (commencing with Section 47610) of Part 26.8 of, to amend and renumber Section 47613.7 of, to amend, repeal, and add Section 14002 of, to add Sections 41344, 41857, 47632.5, 49545.5, 56044, 56045, 56203, 56207.5, and 60643.5 to, to add Article 8 (commencing with Section 18200) to Chapter 2 of Part 11 of, Article 6 (commencing with Section 49080) to Chapter 6.5 of Part 27 of, an article heading (commencing with Section 51110) to, and Article 2 (commencing with Section 51120) to Chapter 1.5 of Part 28 of, Chapter 6 (commencing with Section 47630) to Part 26.8 of, to repeal Sections 8665, 8669.2, 47613, and 47613.5 of, the Education Code, to amend Sections 15379.80, 68926, and 68926.3 of the Government Code, to amend Sections 97.2 and 97.3 of the Revenue and Taxation Code, to amend Section 1120.2 of the Welfare and Institutions Code, and to amend Section 2 of Chapter 948 of, and Section 56 of Chapter 330 of, the Statutes of 1998, relating to education, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 7, 1999. Filed with
Secretary of State July 7, 1999.]

I am signing Assembly Bill No. 1115, however, I am reducing the appropriations made in Section 65, 66, 70, 72 and 73 by a total of \$15,526,000. These appropriations are being eliminated because I have specific concerns about the projects or to ensure the State maintains a prudent reserve. The specific reductions are as follows:

I am reducing the reappropriation in Section 65 by eliminating subdivision (b) which allocates \$200,000 to the Julian Union School District for kitchen equipment needed for nutrition programs. Although this program may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (c) which allocates \$200,000 to the Grossmont Union High School District for construction of a swimming pool at Steele Canyon High School. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (d) which allocates \$100,000 on a one-time basis to the San Diego County Office of Education to provide assistance for schools to secure health insurance for uninsured, low-income pupils. Although this program may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by \$25,000 by reducing subdivision (e) from \$27,500 to \$2,500 for the Alta-Dutch Flat Union School District for afternoon

school busing service. I am taking this action because to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (f) which allocates \$100,000 on a one-time basis to the Los Gatos Union School District to support the expansion of science programs through the Youth Science Institute in the City of Los Gatos. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (g) which allocates \$250,000 on a one-time basis to the Oak Park Unified School District for the purpose of purchasing computer equipment and materials for the library at Oak Park High School. I am taking this action because the budget currently includes \$150.5 million which is allocated to all school districts on the basis of average daily attendance, which districts can use specifically for library materials and equipment.

I am reducing the reappropriation in Section 65 by eliminating subdivision (h) which allocates \$175,000 to the Anaheim City School District for an after-school learning safe neighborhoods program. I am eliminating this project because the use of one-time Proposition 98 funding, for what appears to be an ongoing program, is not appropriate. Moreover, there is an existing grant program for this purpose, the After-School Learning and Safe Neighborhoods Partnerships program, which awards renewable grants and is increased by \$35 million in the 1999 Budget Act for the 1999-2000 fiscal year. Local programs may compete for renewable grants for either purpose by applying through the Department of Education.

I am reducing the reappropriation in Section 65 by eliminating subdivision (i) which allocates \$250,000 to the Rio Del Valle Elementary School District for construction of a gymnasium at Rio Del Valle Junior High School. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (k) which allocates \$6,000 on a one-time basis to the San Juan Unified School District for the purchase of a computer, printer, and appropriate software for the Cottage Elementary School library. I am taking this action because the budget currently includes \$158.5 million which is allocated to all school districts on the basis of average daily attendance, which districts can use specifically for library materials and equipment.

I am reducing the reappropriation in Section 65 by eliminating subdivision (l) which allocates \$250,000 to the Saddleback Valley Unified School District for construction of a gymnasium at Laguna Hills High School. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (m) which allocates \$100,000 to the Woodlake Union High School District for construction of a swimming pool. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the appropriation in Section 65 by eliminating subdivision (n) which allocates \$110,000 to the Sacramento City Unified School District to support the Sacramento START after-school program. I am eliminating this project because the use of one-time Proposition 98 funding, for what appears to be an ongoing program, is not appropriate. Moreover, there is an existing grant program for this purpose, the After-School Learning and Safe Neighborhoods Partnerships program, which awards renewable grants and is increased by \$35 million in the 1999 Budget Act for the 1999-2000 fiscal year. Local programs may compete for renewable grants for either purpose by applying through the Department of Education.

I am reducing the reappropriation in Section 65 by eliminating subdivision (o) which allocates \$30,000 on a one-time basis to the Galt Joint Union Elementary School District to support an education program using STAR test results to improve teaching. I am deleting this funding because I recently enacted legislation implementing the state wide accountability initiative to hold schools accountable for their performance

and to reward high achieving and improving schools, therefore this proposal unnecessary.

I am reducing the reappropriation in Section 65 by eliminating subdivision (p) which allocates \$10,000 to the Oak View Unified School District to repair the school blacktop area. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the appropriation in Section 65 by eliminating subdivision (r) which allocates \$30,000 to the ABC School District for an after school project at Hawaiian Gardens Elementary School. I am eliminating this project because the use of one-time Proposition 98 funding, for what appears to be an ongoing program, is not appropriate. Moreover, there is an existing grant program for this purpose, the After-School Learning and Safe Neighborhoods Partnerships program, which awards renewable grants and is increased by \$35 million in the 1999 Budget Act for the 1999-2000 fiscal year. Local programs may compete for renewable grants for either purpose by applying through the Department of Education.

I am sustaining subdivision (z) of Section 65 which reappropriates \$700,000 to the Superintendent of Public Instruction for allocation to the County Office Fiscal Crisis and Management Assistance Team (FCMAT) for distribution to the Compton Unified School District. However, I am requesting that these funds be used only for the specific purposes of implementing the school district's recovery plans. I also encourage the Compton Unified School District to fully avail itself of the existing program funding provided, including for summer school programs, after school programs, and the staff development day buy out program as appropriate, to assist the district in funding its reforms.

I am sustaining subdivision (aa) of Section 65 which reappropriates \$1,500,000 to subsidize the costs of low-income children's participation in residential science camps. However, I note that this is a one-time appropriation; this program should develop alternative funding sources for the future.

I am reducing the reappropriation in Section 65 by eliminating subdivision (cc) which allocates \$232,000 on a one-time basis to the Bilingual Foundation of the Arts to develop arts-based literacy skills in school age children. I am deleting the funding because the budget includes \$6 million for Local Arts Education projects which can be used for this purpose.

I am reducing the reappropriation in Section 65 by eliminating subdivision (dd) which allocates \$100,000 to the Los Angeles Unified School District to renovate the San Fernando High School Teen Health Clinic. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the appropriation in Section 65 of this bill by eliminating subdivision (hh) which allocates \$16,900 to replace funding reduced as a result of an audit exception at the North Cow Creek School District. An independent audit of the district's class size reduction funding determined that the district inappropriately claimed \$16,900 of incentive funding during the 1996-97 school year for classes with excess enrollment. Since the purpose of the incentive funding is to reduce enrollment to no more than 20 students per teacher and the program does not permit waiver of the class size requirement, it would be inappropriate, and establish an undesirable precedent, to restore funding to the district.

I am reducing the reappropriation in Section 65 by eliminating subdivision (jj) which allocates \$120,000 to the Golden Valley Unified School District for home-to-school transportation. I am taking this action because this augmentation provides funding on a one-time basis for costs that are ongoing.

I am reducing the reappropriation in Section 65 by eliminating subdivision (mm) which allocates \$288,000 on a one-time basis to the Oxnard Unified School District for the Parent University Project. I am taking this action because this augmentation provides funding on a one-time basis for costs that are ongoing.

I am reducing the appropriation in Section 65 bill by eliminating subdivision (oo) which allocates \$139,000 on a one-time basis to the Sacramento City Unified School District for the Center for Educational Excellence. This program provides local

services and also disseminates the Center's language arts curricula and models statewide. This augmentation would reimburse the district for additional costs of statewide distribution. It is not clear why this school district is involved in a program that distributes materials on a statewide basis or whether the materials meet the standards established by the State Board of Education. The distribution function described for the Center is currently and appropriately performed by the State Department of Education.

I am sustaining subdivision (pp) of Section 65 which reappropriates \$750,000 to the Superintendent of Public Instruction for allocation to the County Office Fiscal Crisis and Management Assistance Team (FCMAT) for an audit of the Oakland Unified School District. However, I am requesting that FCMAT conduct a comprehensive assessment of the District in its major operational areas and provide recommendations by January 31, 2000. FCMAT and the district, in consultation with the Department of Finance, should enter into a contract specifying the terms of the assessments and the responsibilities of each of the parties prior to allocation of the \$750,000 to FCMAT.

I am reducing the reappropriation in Section 65 by eliminating subdivision (qq) which allocates \$250,000 to the Capistrano Unified School District for a planning grant to develop a teacher training and development facility. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 65 by eliminating subdivision (ss) which allocates \$500,000 to the Los Angeles Unified School District for renovation of the San Fernando Middle School Auditorium. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the appropriation in Section 66 by eliminating subdivision (b) which allocates \$500,000 to the Sacramento County Office of Education for a State Resource Center for the California Reading Initiative. Although this project may be meritorious, I am deleting the funding for it to ensure the State maintains a prudent reserve.

I am reducing the reappropriation in Section 70 by \$2,820,000 by deleting subdivisions (a), (b), (c), (d)(1), (e) and (f), which would have provided for a variety of local projects for Community College districts. While voter registration is an important activity, I am reducing the \$300,000 in schedule (c) for voter registration purposes because it does not appear necessary to provide funding for an activity that could be easily undertaken by campus groups or other civic groups. Although the other deleted projects may be meritorious, I am deleting the funding for them to ensure the state maintains a prudent reserve.

I am reducing the appropriation in Section 72 by eliminating subdivision (a) which appropriates \$2,000,000 to the Department of Education for allocation by the Controller for reimbursement of Sacramento City Unified School District's 1998-99 voluntary desegregation audited claim. The state is not statutorily obligated to pay for any costs incurred for voluntary integration programs above the amount budgeted for that purpose. Desegregation claims are funded in accordance with an existing statutory formula, as limited by funding appropriated in the Budget Act. Based on these statutory provisions, there is no legal obligation to fund these programs beyond the amount provided in the annual Budget Act.

I am reducing the appropriation in Section 73 by eliminating subdivisions (a), (b), (c) and (d) which allocate a total of \$6,724,100 to reimburse school districts desegregation program deficiencies for fiscal years 1994-95 and 1995-96. Desegregation claims are funded in accordance with an existing statutory formula, as limited by funding appropriated in the Budget Act. Based on these statutory provisions, there is no legal obligation to fund these programs beyond the amount provided in the annual Budget Act. In addition, the Legislature statutorily limited the funding formula for this program in the current year as well as in the past four years in the education trailer bills. The provisions statutorily limit the funding otherwise provided in statute for court-ordered desegregation and voluntary integration programs to the level of funding provided in the appropriation for these programs.

consistent with all other programs funded through the mega-item appropriation. Finally, districts are advised of the amounts available for each fiscal year for these programs by the State Department of Education.

GRAY DAVIS, Governor

LEGISLATIVE COUNSEL'S DIGEST

AB 1115, Strom-Martin. Education.

(1) Existing law provides a deficit factor for the revenue limit of each county superintendent of schools.

This bill would provide that the revenue limit for the 1999-2000 fiscal year for each county superintendent of schools shall be reduced by a 8.628% deficit factor.

(2) Under existing law, on or before June 30, 1999, the State Department of Education is required to develop prekindergarten learning development guidelines. The development of these guidelines is required to be funded from funds appropriated for this purpose in the Budget Act of 1998. The guidelines are required to focus on preparing 4- and 5-year-old children for kindergarten. The guidelines are required to be articulated with the academic content and performance standards adopted by the State Board of Education for kindergarten and grades 1 to 12, inclusive.

This bill would require the State Department of Education in future expenditure plans for quality improvement activities to include funding for periodically updating and distributing the guidelines, and providing education, outreach, and training services to implement the guidelines. The bill would require child and development programs for migrant families, state preschool, and general child care and development programs to use the guidelines.

(3) Under existing law, the Department of Finance and the Department of General Services are required to approve or disapprove annual child care and development program contract funding terms and conditions and contract face sheets submitted by the State Department of Education not more than 30 working days from the date of submission, unless unresolved conflicts remain between the Department of Finance, the State Department of Education, and the Department of General Services.

This bill would require alternative payment child care systems, as defined, to be subject to rates established in the Regional Market Rate Survey of California Child Care Providers and would require the State Department of Education to contract to conduct and complete the annual Regional Market Rate Survey. The bill would require the Department of Finance to provide to the State Department of Education the State Median Income amount for a 4-person household in California based on the best available data, and would require the State Department of Education to adjust its fee schedule for child care providers to reflect this updated state median income.

(4) Existing law establishes the After School Learning and Safe Neighborhoods Partnerships Program to serve pupils in

kindergarten and grades 1 to 9, inclusive, at participating elementary, middle, and junior high schoolsites.

This bill would provide that the program is also established to serve pupils at charter schoolsites.

(5) Under existing law, there is the California State Summer School for Mathematics and Science created to establish a multidisciplinary mathematics and science program to enable pupils with demonstrated academic excellence in mathematics and science to receive intensive training in these subjects. The summer school is governed by the State Board of Education and required to provide a training ground for pupils who wish to study advanced mathematics or science or to pursue careers that require a high degree of mathematics or scientific training. This program is repealed on January 1, 2004.

This bill would instead provide that the program is established to provide academic development to enable pupils with demonstrated academic excellence in mathematics and science to receive intensive educational enrichment in these subjects and an opportunity for pupils who wish to study advanced mathematics or science or to pursue careers that require a high degree of skills and knowledge mathematics or science. This bill would request that the Regents of the University of California to operate the summer school, and would make conforming changes to this program transferring its operation and governance from the State Board of Education to the Regents of the University of California. The bill would continue the summer school indefinitely. The bill would appropriate \$1,000,000 to the University of California for purposes of the summer school that was appropriated from the General Fund to the State Board of Education.

(6) Under the Academic Improvement and Achievement Act, the Superintendent of Public Instruction is required to recommend, and the State Board of Education is required to adopt, criteria and regulations for the implementation of the act. This act defines "qualifying school" to mean a comprehensive high school that provides instruction in any of grades 9 to 12, inclusive, with a percentage of pupils who graduate from the school and are eligible for admission to the California State University or the University of California in the following year that is below the statewide average according to information from the California Postsecondary Education Commission. The act requires local educational agencies to be invited to apply to receive funds for qualifying schools, subject to an appropriation of funds for this purpose, and provides that funds allocated may not exceed \$100 per pupil, nor shall be less than \$20,000 at a qualifying school in any single fiscal year.

This bill would delete the requirement to adopt regulations. The bill would revise the definition of "qualifying school" to mean a comprehensive high school that provides instruction in any of grades 9 to 12, inclusive, with a percentage of pupils who graduate from the

school and enroll in the California State University or the University of California in the following year that is below the statewide average according to information from the commission. The bill would delete the requirement that a minimum of \$20,000 be allocated to a qualifying school.

(7) Under existing law, the Controller is required during each fiscal year commencing with the 1980-81 fiscal year, to transfer from Section A of the State School Fund such sums, in addition to the sums accruing from other sources, that provide in Section A of the State School Fund for apportionment during the fiscal year a total amount per pupil in average daily attendance during the preceding fiscal year credited to all elementary, high, and unified school districts and to all county superintendents of schools in the state, as certified by the Superintendent of Public Instruction, of \$180.

This bill would require the Controller, commencing with the 1999-2000 fiscal year, to also transfer additional amounts necessary to meet computed apportionments of general-purpose funding for charter schools. This provision would become inoperative on July 1, 2002, and would be repealed on January 1, 2003.

(8) Existing law, the California Public School Library Protection Act, requires the State Department of Education to issue to qualifying school districts grants for the purpose of improving school libraries. Existing law, the California Public School Library Act of 1998, provides for the transfer of certain funds appropriated in the annual Budget Act to the California Public School Library Protection Fund for apportionment to school districts for the support of a districtwide school library plan and for expenditure for library resources.

This bill would establish the California Classroom Library Materials Act of 1999, and would require the act to be administered by the Superintendent of Public Instruction. The bill would authorize any school district that maintains a kindergarten or any of grades 1 to 4, inclusive, to apply for this funding under the act, and would authorize charter schools to apply for funding on their own behalf or through their chartering entity. The bill would require, as a condition of receiving funding under the act, school districts to develop a districtwide kindergarten and grade 1 to grade 4, inclusive, classroom library plan and to receive certification of the plan from the governing board of the school district. The bill would impose certain requirements regarding the development of the plan, including a means of preventing loss, damage, or destruction of materials.

The bill would establish a fund in the State Treasury to be known as the Business Organizations and Opportunities for Kids Fund to be administered by the State Librarian in consultation with the Superintendent of Public Instruction. The bill would require moneys donated by private entities for the purchase of classroom reading materials to be deposited in this fund. The bill would provide that

moneys in that fund are available for expenditure only upon an appropriation in the annual Budget Act or other act.

The bill would require funds apportioned for purposes of the act to be apportioned to schools in an equal amount per unit of average daily attendance reported in the second principal apportionment of the prior fiscal year for kindergarten or any of grades 1 to 4, inclusive, and would require schoolsites to expend the funds to purchase grade-level appropriate reading materials.

(9) Existing law, as amended by Chapter 1 of the 1999–2000 First Extraordinary Session to become operative January 1, 2000, requires the governing board of each school district maintaining any or all of grades 7 to 12, inclusive, to offer summer school instructional programs for pupils enrolled in those grades who do not demonstrate sufficient progress toward passing the exit examination required for high school graduation. Existing law also authorizes the governing board of any school district that offers certain summer school instructional programs to offer summer school programs for instruction in mathematics, science, and other core academic areas.

This bill would authorize school districts to provide this instruction during the summer, after school, Saturday, or during intersession, or in any combination of summer, after school, Saturday, or intersession instruction, but in addition to the regular schoolday and would apply these provisions to charter schools, thereby imposing a state-mandated local program.

(10) Existing law authorizes the governing board of each school district maintaining any or all of grades 2 to 6, inclusive, to offer programs of direct, systematic, and intensive supplemental instruction to pupils enrolled in grades 2 to 6, inclusive, with low mathematics, reading, or written expression scores to allow those pupils to achieve proficiency in standards adopted by the State Board of Education.

The bill would apply those provisions to charter schools.

(11) Existing law limits a school district's maximum entitlement for reimbursement for pupil attendance in core curriculum area summer school programs and vocational work experience summer school to be an amount equal to 7% of the district's total enrollment for the prior fiscal year multiplied by 120 hours, multiplied by the hourly rate for the current fiscal year.

This bill would revise the manner in which summer school attendance is calculated and apply these provisions to charter schools.

(12) Under existing law, the California Constitution requires a minimum level of funding for school districts and community college districts.

This bill would provide that if, as the result of an audit or review, as defined, a local education agency is required to repay as apportionment significant audit exception the total amount of

disallowed apportionment claims be subtracted from the allocation that the local educational agency would otherwise receive pursuant to this constitutional provision.

This bill would provide for the establishment of a repayment plan for a district with disallowed apportionment claims by the Superintendent of Public Instruction and the Director of Finance.

(13) Under existing law, for the 1990-91 fiscal year and each fiscal year thereafter, allocations calculated to be applied by the state for the support of school districts and community colleges is required to be distributed in accordance with certain calculations. This provision does not apply to the fiscal years 1992-93 to 1998-99, inclusive.

This bill would provide that this provision does not apply to fiscal year 1999-2000.

(14) Under existing law, the Superintendent of Public Instruction is required to compute an inflation adjustment in accordance with a formula for the 1986-87 fiscal year and each fiscal year thereafter.

This bill would revise the formula for the 1999-2000 fiscal year, and each fiscal year thereafter.

This bill would also provide that the revenue limit for each school district shall be reduced by an 6.996% deficit factor, for the 1999-2000 fiscal year.

(15) Under existing law, the county superintendent of instruction is required to compute an amount for each school district's summer school attendance in accordance with a specified formula.

This bill would require the county superintendent of instruction to compute an amount for each charter school's summer school attendance in the same manner, thereby imposing a state-mandated local program.

(16) Existing law requires that a person to be employed in a position not requiring certification qualifications, except a secondary school pupil employed in a temporary or part-time position by the governing board of the school district having jurisdiction over the school attended by the pupil, to be fingerprinted for purposes of a criminal history check by the Department of Justice.

This bill would require the Department of Justice to process all requests from a school district, an employer, or a human resources agency for criminal history information on a volunteer to be used in a school pursuant to the provisions that relate to persons employed by a school district that do not require certification qualifications.

(17) Existing law authorizes the Commission on Teacher Credentialing to set a fee for the issuance and renewal of teaching and service credentials that may not exceed \$70 and to charge a single fee, not to exceed the charge for a single supplemental credential, for all supplemental credentials applied for at the same time.

This bill would authorize the commission to waive those fees for first-time teaching credential applicants subject to funds being appropriated expressly for this purpose in the annual Budget Act.

(18) Existing law sets forth a formula for computing the amount that a school district may be reimbursed for the costs of its voluntary program designed to remedy the harmful effects of racial segregation. Existing law provides that, commencing with the 1998-99 fiscal year and each fiscal year thereafter, the amount that the Sacramento City Unified School District may be reimbursed for the costs of its voluntary desegregation program shall not exceed the amount in excess of $\frac{1}{5}$ of the audited desegregation cost approved by the Controller and actually incurred in the 1990-91 fiscal year, reduced by the federal desegregation reimbursement of \$3,096,989 received in the 1990-91 fiscal year, as adjusted for inflation and changes in enrollment, as specified.

This bill would provide that notwithstanding this provision, commencing with the 1998-99 fiscal year, the Sacramento City Unified School District's level of reimbursement shall be calculated based on actual reimbursements received for its 1998-99 voluntary desegregation audited claim.

(19) Under existing law, each fiscal year, the Superintendent of Public Instruction is required to provide each eligible school district, county office of education, and charter school applying for a grant under the Instructional Time and Staff Development Reform Program with a staff development allowance of \$270 per day for up to 3 days, for each certificated classroom teacher and \$140 per day for up to one day for each classified classroom instructional aide and certificated teaching assistant who participates in staff development instructional methods.

This bill would require that these amounts be adjusted annually commencing in the 1999-2000 fiscal year by a specified inflation adjustment and would include conflict resolution as curriculum that may be included in staff development.

(20) Under existing law, school districts are apportioned state funds for home-to-school transportation and special education transportation in accordance with specified formulas.

This bill would provide that a charter school is eligible for funding pursuant to, and shall comply with all requirements of, these provisions and that for purposes of these provisions.

(21) Under existing law, the Superintendent of Public Instruction is required to apportion to each charter school for each fiscal year (1) from funds appropriated to Section A of the State School Fund for apportionment for that fiscal year, an amount for each unit of regular average daily attendance in the charter school that is equal to the current fiscal year base revenue limit for the school district to which the charter petition was submitted, (2) for each pupil enrolled in the charter school who is entitled to special education services, the state and federal funds for special education services for that pupil that would have been apportioned for that pupil to the school district to which the charter petition was submitted, and (3) funds for specified

categorical education programs to the extent that any pupil enrolled in the charter school is eligible to participate.

This bill would delete this provision.

(22) Under existing law, the full apportionment received by the basic aid district, as defined, under certain circumstances, is required to be provided to a charter school, and with respect to any pupil of a charter school located within a basic aid school district who resides in a district other than a basic aid district, the Superintendent of Public Instruction, commencing with the 1998-99 fiscal year, is required to calculate for that school an apportionment of state funds that provides 70 percent of the district revenue limit calculated that would have been apportioned to the school district of residence for any average daily attendance credited.

This bill would repeal this provision.

(23) Under existing law, notwithstanding the provision discussed above, commencing with the 1999-2000 school year and only upon adoption of regulations, charter school operational funding is required to be equal to the total funding that would be available to a similar school district serving a similar pupil population. However, a charter school is not required to be funded as a necessary small school or a necessary small high school, nor receive revenue limit funding that exceeds the statewide average for a school district of a similar type.

This bill would repeal this provision.

(24) This bill would revise the method for funding charter schools. It would require the Superintendent of Public Instruction to annually compute a general-purpose entitlement, as defined, and a categorical block grant amount, as defined, for each charter school. The bill would provide that general-purpose entitlement funding may be used for any public school purposes determined by the governing body of the charter school.

(25) This bill would provide that a charter school may be deemed to be a local educational agency for purposes of special education funding and compliance with applicable federal law.

(26) Under the High-Risk First-Time Offenders Program, the Superintendent of Public Instruction is required to apportion to each county office of education or school district that operates a program, in addition to funds from all other sources and subject to the limitation specified in the Budget Act or other statute, \$3,000 per year for each unit of average daily attendance reported at the annual apportionment for pupil attendance in a program.

This bill would authorize the Superintendent of Public Instruction to provide an apportionment for startup costs under specified conditions during the 1st year that a county office of education or a school district operates a High-Risk First-Time Offenders Program.

(27) Under the Transitioning High-Risk Youth Program, the Superintendent of Public Instruction is required to apportion to each

county office of education or school district that operates a program, in addition to funds from all other sources and subject to the limitation specified in the Budget Act or other statute, \$3,000 per year for each unit of average daily attendance reported at the annual apportionment for pupil attendance in a program.

This bill would authorize the Superintendent of Public Instruction to provide an apportionment for startup costs under specified conditions during the 1st year that a county office of education or a school district operates a Transitioning High-Risk Youth Program.

(28) Under existing law, in addition to funds from all other sources, the Superintendent of Public Instruction is required to apportion to each school district that operates a community day school \$4,000 per year, and for each county office of education that operates a community day school \$3,000 per year, for each unit of average daily attendance reported at the annual apportionment for pupil attendance at community day schools.

This bill would require that this amount be adjusted annually commencing in the 1999-2000 fiscal year for inflation by a specified calculation.

(29) Under existing law, there is a County Office Fiscal Crisis and Management Assistance Team that consists of persons having extensive experience in school district budgeting, accounting, data processing, telecommunications, risk management, food services, pupil transportation, purchasing and warehousing, facilities maintenance and operation, and personnel administration, organization, and staffing.

This bill would establish the California School Information Service, administered by the County Office Fiscal Crisis and Management Assistance Team, which would be authorized to hire a program administrator. The California School Information Services program administrator would be required to submit to the State Board of Education a plan to administer, coordinate, and manage the development and implementation of an electronic statewide school information system to address current problems of information exchange.

(30) Under existing law, the State Department of Education is required, on behalf of the state, to participate in a specified federal child care food program, and may not terminate its participation in the program unless the Legislature authorizes the termination.

This bill would require the State Department of Education, to the extent permitted by federal law, to adopt regulations to establish eligibility requirements for participation in the child care food program and to impose penalties and sanctions for noncompliance by sponsoring organizations and would authorize the department to establish contracts effective for periods of 12 months or less for sponsoring organizations meeting the department's high-risk profile.

(31) Existing law provides that parents or guardians of pupils enrolled in public school have specified rights and should have specified opportunities with regard to the education of their children. Existing law requires, upon approval by the State Board of Education, the State Department of Education to make materials that describe a comprehensive partnership at schools that involves parents and guardians of pupils in the public schools of California on or before December 31, 1999, and requires these materials to include information about the possible roles of each parent or guardian, and of each teacher, principal, and other school personnel in fostering and participating in parent involvement activities and programs.

This bill would establish the Parental Involvement Grant Program and would require the Superintendent of Public Instruction to administer this program. The bill would authorize any school district or charter school that maintains a kindergarten or any of grades 1 to 12, inclusive, to apply on behalf of a school for funding under the program if the schoolsite council submits an application and a plan that contains certain elements, including, among others, a plan for a program that facilitates significant involvement of parents in their children's education. The bill would require the plan developed by the schoolsite council to be reviewed and approved by the governing board of the school district or in the case of a charter school, a specified local educational agency, and to be submitted to the State Department of Education together with the application for funding pursuant to this program. The bill would require the Superintendent of Public Instruction, in any fiscal year in which funds are appropriated for making parental involvement grants pursuant to this program, to administer the application process and to award one-time grants, on a competitive basis, in the amount of \$25,000.

(32) Under existing law, a school district that elects to continue to operate a class size reduction program in grades 10 to 12, inclusive, is eligible to receive \$135 per pupil certified pursuant to this chapter as it read on July 1, 1998, except that total funding shall not exceed the amount received by the school district for the program for grades 10 to 12, inclusive, in the 1997-98 fiscal year.

This bill would increase that amount to \$165 per pupil, adjusted annually commencing in the 2000-01 fiscal year by a specified inflation adjustment, except that total funding would not be permitted to exceed the amount received by the school district for the program for grades 10 to 12, inclusive, in the 1997-98 fiscal year.

(33) Under existing law, the Superintendent of Public Instruction is required to apportion to each applicant district an amount equal to \$135 per unit of full-year equivalent enrollment for special education pupils enrolled in special education classes on a full-time basis and the number of pupils enrolled in necessary small schools that receive specified funding if the district certifies an average class

size of 20 pupils and not more than 22 pupils in each participating class at each participating school.

This bill would instead provide for an apportionment of \$165 per unit of full-year equivalent enrollment for these pupils if the district certifies an average class size of 20 pupils and not more than 22 pupils in each participating class at each participating school, adjusted annually commencing in the 2000-01 fiscal year for inflation.

(34) Under existing law, there is the Elementary School Intensive Reading Program, and the Governor's Reading Award Program. The Superintendent of Public Instruction, with input from an advisory committee, is required to evaluate these programs on or before November 1, 2000.

This bill would instead require the evaluation of these programs on or before November 1, 2001.

(35) Existing law provides for various programs to serve individuals with exceptional needs, as defined.

This bill would prohibit the Superintendent of Public Instruction from allocating state funds to offset the federal funds withheld.

(36) Under existing law, an individual with exceptional needs, who is eligible to receive special educational instruction, related services, or both, is required to receive educational instruction, services, or both, at no cost to his or her parents or, as appropriate, to him or her.

This bill would require the Superintendent of Public Instruction to send a notice to each member of the governing board of a local education agency within 30 days of the superintendent's receipt of notification by the federal government that a local educational agency is not in compliance with the Individual's with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973, or when the Superintendent of Public Instruction determines that the local educational agency is not in compliance with any other special education provision, with a description of those services required by the statute with which the local educational agency is not in compliance. Upon receipt of the notification, the governing board would be required to address the issue of noncompliance at a regularly scheduled public hearing.

(37) Under existing law, for the 1998-99 fiscal year, the Superintendent of Public Instruction is required to make computations to determine the amount of funding for each special education local plan area, including computations to determine the inflation adjustment for the fiscal year in which the computation is made.

This bill would revise that inflation adjustment.

(38) Under existing law, in order to mitigate the effects of any declining enrollment, commencing in the 1998-99 fiscal year, and each fiscal year thereafter, the Superintendent of Public Instruction is required to calculate allocations to special education local plan

areas based on the average daily attendance reported for the special education local plan area for the fiscal year in which the computation is made or the prior fiscal year, whichever is greater, adjusted for any loss or gain of average daily attendance reported for the special education local plan area due to a reorganization or transfer of territory in the special education local plan area.

This bill would revise that calculation.

(39) Under existing law, the State Board of Education is required to complete the adoption of the portion of pupil assessments that meets certain objectives and that yields valid, reliable estimates of school performance, school district performance, and statewide performance of pupils that, in grades 4, 5, 8, and 10, assess basic academic skills and incorporate the use of direct writing assessment and other assessments of applied academic skills, in the core curriculum areas of reading, writing, and mathematics by December 31, 1999, and the board is required to complete the adoption of that portion of pupil assessments for these pupils in the core curriculum areas of history/social science and science by December 31, 2000.

The bill would instead require the board to adopt performance standards not later than July 15, 2000, and require the board to complete the adoption of the pupil assessments in the core curriculum areas not later than November 15, 2000.

(40) Under the Standardized Testing and Reporting Program, known as the STAR Program, the Superintendent of Public Instruction is required to apportion funds, to enable school districts to administer to each of its pupils in grades 2 to 11, inclusive, the achievement test designated by the State Board of Education. The State Board of Education is required to establish the amount of funding to be apportioned, which is up to \$8 per test administered to a pupil in grades 2 to 11, inclusive.

This bill would provide, instead of up to \$8 per test, that an adjustment to the amount of funding apportioned per test may not be valid without the approval of the Director of Finance, would require that these requests be submitted in writing to the director and the chairpersons of the fiscal committees of the Legislature with accompanying material justifying the proposed adjustment, and would require the director to approve or disapprove the amount within 30 days of receipt of the request and notify the chairpersons of the fiscal committees of the Legislature.

(41) Under the STAR Program, to be eligible for consideration, a test publisher is required to meet certain conditions, including, but not limited to, to provide disaggregated scores, based on limited-English-proficient status and non-limited-English-proficient status, provide disaggregated scores by pupil gender, and to provide disaggregated scores based on whether pupils are economically disadvantaged or not.

This bill would require a test publisher to agree in writing to also provide disaggregated scores for pupils who have individualized education programs and are enrolled in special education, to the extent required by federal law. The bill would also require a school district to be reimbursed by the publisher for unexpected expenses incurred due to the late delivery of testing materials.

(42) Under existing law, the Superintendent of Public Instruction is required to review existing tests that assess the English language development of pupils whose primary language is a language other than English. These tests are required to include, but not be limited to, an assessment of achievement of these pupils in English reading, speaking, and written skills.

This bill would require the Superintendent of Public Instruction, not later than August 15, 1999, to release a request for proposals for the development of this test or series of tests. The bill would require the State Board of Education, not later than September 15, 1999, to select a contractor or contractors for the development of the test or series of tests, to be available for administration during the 2000-01 school year. The bill would also require the State Board of Education, not later than July 1, 1999, to approve standards for English language development for pupils whose primary language is other than English.

(43) Under existing law, the Board of Governors of the California Community Colleges are required to develop criteria and standards for the purposes of making the annual budget request for the California Community Colleges to the Governor and the Legislature, and for the purpose of allocating the state general apportionment revenues. Annual revenue adjustments are required to be made to reflect cost changes, using the Implicit Price Deflator for State and Local Government Purchases of Goods and Services for the United States as published by the United States Department of Commerce, and using the ratio for the 4th calendar quarter of the latest available year to the 4th calendar quarter of the prior year rounded up to the 100th.

This bill would instead require the board of governors to use the same factor as required for school districts.

(44) Under existing law, the California Community Colleges Economic Development Program becomes inoperative on June 30, 1999, and as of January 1, 2000, is repealed.

This bill would extend this program until January 1, 2001.

(45) Under existing law, the fee for filing a notice of appeal in a civil case appealed to a court of appeal is \$250 and the fee for filing a petition for a writ within the original civil jurisdiction of a court of appeal is \$250.

This bill would increase these amounts to \$265.

(46) Under existing law, the \$50 of each fee collected in a civil case by the clerk of each court of appeal for filing a notice of appeal is

required to be paid into the State Treasury for deposit in a special account in the General Fund known as the California State Law Library Special Account. Existing law provides that this provision is repealed on January 1, 2000.

This bill would increase the fee to \$65 and would extend this provision until January 1, 2005, thereby imposing a state-mandated local program by extending the duties of the clerk of each court of appeals.

(47) Existing property tax law requires the county auditor, in each fiscal year, to allocate property tax revenue to local jurisdictions in accordance with specified formulas and procedures, and generally requires that each jurisdiction be allocated an amount equal to the total of the amount of revenue allocated to that jurisdiction in the prior fiscal year, subject to certain modifications, and that jurisdiction's portion of the annual tax increment, as defined. Existing property tax law also reduces the amounts of ad valorem property tax revenue that would otherwise be annually allocated to the county, cities, and special districts pursuant to these general allocation requirements by requiring, for purposes of determining property tax revenue allocations in each county for the 1992-93 and 1993-94 fiscal years, that the amounts of property tax revenue deemed allocated in the prior fiscal year to the county, cities, and special districts be reduced in accordance with certain formulas. It requires that the revenues not allocated to the county, cities, and special districts as a result of these reductions be transferred to the Educational Revenue Augmentation Fund in that county for allocation to school districts, community college districts, and the county office of education.

This bill would require, for the 1999-2000 fiscal year and each fiscal year thereafter, that if, after making these prescribed allocations, a county auditor determines that there are still additional funds to be allocated, that those funds be allocated to the county, cities, and special districts in proportion to the amounts of ad valorem property tax revenue otherwise required to be shifted from those local agencies to the county's Educational Revenue Augmentation Fund for the relevant fiscal year. This bill would, for the 1999-2000 fiscal year, condition the operation of this allocation provision upon an appropriation, as provided, in the Budget Act of 1999. By imposing new duties in the allocation of ad valorem property tax revenues, this bill would impose a state-mandated local program. However, this bill would provide that no reimbursement is required by these provisions for a specified reason.

(48) Under existing law, there is in the Department of the Youth Authority a correctional education authority for the purpose of carrying out the education and training of wards committed to the youth authority.

This bill would provide that for purposes of receiving state funds pursuant to subdivision (b) of Article XVI of the California

Constitution (Proposition 98), the correctional education authority is a state agency and is only entitled to state funding for direct instructional services provided to wards attending a course of study. The bill would prohibit the authority from receiving state funds unless the funds are specifically appropriated to the Youth Authority for direct instructional services, and would provide that the authority may not receive additional funds from the State Department of Education under any other program.

(49) Under existing law, \$5,000,000 is appropriated from the General Fund to the Library of California Board to fund the startup phase of the Library of California for expenditure in the 1998-99 fiscal year.

This bill would authorize expenditure of these funds in the 1998-99 and 1999-2000 fiscal years, thereby making an appropriation.

(50) This bill would require, notwithstanding any other provision of law, that the state funds for revenue limits to school districts, county superintendents of schools, and charter school operational funding certified to the Controller in the 2000-01 fiscal year do not exceed certain amounts as determined by statute.

(51) This bill would provide that, notwithstanding any other provision of law, the cost-of-living adjustment for certain items of the Budget Act of 1999 is 1.41% and would provide that these funds are in lieu of the amounts that would otherwise be appropriated.

(52) This bill would reappropriate \$15,471,000 from the Proposition 98 Reversion Account to the Superintendent of Public Instruction for allocations in various amounts on a one-time basis to various school districts for specified purposes.

(53) This bill would appropriate \$973,400 from the General Fund to the Superintendent of Public Instruction for allocation in various amounts to school districts on a one-time basis for specified purposes. These funds would be applied toward the minimum funding requirements for school districts and community colleges imposed by Section 8 of Article XVI of the California Constitution.

(54) This bill would appropriate \$134,000,000 from the General Fund to the Superintendent of Public Instruction for allocation on a one-time basis to school districts and charter schools, and would require the Superintendent of Public Instruction to allocate these funds in specified amounts to school districts and charter schools on an enrollment basis for kindergarten and grades 1 to 8, inclusive, and grades 9 to 12, inclusive. These funds would be applied toward the minimum funding requirements for school districts and community colleges imposed by Section 8 of Article XVI of the California Constitution.

(55) This bill would appropriate \$1,000,000 from the General Fund to the Superintendent of Public Instruction for allocation to the 5 Challenger Learner Centers, and would require that each center be allocated an equal amount.

(56) This bill would provide that the unencumbered balance as of June 30, 1999, in the 1997 Omnibus Education Trailer Bill or reimbursement of state-mandated local cost claims submitted by local education agencies is reappropriated to the Controller for the reimbursement of these claims for fiscal years 1995-96 to 1999-2000, inclusive.

(57) The bill would reappropriate \$3,320,000 from the Proposition 98 Reversion Account to the Chancellor of the California Community Colleges for various purposes.

(58) This bill would appropriate \$10,000,000 from the General Fund to the Controller for transfer to Section B of the State School Fund for the purpose of providing one-time grants to community college districts for the 1999-2000 fiscal year for the purpose of one-time expenditures on high priority projects for instructional equipment, library materials replacement, technology infrastructure, scheduled maintenance, and special repairs. The bill would require these funds to be allocated in an average amount per actual statewide full-time equivalent student enrollment reported for the 1998-99 fiscal year. These funds would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1998-99 fiscal year.

(59) Existing law requires, and provides a mechanism for, reimbursement of certain school district costs associated with compliance with desegregation plans or orders and voluntary integration programs.

This bill would appropriate \$2,000,000 from the General Fund to the State Controller to provide for the unfunded costs for Sacramento City Unified School District's 1998-99 voluntary integration program. The bill would require the funds appropriated by these provisions to be counted toward the state's minimum funding obligation pursuant to Section 8 of Article XVI of the California Constitution for the 1998-99 fiscal year.

(60) This bill would appropriate a total of \$6,724,097 from the General Fund to the State Controller, for allocation to school districts for costs associated with school desegregation pursuant to a prescribed schedule for the 1994-95 and the 1995-96 fiscal years.

This bill would require the funds appropriated by these provisions to be counted towards the state's minimum funding obligation pursuant to Section 8 of Article XVI of the California Constitution for years prior to the 1998-99 fiscal year to the extent that obligations remain.

(61) This bill would appropriate \$200,000 from the General Fund to the University of California for violence prevention studies.

(62) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that

reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

(63) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 2558.45 of the Education Code is amended to read:

2558.45. For the purposes of this article the revenue limit of each county superintendent of schools shall be reduced by a deficit factor, as follows:

(a) (1) The revenue limit for the 1994-95 fiscal year for each county superintendent of schools determined pursuant to this article shall be reduced by a 12.59 percent deficit factor.

(2) The revenue limit for the 1995-96 fiscal year determined pursuant to this article for each county superintendent of schools shall be reduced by an 11.70 percent deficit factor.

(3) The revenue limit for the 1996-97 and 1997-98 fiscal years determined pursuant to this article for each county superintendent of schools shall be reduced by an 11.547 percent deficit factor, as adjusted pursuant to Section 42238.41.

(4) The revenue limit for the 1999-2000 fiscal year determined pursuant to this article for each county superintendent of schools shall be reduced by a 8.628 percent deficit factor.

(b) (1) The revenue limit for each county superintendent of schools for the 1994-95 fiscal year shall be determined as if the revenue limit for each county superintendent of schools had been determined for the 1993-94 fiscal year without being reduced by the deficit factor required pursuant to Section 2558.4.

(2) When computing the revenue limit for each county superintendent of schools for the 1995-96 or any subsequent fiscal year pursuant to this article, the revenue limit shall be determined as if the revenue limit for each county superintendent of schools had been determined for the previous fiscal year without being reduced by the deficit factor specified in this section.

SEC. 2. Section 8203.3 of the Education Code is amended to read:

8203.3. (a) On or before June 30, 1999, the State Department of Education shall develop prekindergarten learning development guidelines. The development of these guidelines shall be funded

notify school districts as required by this subdivision within seven work days after receiving instruction from the State Board of Education.

(2) If satisfied that the publisher has met the requirements of subdivision (a), and that the State Department of Education and the State Board of Education have received complete statewide data, to the satisfaction of the board, reported in the manner prescribed by this section, the State Board of Education shall determine that all school districts may make final payments to the publisher.

(3) If the State Board of Education is not satisfied that the publisher has met all of the requirements of subdivision (a) or any of the individual components of test administration, the board may authorize partial payment. The State Board of Education may adopt regulations establishing a process for partial payments to the test publisher by school districts.

(f) The State Board of Education shall consider the performance of publishers no later than July 31 following the test administration for purposes of making appropriate determinations pursuant to the standard agreement authorized pursuant to this section. Any failure of the test publisher to meet the terms of the standard agreement or other requirements of this section that is caused by a school district's failure to fulfill its obligations shall not be deemed cause for a determination adverse to the test publisher under this subdivision.

SEC. 50. Section 60643.5 is added to the Education Code, to read:

60643.5. (a) A school shall be reimbursed by the test publisher selected pursuant to this article for any unexpected expenses incurred due to scheduling changes that resulted from the late delivery of testing materials in connection with the STAR program.

(b) The State Board of Education shall adopt necessary changes to the standard agreement adopted pursuant to Section 60643 to provide for the reimbursement required by subdivision (a) to ensure timely delivery of testing materials to all schools.

(c) The State Department of Education shall monitor and report to the State Board of Education regarding the publisher's production, processing, and delivery system to ensure that a timely delivery of testing materials to all schools occurs during the 1999-2000 testing cycle.

SEC. 51. Section 60810 of the Education Code is amended to read:

60810. (a) (1) The Superintendent of Public Instruction shall review existing tests that assess the English language development of pupils whose primary language is a language other than English. The tests shall include, but not be limited to, an assessment of achievement of these pupils in English reading, speaking, and written skills. The superintendent shall determine which tests, if any, meet the requirements of subdivisions (b) and (c). If any existing test or series of tests meets these criteria, the superintendent, with

approval of the State Board of Education, shall report to the Legislature on its findings and recommendations.

(2) If no suitable test exists, the superintendent shall explore the option of a collaborative effort with other states to develop a test or series of tests and share test development costs. If no suitable test exists, the superintendent, with approval of the State Board of Education, may contract with a local education agency to develop a test or series of tests that meets the criteria of subdivisions (b) and (c) or may contract to modify an existing test or series of tests so that it will meet the requirements of subdivisions (b) and (c).

(3) Not later than August 15, 1999, the Superintendent of Public Instruction and the State Board of Education shall release a request for proposals for the development of the test or series of tests required by this subdivision. Not later than September 15, 1999, the State Board of Education shall select a contractor or contractors for the development of the test or series of tests required by this subdivision, to be available for administration during the 2000-01 school year.

(b) The test or series of tests developed or acquired pursuant to subdivision (a) shall have sufficient range to assess pupils in kindergarten and grades 1 to 12, inclusive, in English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English.

(c) The test or series of tests shall meet all of the following requirements:

(1) Provide sufficient information about pupils at each grade level to determine levels of proficiency ranging from no English proficiency to fluent English proficiency with at least two intermediate levels.

(2) Have psychometric properties of reliability and validity deemed adequate by technical experts.

(3) Be capable of administration to pupils with any primary language other than English.

(4) Be capable of administration by classroom teachers.

(5) Yield scores that allow comparison of a pupil's growth over time, can be tied to readiness for various instructional options, and can be aggregated for use in the evaluation of program effectiveness.

(6) Not discriminate on the basis of race, ethnicity, or gender.

(7) Be aligned with the standards for English language development adopted by the State Board of Education pursuant to Section 60811.

(d) The test shall be used for the following purposes:

(1) To identify pupils who are limited English proficient.

(2) To determine the level of English language proficiency of pupils who are limited English proficient.

(3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

SEC. 52. Section 60811 of the Education Code is amended to read:

60811. Not later than July 1, 1999, the State Board of Education shall approve standards for English language development for pupils whose primary language is a language other than English. The standards shall be comparable in rigor and specificity to the standards for English language arts adopted pursuant to Section 60605.

SEC. 53. Section 84750 of the Education Code is amended to read:

84750. The board of governors, in accordance with the statewide requirements contained in subdivisions (a) to (j), inclusive, and in consultation with institutional representatives of the California Community Colleges and statewide faculty and staff organizations, so as to ensure their participation in the development and review of policy proposals, shall develop criteria and standards for the purposes of making the annual budget request for the California Community Colleges to the Governor and the Legislature, and for the purpose of allocating the state general apportionment revenues, beginning with the budget request for the 1991-92 fiscal year.

In developing the criteria and standards, the board of governors shall utilize and strongly consider the guidelines and work products of the Task Force on Community College Financing as established pursuant to Chapter 1465 of the Statutes of 1986, and shall complete the development of these criteria and standards, accompanied by the necessary procedures, processes, and formulas for utilizing its criteria and standards, by March 1, 1990, and shall submit on or before that date a report on these items to the Legislature and the Governor.

The board of governors shall develop the criteria and standards within the following statewide minimum requirements:

(a) The calculations of each community college district's revenue level for each fiscal year shall be based on the level of general apportionment revenues (state and local) the district received for the prior year plus any amount attributed to a deficit of minimum workload growth, with revenue adjustments being made for increases or decreases in workload, for program improvement as authorized by this section or by any other provision of law, for inflation, and for other purposes authorized by law.

(b) (1) For credit instruction, the funding mechanism developed pursuant to this section shall recognize the needs among the major categories of operation of community colleges, with categories established for instruction, instructional services and libraries, student services, maintenance and operations, and institutional support.

(2) The board of governors may propose to the Legislature, for enactment by statute, other cost categories when adequate data exist.

(3) Funding for noncredit classes shall be determined as follows:

Senate Bill No. 638

CHAPTER 678

An act to add Section 60812 to, and to add Article 3.5 (commencing with Section 313) to Chapter 3 of Part 1 of, the Education Code, relating to English language education.

[Approved by Governor October 6, 1999. Filed
with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

SB 638, Alpert. English learners.

Existing law relating to English language education for immigrant children, with certain exceptions, requires that all children in California public schools be taught English by being taught in English, and in particular, requires that all children be placed in English language classrooms. Existing law requires that children who are English learners be educated through sheltered English immersion during a temporary transition period, not normally to exceed one year. Existing law provides for waiver of these requirements with the annual prior written informed consent of the parent or guardian.

This bill would require each school district to assess the English language development of each pupil to determine the level of proficiency. The bill would require the school district to establish procedures based upon guidelines and criteria developed by the State Board of Education for conducting the assessment and for the reclassification of a pupil from English learner to proficient in English.

This bill would, commencing with the 2000-01 school year, require the assessment to be conducted upon initial enrollment, and annually, thereafter, until the pupil is designated as English proficient.

Existing law requires the Superintendent of Public Instruction to review existing tests that assess the English language development of pupils whose primary language is other than English, and to determine which tests meet prescribed criteria or to develop such a test. The law requires the State Board of Education to approve related standards.

The bill would require the assessment of a pupil pursuant to the bill to primarily utilize the English language development test identified or developed by the Superintendent of Public Instruction, and in the interim would require the use of a test developed by the school district or by the State Department of Education. The bill would require test results to be made available to the public on the State

Department of Education Internet site. The bill would require the reclassification procedures to utilize multiple criteria in determining whether to reclassify a pupil as proficient in English, including, but not limited to, assessment of language proficiency using an objective assessment instrument, including, but not limited to, the English language development test, teacher evaluation, parental opinion and consultation, and comparison of the pupil's performance in basic skills against an empirically established range of performance in basic skills based upon the performance of English proficient pupils of the same age.

By establishing new requirements for English language assessment and for reclassification of pupils by school districts, this bill would impose a state-mandated local program.

The bill would declare that it is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227).

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Article 3.5 (commencing with Section 313) is added to Chapter 3 of Part 1 of the Education Code, to read:

Article 3.5. English Language Proficiency Assessment

313. (a) Each school district that has one or more pupils who are English learners shall assess each pupil's English language development in order to determine the level of proficiency for the purposes of this chapter.

(b) The State Department of Education, with the approval of the State Board of Education, shall establish procedures for conducting the assessment required pursuant to subdivision (a) and for the reclassification of a pupil from English learner to proficient in English.

(c) Commencing with the 2000-01 school year, the assessment shall be conducted upon initial enrollment, and annually, thereafter, on the anniversary of the pupil's initial identification by the school

district as being an English learner. The annual assessments shall continue until the pupil is redesignated as English proficient. The assessment shall primarily utilize the English language development test identified or developed by the Superintendent of Public Instruction pursuant to Chapter 7 (commencing with Section 60810) of Part 33. Prior to completion of the English language development test, a school district shall use either an assessment instrument developed by the school district or an assessment recommended by the State Department of Education.

(d) The reclassification procedures developed by the State Department of Education shall utilize multiple criteria in determining whether to reclassify a pupil as proficient in English, including, but not limited to, all of the following:

(1) Assessment of language proficiency using an objective assessment instrument, including but not limited to, the English language development test pursuant to Section 60810.

(2) Teacher evaluation, including, but not limited to, a review of the pupil's curriculum mastery.

(3) Parental opinion and consultation.

(4) Comparison of the pupil's performance in basic skills against an empirically established range of performance in basic skills based upon the performance of English proficient pupils of the same age, that demonstrates whether the pupil is sufficiently proficient in English to participate effectively in a curriculum designed for pupils of the same age whose native language is English.

SEC. 2. Section 60812 is added to the Education Code, to read:

60812. Commencing the school year following the year in which the Superintendent of Public Instruction has developed or identified a test pursuant to this chapter, the State Department of Education shall place the results of the statewide test, including average scores for every school district on its Internet site for public access.

SEC. 3. The Legislature finds and declares that this act provides an assessment mechanism that is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227, approved by the voters at the June 2, 1998, primary election).

SEC. 4. It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.

SEC. 5. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for

Ch. 678

— 4 —

reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

o

93

└

Senate Bill No. 1667

CHAPTER 71

An act to amend Sections 313, 2550, 8278, 10551, 10554, 10555, 32228, 32228.1, 33050, 41203.1, 47652, 48664, 49550.3, 54743, 54744, 54745, 54746, 54747, 54748, 54749, 54749.5, 76300, 87885, and 92820 of, to add Sections 2568, 42238.23, and 52052.3 to, to add and repeal Chapter 5 (commencing with Section 420) of Part 1 of, and to add Chapter 4 (commencing with Section 14550) to Part 9 of, the Education Code, to amend Section 6516.6 of, to add Chapter 3.10 (commencing with Section 15820.80) to Part 10b of Division 3 of Title 2 of, and to add and repeal Section 15820.84 of, the Government Code; and to add Section 10299 to the Public Contract Code, relating to government, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 5, 2000. Filed with
Secretary of State July 5, 2000.]

I am signing Senate Bill 1667. However, I am deleting Section 41, reducing the appropriations made in Section 42 by a total of \$17,566,000, and reducing the appropriations made in Section 43 by a total of \$3,626,000. These appropriations are being eliminated because I have specific concerns with the projects. The specific reductions are as follows:

I am deleting Section 41 of this bill, which appropriates \$8.9 million for county office of education equalization. This augmentation is being eliminated because the 2000-01 Budget continues discretionary funding increases from previous years for county offices of education and provides an increase of \$48,000,000 in discretionary funding by eliminating the county offices of education deficit factor.

I am also reducing Section 42 of this bill from \$32,852,000 to \$15,286,000. The specific reductions are as follows:

I am reducing the appropriation in Section 42 by eliminating paragraph (6) of subdivision (a), which allocates \$300,000 to the San Francisco Unified School District for expansion of arts education in grades K-5. Grants for this purpose are available on a competitive basis through the Department of Education, and I am therefore deleting this appropriation to fund higher competing priorities.

I am reducing the appropriation in Section 42 by reducing paragraph (7) of subdivision (a) from \$500,000 to \$400,000, to the Culver City Unified School District to repair the track at Culver City High School, in order to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (8) of subdivision (a), which allocates \$10,000 to the Los Angeles Unified School District for a school-based/school-linked health program at the Maclay Middle School. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (9) of subdivision (a), which allocates \$10,000 to the Los Angeles Unified School District for a school-based/school-linked health program at the Pacoima Middle School. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (11) of subdivision (a), which allocates \$20,000 to the Manhattan Beach Unified School District for the purchase of equipment for teaching aids to reduce diversity intensity

and increase cultural awareness at Mira Costa High School, to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (15) of subdivision (a), which allocates \$100,000 to Liggett Elementary for establishment of a Parent Education Center. Grants are already available for this purpose through the Department of Education, pursuant to the Parental Involvement Program established pursuant to Chapter 734 of the Statutes of 1999. Additional support for this purpose should be provided from local resources.

I am reducing the appropriation in Section 42 by eliminating paragraph (18) of subdivision (a), which allocates \$200,000 to the Sunnyvale Elementary School District for Project H.E.L.P. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (19) of subdivision (a), which allocates \$250,000 to the Lamont Elementary School District for portable classrooms. Funding for this purpose should be sought through the State Allocation Board process.

I am reducing the appropriation in Section 42 by eliminating paragraph (22) of subdivision (a), which allocates \$450,000 to the Los Angeles Unified School District for the San Fernando High School Health Clinic. I am reducing this appropriation in order to fund competing higher priorities.

I am sustaining the appropriation of \$500,000 in paragraph (23) of subdivision (a) of Section 42 for the Baldwin Park Unified School District's Drama, Reading, English, and Mathematics (DREAM) project, on a one-time basis only, thus any future support for this project should be provided from local resources.

I am reducing the appropriation in Section 42 by reducing paragraph (24) of subdivision (a) from \$500,000 to \$200,000, to the Montebello Unified School District for natural gas powered delivery trucks, in order to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (25) of subdivision (a), which allocates \$150,000 to the Elk Grove Unified School District for a Japanese language academy. I am deleting this appropriation to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (26) of subdivision (a), which allocates \$500,000 to the Oakland Unified School District for a reading training program. The Budget Bill already includes significant funding for reading staff development, reading programs, and remedial instruction in reading, and I am therefore unable to support this request.

I am reducing the appropriation in Section 42 by reducing the amount in paragraph (27) of subdivision (a), from \$350,000 to \$200,000 for allocation to the Burbank Unified School District to continue a literacy program on a one-time basis only, thus any future support for this project should be provided from local resources.

I am sustaining the appropriation of \$300,000 in paragraph (28) of subdivision (a) of Section 42 for the Temple City Unified School District's Arts Academy, on a one-time basis only, future support for this project should be provided from local resources.

I am reducing the appropriation in Section 42 by eliminating paragraph (29) of subdivision (a), which allocates \$400,000 to the Alum Rock Union Elementary School District for a mathematics/science center that would provide training and science/mathematics supplies to teachers. The 2000-01 Budget already contains \$246 million for the Staff Development Day Buy-Out program and \$108 million for a variety of Professional Development Institutes, including institutes in elementary mathematics and algebra, to help improve teacher's skills and expertise in classroom instruction.

I am reducing the appropriation in Section 42 by eliminating paragraph (30) of subdivision (a), which allocates \$50,000 to the Santa Monica Malibu Unified School District for an after school youth program at Malibu High School. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (32) of subdivision (a), which allocates \$200,000 to the Tahoe-Truckee Unified School District

for the North Tahoe Youth Center. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (34) of subdivision (a), which allocates \$675,000 to the Los Alamitos Unified School District for reimbursement for class size reduction costs. Funding for this purpose should be sought through the class size reduction facilities program.

I am reducing the appropriation in Section 42 by reducing the amount in paragraph (35) of subdivision (a), from \$10,000,000 to \$5,000,000 for allocation to the Alford Unified School District for construction costs associated with the Center for Primary Education. The balance of funding required for this project should be sought through the School Facilities Program or from local resources.

I am reducing the appropriation in Section 42 by eliminating paragraph (36) of subdivision (a), which allocates \$900,000 to the Riverside County Office of Education for the purpose of screening and diagnosing pupils for Scotopic Sensitivity Syndrome, to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (37) of subdivision (a), which allocates \$500,000 to the Saugus Union Elementary School District for costs associated with testing air quality in portable classrooms. As indoor air quality in portable classrooms is an important issue, the Budget provides \$1 million to the Air Resources Board and the State Department of Health Services for purposes of conducting a comprehensive study and review of the environmental health conditions, including air quality, in portable classrooms.

I am reducing the appropriation in Section 42 by eliminating paragraph (38) of subdivision (a), which allocates \$275,000 to the Inyo County Office of Education for facilities costs. Funding for this project may be available through the School Facilities Program.

I am reducing the appropriation in Section 42 by eliminating paragraph (39) of subdivision (a), which allocates \$500,000 to the Calaveras Unified School District for swimming pool renovations, in order to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (40) of subdivision (a), which allocates \$27,000 to the Alta-Dutch Flat Union Elementary School District for Afternoon Transportation Services, in order to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (43) of subdivision (a), which allocates \$469,000 to the Mariposa Unified School District for declining ADA. As current law provides sufficient provisions to cushion the loss of ADA for school districts, I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by reducing the amount in paragraph (44) of subdivision (a), from \$568,000 to \$285,000 for the Chatom Union Elementary School District. The original augmentation included funding for declining ADA and for the purchase of school buses. As current law provides sufficient provisions to cushion the loss of ADA for school districts, I am reducing this appropriation maintaining only the funding for the purchase of school buses.

I am reducing the appropriation in Section 42 by eliminating paragraph (45) of subdivision (a), which allocates \$3,700,000 to the Clovis Unified School District for the Central Valley Applied Agriculture and Technology Center. I am deleting this appropriation to fund higher competing priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (47) of subdivision (a), which allocates \$112,000 to the Alameda County Office of Education for the Smart Kids, Safe Kids program. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (48) of subdivision (a), which allocates \$475,000 to the Millbrae Elementary School District for declining ADA. As current law provides sufficient provisions to cushion the loss of ADA for school districts, I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by eliminating paragraph (52) of subdivision (a), which allocates \$160,000 to the Soledad Enrichment Charter School for Operation Y.E.S. I am reducing this appropriation in order to fund competing higher priorities.

I am reducing the appropriation in Section 42 by reducing the amount in paragraph (55) of subdivision (a), from \$5,000,000 to \$3,700,000 for the Clovis and Fresno Unified School Districts for the Center for Advanced Research and Technology. I am reducing this appropriation to fund higher competing priorities.

I am also reducing Section 43 of this bill by \$3,626,000, from \$8,576,000 to \$4,950,000. The specific reductions are as follows:

I am reducing the appropriation in Section 43 by eliminating paragraph (1) of subdivision (a) which allocates \$575,000 for preliminary plans, working drawings and construction for the Santa Clarita Community College District, College of the Canyons Welding Technology and Manufacturing Technology Lab. Funding for this project is premature as the project has circumvented the Chancellor's Office review and priority setting process, and has not been identified by the District as a priority on their five-year capital outlay plan.

I am reducing the appropriation in Section 43 by eliminating paragraph (2) of subdivision (a) which allocates \$551,000 for the working drawings phase of the Victor Valley Community College District, Victor Valley College Advanced Technology Building. Funding for this project is premature as the funding of previous phases was predicated upon the commitment of the District that funding for subsequent phases would not be sought until the 2001-2002 fiscal year.

I am reducing the appropriation in Section 43 by eliminating paragraph (4) of subdivision (a), which allocates \$1,500,000 to the Copper Mountain Community College District for transition and technology costs. Copper Mountain will be fully operational as a district and receive local assistance apportionment funding in the 2000-01 fiscal year. Therefore, the need for additional district-specific funding is unclear.

I am reducing the appropriation in Section 43 by reducing the allocation in paragraph (7) for the acquisition of land for the future construction of the Los Angeles Community College District (LACCD), Los Angeles City College Satellite Center from \$4,000,000 to \$3,000,000. In addition, I am restricting expenditure of the remaining \$3,000,000. The Los Angeles Community College District has not yet demonstrated the programmatic necessity of a satellite center. Prior to the expenditure of these funds the LACCD and the California Community College (CCC) must receive the requisite approvals for the satellite center from the California Postsecondary Education Commission (CPEC). Further, the need for a satellite center must be justified and demonstrated to the Department of Finance (DOF). The proposal submitted to the DOF must identify and demonstrate the programmatic need for the satellite center, the annual enrollment and full time equivalents served, the costs of the center both during development and once fully developed, and the full scope and cost of the acquisition and construction proposal for the center. The submittal to DOF must demonstrate that the center will meet the programmatic needs of both the district and the CCC and additionally substantiate that the space needs for the new center cannot be accommodated in existing facilities and campuses in the district. Finally, the funds will only be available for expenditure upon certification from the seller that the site is an environmentally clean site and that the owner will accept liability for any hazardous waste on the site or ground water contamination. Current and future resources should not be allocated on an ad hoc basis; rather, allocated to projects that have been developed in the context of the Administration's overall priorities, cost standards, guidelines, instructional purposes, enrollment related needs, and scope standards and secured the appropriate programmatic and site review and approval.

GRAY DAVIS, Governor

LEGISLATIVE COUNSEL'S DIGEST

SB 1667, Alpert. Education and government.

(1) Existing law requires a school district that has one or more pupils who are English learners to assess each pupil's English language development in order to determine the pupil's level of proficiency. Existing law, commencing with the 2000-01 school year, requires the assessment to be conducted upon initial enrollment, and annually, thereafter, on the anniversary of the pupil's initial identification by the school district as being an English learner.

This bill would, instead, require that the annual assessment be conducted upon initial enrollment during a period of time determined by the Superintendent of Public Instruction and the State Board of Education.

(2) Existing law establishes the English Language Acquisition Program designed for pupils enrolled in grades 4 to 8, inclusive, under which a school district conducts an academic assessment of English language learners, provides a program for English language development instruction, provides supplemental instructional support, and coordinates services and funding sources available to English language learners.

This bill, in addition, would establish, until January 1, 2004, the English Language and Intensive Literacy Program for pupils in kindergarten and grades 1 to 12, inclusive. The bill would require the Superintendent of Public Instruction to develop, and the State Board of Education to approve guidelines for implementing the program. The bill would require that at least 90% of the funds received for the program be expended on direct services or materials for English language learners. The bill would require that an independent evaluation of the program be completed and submitted to the appropriate committees of the Legislature.

(3) Existing law requires the Superintendent of Public Instruction to make certain computations to determine the amount to be allocated for direct services and other purposes provided by county superintendents of schools and to determine each county superintendent's revenue limit for county superintendent responsibilities and direct services. Existing law requires the Superintendent of Public Instruction to apportion equalization funding for the 1999-2000 fiscal year to certain county offices of education in prescribed amounts.

This bill would require the Superintendent of Public Instruction to compute a rate per unit of average daily attendance for the 2000-01 fiscal year for certain county offices of education for purposes of equalizing funding for those county offices of education.

(4) Existing law requires child development appropriations to be available for expenditure for 3 years, except that funds remaining unencumbered at the end of the first fiscal year are required to revert to the General Fund.

This bill would exempt from the requirement that child development appropriations be available for 3 years appropriations for the After School Learning and Safe Neighborhoods Partnerships Program and for CalWORKs child care.

(5) Existing law requires the State Department of Education to convene an advisory committee to the governing board of the County Office Fiscal Crisis and Management Assistance Team on establishing telecommunication standards to support the efficient sharing of school business and administrative information and requires that the advisory committee be disbanded as of December 31, 1995. Existing law, until January 1, 2001, establishes the Educational Telecommunication Fund in order for the governing board to carry out its responsibilities regarding the telecommunication standards and requires that the amount of any offset made to the principal apportionments of school districts because the apportionments were not in accordance with law be deposited in the fund for a maximum deposit of \$1,000,000. Existing law requires the governing board to make annual reports to the Governor, the Legislature, the State Board of Education, and the Superintendent of Public Instruction.

This bill would delete the date that the committee is required to be disbanded and would change to January 1, 2002, the date upon which the provisions regarding the Educational Telecommunication Fund become inoperative. The bill would also increase the maximum amount that may be annually deposited in the fund to \$10,000,000 and require the annual report to be given also to the Department of Finance.

(6) Existing law authorizes the revenue limit of a school district to be reduced by the decreased employer contributions to the Public Employees' Retirement System resulting from the enactment of specified legislation and to offset that amount by any increase in those contributions resulting from subsequent changes in employer contribution rates.

This bill would, notwithstanding any other provision of law, prohibit excluding, from the calculations of the reduction described above, any persons providing services to local education agencies through use of a joint powers authority involving the local education agencies if those persons would otherwise be considered school employees and subject the local educational agency to the reduction described above.

(7) Existing law establishes the Carl Washington School Safety and Violence Prevention Act, which requires the Superintendent of Public Instruction to provide funds to school districts serving pupils in any of grades 8 to 12, inclusive, for the purpose for promoting school safety and reducing schoolsite violence.

This bill would expand the School Safety and Violence Prevention program to school districts that serve pupils in kindergarten or any of grades 1 to 12, inclusive.

(8) Existing law authorizes the governing board of a school district and a county board of education to request the State Board of Education to waive provisions of the Education Code and implementing regulations adopted by the State Board of Education except certain enumerated provisions and requires the State Board of Education to approve requests for waivers unless the board makes certain findings.

This bill, in addition, would prohibit the request for, and the granting of, a waiver of provisions of the Leroy F. Greene School Facilities Act of 1998.

(9) Existing law requires, for the 1990-91 fiscal year and each fiscal year thereafter, that moneys to be applied by the state for the support of school districts and community college districts be distributed in accordance with certain calculations. This provision does not apply to the fiscal years between the 1992-93 fiscal year and the 1999-2000 fiscal year, inclusive.

This bill would, instead, make this provision inapplicable to the fiscal years between the 1992-93 fiscal year and the 2000-01 fiscal year, inclusive.

(10) Existing law establishes the State School Fund, provides for the annual transfer from the fund for support of the public schools, and provides for related financial and compliance audits. Existing law authorizes formation of joint powers authorities for local educational purposes.

This bill would prohibit a local education agency from avoiding obligations, or from shifting financial obligations to the state through participation in a joint powers authority.

Existing law, regarding determination of the base revenue limit for funding public schools, requires prescribed computations to be made, including, but not limited to, computations regarding employer retirement contributions.

This bill would require employees providing services to a joint power authority to be considered school employees for the purposes of these retirement computations.

(11) Existing law provides for the establishment of charter schools if certain conditions are met, and establishes a method for funding charter schools. Existing law makes a charter school that is in its first year of operation eligible for certain advance apportionments during the 1999-2000 fiscal year.

This bill would make this provision applicable to a charter school in its first year of operation in any fiscal year.

(12) Existing law authorizes the governing board of a school district to establish one or more community day schools for expelled, probation referred, school attendance review board referred, or

district referred pupils. A school district that operates a community day school receives \$4 times the number of hours, not to exceed 2, per schoolday that a community day school pupil remains at the community day school under appropriate supervision.

This bill would adjust the \$4 amount annually commencing in the 2000-01 fiscal year for inflation.

(13) Existing law requires the State Department of Education to provide information and limited financial assistance to encourage school breakfast program startup and expansion into all qualified schools. One eligibility criteria is that 30% of the school enrollment apply and qualify for free and reduced-price meals. Existing law limits the amount of a grant to \$10,000 per schoolsite for nonrecurring expenses incurred in initiating school breakfast programs.

This bill would authorize the grants also to be awarded for the expansion of school breakfast programs and the initiation and expansion of summer food service programs. The bill would change the eligibility criteria to require that 20% of the school enrollment apply and qualify for free and reduced-price meals. The bill would allow grant funds to be used for computer point-of-service systems and the purchase of vehicles for transporting food.

(14) Existing law establishes the Public School Performance Accountability Program consisting of an Academic Performance Index, an Immediate Intervention/Underperforming Schools Program, and a Governor's High Achieving/Improving Schools Program. The Public School Performance Accountability Program requires the Superintendent of Public Instruction, with approval of the State Board of Education, to develop the Academic Performance Index (API), consisting of a variety of indicators, including pupil test scores, to be used to measure the performance of schools.

This bill would include in the API the test scores of pupils who are in the first year of enrollment in a high school, but who, in the prior year, were enrolled in an elementary school district that normally matriculates to the high school district.

(15) Existing law establishes the California School Age Families Education Program (Cal-SAFE), a comprehensive, continuous, and community linked school-based program that focuses on youth development and dropout prevention for pregnant and parenting pupils and on child care and development services for their children for the purpose of improving results for pupils and their children.

This bill would delay the transition to the Cal-SAFE program for one year.

Existing law requires a county service coordination plan that provides for educational and related support services to pregnant and parenting teens and their children to include certain information that is to be collected according to the zip codes of individuals.

This bill would replace tracking by zip code with a method to be determined by the State Department of Education and increase the

time in which the county service coordination plan must be submitted to the department.

Existing law authorizes the governing board of a school district or county superintendent of schools, individually, or jointly as a consortium, to submit an application to establish and maintain a Cal-SAFE program.

This bill would eliminate this authorization as to a consortium of governing boards of school districts or county superintendents of schools, or both.

Existing law requires the State Department of Education to submit a report every 5 years to the Joint Legislative Budget Committee and appropriate policy and fiscal committees of the Legislature, commencing March 1, 2004.

This bill would require the reports to commence on March 1, 2005.

Existing law provides state funding for a school district or county superintendent of schools participating in Cal-SAFE pursuant to a formula based on units of average daily attendance generated by pupils served. Existing law provides for the maintenance and use of state funds received under the Cal-SAFE program.

This bill would revise the amount of state funds provided to school districts and county superintendents participating in the Cal-SAFE program and add other related provisions pertaining to the computation of average daily attendance. The bill would authorize school districts and county offices of education to submit claims for a one-time service level exemption from the initial allocation reserved for the program for startup costs for the opening of child care and development sites. The bill would authorize a charter school to participate in Cal-SAFE programs and be eligible for funding.

Existing law requires pregnant minors programs that continue to operate as Cal-SAFE programs to continue the actual enrollment and authorizes them to continue to receive certain levels of funding.

This bill would authorize those pregnant minors programs to continue to claim funding up to certain amounts and make provisions for county offices of education that choose to retain their pregnant minor program revenue limit rather than convert to Cal-SAFE revenue limits.

(16) Existing law requires the waiver of student fees charged by community college districts for students who demonstrate financial need or are otherwise eligible for the waiver. Existing law requires the Board of Governors of the California Community Colleges to allocate to community college districts for determining financial need and delivering student financial aid services an amount based on the amount of fees waived.

This bill would require the above allocation to be made based on the number of credit units for which fees are waived, as specified.

(17) Existing law requires the Chancellor of the California Community Colleges to apportion to each district that establishes a

part-time faculty program, as specified, an amount equal up to 50% of the total costs of the compensation paid for office hours of part-time faculty.

This bill would instead require the Chancellor to apportion to each of these districts an amount equal to \$1 for every \$2 that the district provides in compensation under the program.

(18) Existing law established in the Neurology Department at the University of California, San Francisco, a research project on substance abuse that has as its major goal the identification of new pharmaceutical agents to prevent or treat alcohol and drug addiction. Existing law states the intent of the Legislature that dedicated state funding for this research shall be provided for 5 years and be appropriated in the annual Budget Act.

This bill would state that it is further the intent of the Legislature that the augmentation of \$1,000,000 per year appropriated in the Budget Act of 2000 for this program be used for permanent ongoing support of the program.

(19) Existing law authorizes the State Public Works Board, subject to statutory approval, to finance the acquisition of equipment, or construction, renovation, and equipping of facilities, or both, on sites within the University of California, the California State University, the California Maritime Academy, or the community college districts, utilizing lease or lease-purchase agreements. Existing law authorizes the State Public Works Board to finance these projects through the issuance of certificates, revenue bonds, negotiable notes, or bond anticipation notes.

This bill would authorize the Regents of the University of California to acquire, design, construct, or renovate acute care hospital buildings on a site or sites owned by, or subject to a lease or option to purchase held by, the regents to implement its seismic safety compliance plan. The bill would authorize, until June 30, 2010, the State Public Works Board to issue up to \$600,000,000 in revenue bonds, negotiable notes, or negotiable bond anticipation notes pursuant to specified provisions of existing law to finance the acquisition, design, construction, or renovation of these acute care hospital buildings to implement the seismic safety compliance plan. The bill would authorize the State Public Works Board and the regents to borrow funds for project costs, excluding preliminary plans and working drawings, from the Pooled Money Investment Account. The bill would authorize the board and the regents, upon mutual agreement, to lease any properties of the regents to facilitate the financing authorized by these provisions.

(20) Existing law authorizes a joint powers authority to issue bonds in order to (1) purchase obligations of local agencies or make loans to local agencies to finance the local agencies' unfunded actuarial pension liability or to purchase or make loans to finance the purchase of delinquent assessments or taxes or (2) acquire any or all right, title,

or interest of a local agency in and to the enforcement and collection of delinquent and uncollected property taxes, assessments, and other receivables placed for collection on the property tax rolls.

This bill would make the authority described in (2) above inoperative through June 30, 2001.

(21) Existing law authorizes the Department of General Services to establish the California Multiple Awards Schedule program, which permits state agencies to purchase information technology services from vendors that hold federal contracts.

This bill would authorize the Director of General Services to enter a variety of types of contracts for information technology services, including using master agreements, multiple award schedules, cooperative agreements, and other types of agreements.

(22) This bill would provide that, notwithstanding any other provision of law, the cost-of-living adjustment for certain education-related items of the Budget Act of 2000 is 3.17% and would provide that these funds are in lieu of the amounts that otherwise would be appropriated.

(23) This bill would appropriate \$25,000,000 from the General Fund for transfer by the Controller to the Child Care Facilities Revolving Fund and would appropriate \$175,000,000 from the General Fund to the Secretary of Education for the Education Technology Grant Program. These funds would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article IV of the California Constitution for the 1999-2000 fiscal year.

(24) This bill would appropriate \$100,000,000 to the Chancellor of the California Community Colleges to provide one-time grants to districts for the 2000-01 fiscal year. These funds would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(25) This bill would appropriate \$250,000,000 to the Superintendent of Public Instruction for allocation to school districts, county offices of education, and charter schools on a competitive basis to carry out the English Language and Intensive Literacy Program. These funds would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(26) This bill would appropriate \$139,000,000, as a contingency expenditure, to be authorized by the Department of Finance for transfer to the Controller as necessary for the reimbursement of state-mandated cost claims submitted by school districts and county offices of education. These funds would be applied toward the minimum funding requirement for school districts and community

college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(27) This bill would appropriate \$425,000,000 from the General Fund for allocation by the Superintendent of Public Instruction for the purpose of providing funds to each regular public school in the state and for each school district, county office of education, and charter school. The allocation to regular public schools would be made on the basis of units of average daily attendance and used in accordance with proposals of schoolsite councils, schoolwide advisory groups, or school support groups, as approved by school district governing boards, as prescribed. The allocation to school districts, county offices of education, and charter schools would be required to be used for school safety, deferred maintenance, technology staff development, education technology connectivity, or facility improvements. These funds would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(28) The bill would appropriate \$350,000,000 from the General Fund, for transfer by the Controller to Section A of the State School Fund, for allocation on a one-time basis by the Superintendent of Public Instruction to school districts, county offices of education, and charter schools for the Academic Performance Index Schoolsite Employees Performance Bonus.

As a condition of receiving these funds, a schoolsite would be required to expend 50% of the funds to provide one-time bonuses, to its employees, to be divided equally among all schoolsite employees on a full-time equivalent basis. The other 50% would be used at the discretion of the schoolsite for any one-time purposes. These funds would be applied toward the minimum funding requirements for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(29) This bill would appropriate \$8,900,000 from the General Fund to the Superintendent of Public Instruction for purposes of allocating funds to county offices of education pursuant to provisions relating to the equalization of revenue limits. These funds would be applied toward the minimum funding requirements for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 2000-01 fiscal year.

(30) This bill would appropriate \$32,852,000 from the General Fund to the Superintendent of Public Instruction for allocations in various amounts on a one-time basis to various county offices of education and school districts for specified purposes.

(31) This bill would appropriate \$8,567,000 from the General Fund to the Chancellor of the California Community Colleges for allocations in various amounts on a one-time basis to various

community college districts and community colleges for specified purposes. The funds appropriated in (30) and this paragraph would be applied toward the minimum funding requirement for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution for the 1999-2000 fiscal year.

(32) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 313 of the Education Code is amended to read:

313. (a) Each school district that has one or more pupils who are English learners shall assess each pupil's English language development in order to determine the level of proficiency for the purposes of this chapter.

(b) The State Department of Education, with the approval of the State Board of Education, shall establish procedures for conducting the assessment required pursuant to subdivision (a) and for the reclassification of a pupil from English learner to proficient in English.

(c) Commencing with the 2000-01 school year, the assessment shall be conducted upon initial enrollment, and annually, thereafter, during a period of time determined by the Superintendent of Public Instruction and the State Board of Education. The annual assessments shall continue until the pupil is redesignated as English proficient. The assessment shall primarily utilize the English language development test identified or developed by the Superintendent of Public Instruction pursuant to Chapter 7 (commencing with Section 60810) of Part 33. Prior to completion of the English language development test, a school district shall use either an assessment instrument developed by the school district or an assessment recommended by the State Department of Education.

(d) The reclassification procedures developed by the State Department of Education shall utilize multiple criteria in determining whether to reclassify a pupil as proficient in English, including, but not limited to, all of the following:

(1) Assessment of language proficiency using an objective assessment instrument, including but not limited to, the English language development test pursuant to Section 60810.

(2) Teacher evaluation, including, but not limited to, a review of the pupil's curriculum mastery.

(3) Parental opinion and consultation.

(4) Comparison of the pupil's performance in basic skills against an empirically established range of performance in basic skills based

upon the performance of English proficient pupils of the same age, that demonstrates whether the pupil is sufficiently proficient in English to participate effectively in a curriculum designed for pupils of the same age whose native language is English.

(e) It is the intent of the Legislature that nothing in this section precludes a school district or county office of education from testing English language learners more than once in a school year if the school district or county office of education chooses to do so.

SEC. 2. Chapter 5 (commencing with Section 420) is added to Part 1 of the Education Code, to read:

CHAPTER 5. ENGLISH LANGUAGE AND INTENSIVE LITERACY PROGRAM

420. This chapter shall be known and may be cited as the English Language and Intensive Literacy Program.

421. The English Language and Intensive Literacy Program is hereby established and shall be administered by the Superintendent of Public Instruction. The Superintendent of Public Instruction shall develop, and the State Board of Education shall approve, guidelines for implementing this chapter, including, but not limited to, guidelines for reviewing and approving English Learner Literacy grants.

422. (a) A school district, county office of education, or charter school that maintains kindergarten or any of kindergarten or grades 1 to 12, inclusive, may apply for a grant of four hundred dollars (\$400) per pupil to operate a program that provides multiple, intensive English language and literacy opportunities for pupils in any one or combination of kindergarten and grades 1 to 12, inclusive, with an emphasis on mastery of English language and literacy skills that will allow pupils to significantly improve achievement in the classroom. Funding for the program established pursuant to this chapter shall be provided in Section 37 of the act adding this chapter.

(b) Pupils shall remain eligible for participation in the program established pursuant to this chapter for three calendar months after completing grade 12.

(c) The purposes of the program established pursuant to this chapter include, but are not limited to, both of the following:

(1) To provide pupils who are experiencing difficulty learning English and difficulty in reading with increased instructional opportunities.

(2) To provide stimulating and enriching opportunities for all pupils to increase their English and literacy skills.

(d) (1) Instruction provided pursuant to the program shall be consistent with the standards for a comprehensive English language development instruction program that is research-based, as described in subparagraphs (A) and (B) of paragraph (4) of

Education Code Section 313

(a) Each school district that has one or more pupils who are English learners shall assess each pupil's English language development in order to determine the level of proficiency for the purposes of this chapter.

(b) The State Department of Education, with the approval of the State Board of Education, shall establish procedures for conducting the assessment required pursuant to subdivision (a) and for the reclassification of a pupil from English learner to proficient in English.

(c) Commencing with the 2000-01 school year, the assessment shall be conducted upon initial enrollment, and annually, thereafter, during a period of time determined by the Superintendent of Public Instruction and the State Board of Education. The annual assessments shall continue until the pupil is redesignated as English proficient. The assessment shall primarily utilize the English language development test identified or developed by the Superintendent of Public Instruction pursuant to Chapter 7 (commencing with Section 60810) of Part 33. Prior to completion of the English language development test, a school district shall use either an assessment instrument developed by the school district or an assessment recommended by the State Department of Education.

(d) The reclassification procedures developed by the State Department of Education shall utilize multiple criteria in determining whether to reclassify a pupil as proficient in English, including, but not limited to, all of the following:

(1) Assessment of language proficiency using an objective assessment instrument, including but not limited to, the English language development test pursuant to Section 60810.

(2) Teacher evaluation, including, but not limited to, a review of the pupil's curriculum mastery.

(3) Parental opinion and consultation.

(4) Comparison of the pupil's performance in basic skills against an empirically established range of performance in basic skills based upon the performance of English proficient pupils of the same age, that demonstrates whether the pupil is sufficiently proficient in English to participate effectively in a curriculum designed for pupils of the same age whose native language is English.

(e) It is the intent of the Legislature that nothing in this section precludes a school district or county office of education from testing English language learners more than once in a school year if the school district or county office of education chooses to do so.

Education Code Section 60810

(a) (1) The Superintendent of Public Instruction shall review existing tests that assess the English language development of pupils whose primary language is a language other than English. The tests shall include, but not be limited to, an assessment of achievement of these pupils in English reading, speaking, and written skills. The superintendent shall determine which tests, if any, meet the requirements of subdivisions (b) and (c). If any existing test or series of

tests meets these criteria, the superintendent, with approval of the State Board of Education, shall report to the Legislature on its findings and recommendations.

(2) If no suitable test exists, the superintendent shall explore the option of a collaborative effort with other states to develop a test or series of tests and share test development costs. If no suitable test exists, the superintendent, with approval of the State Board of Education, may contract with a local education agency to develop a test or series of tests that meets the criteria of subdivisions (b) and (c) or may contract to modify an existing test or series of tests so that it will meet the requirements of subdivisions (b) and (c).

(3) Not later than August 15, 1999, the Superintendent of Public Instruction and the State Board of Education shall release a request for proposals for the development of the test or series of tests required by this subdivision. Not later than September 15, 1999, the State Board of Education shall select a contractor or contractors for the development of the test or series of tests required by this subdivision, to be available for administration during the 2000-01 school year.

(b) The test or series of tests developed or acquired pursuant to subdivision (a) shall have sufficient range to assess pupils in kindergarten and grades 1 to 12, inclusive, in English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English.

(c) The test or series of tests shall meet all of the following requirements:

(1) Provide sufficient information about pupils at each grade level to determine levels of proficiency ranging from no English proficiency to fluent English proficiency with at least two intermediate levels.

(2) Have psychometric properties of reliability and validity deemed adequate by technical experts.

(3) Be capable of administration to pupils with any primary language other than English.

(4) Be capable of administration by classroom teachers.

(5) Yield scores that allow comparison of a pupil's growth over time, can be tied to readiness for various instructional options, and can be aggregated for use in the evaluation of program effectiveness.

(6) Not discriminate on the basis of race, ethnicity, or gender.

(7) Be aligned with the standards for English language development adopted by the State Board of Education pursuant to Section 60811.

(d) The test shall be used for the following purposes:

(1) To identify pupils who are limited English proficient.

(2) To determine the level of English language proficiency of pupils who are limited English proficient.

EDUCATION CODE SECTION 52164.1

Education Code Section 52164.1

The superintendent, with the approval of the State Board of Education, shall prescribe census-taking methods, applicable to all school districts in the state, which shall include, but need not be limited to, the following:

(a) A determination of the primary language of each pupil enrolled in the school district. The primary language of new pupils shall be determined as they enroll. Once determined, the primary language need not be redetermined unless the parent or guardian claims there is an error. Home language determinations are required only once, unless the results are disputed by a parent or guardian.

(b) An assessment of the language skills of all pupils whose primary language is other than English. All the skills listed in subdivision (m) of Section 52163 shall be assessed, except that reading and writing skills need not be assessed for pupils in kindergarten and grades 1 and 2. For those pupils who, on the basis of oral language proficiency alone, are clearly limited English proficient, assessment of reading and writing skills shall be necessary only to the extent required by subdivision (c). This assessment, which shall be made as pupils enroll in the district, shall determine whether such pupils are fluent in English or are of limited English proficiency.

(c) For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available. Parallel forms of the instruments used to determine English proficiency shall be used, if available. The results of the parallel assessment shall determine the extent and sequence in which English and the primary language will be used in the instruction of basic skills.

A diagnostic assessment in the language designated for basic skills instruction measuring speaking, comprehension, reading, and writing, shall be administered for instructional use at the district level. Such diagnostic assessment shall be updated as necessary to provide a curriculum meeting the individual needs of each pupil of limited English proficiency.

If the assessment conducted pursuant to this subdivision indicates that the pupil has no proficiency in the primary language, further assessment of the pupil's primary language skills including consultation with the pupil's parents or guardians, the classroom teacher, the pupil, or others who are familiar with the pupil's language ability in various environments shall be conducted. If this detailed assessment indicates that the pupil has no proficiency in his or her primary language, then the pupil is not entitled to the protection of this article.

The diagnostic assessment process shall be completed within 90 days after the date of the pupil's initial enrollment and shall be performed in accordance with rules and regulations adopted by the board.

The parent or guardian of the pupil shall be notified of the results of the assessment. The Department of Education shall conduct an equivalency study of all language proficiency tests designated for the identification of pupils of limited English proficiency to insure uniformity of language classifications and to insure the reliability and validity of such tests. Tests, materials, and procedures to determine proficiency shall be selected to meet psychometric standards and administered so as not to be racially, culturally, or sexually discriminatory.

The Department of Education shall annually evaluate the adequacy of and designate the instruments to be used by school districts, and such instruments shall be available by March 15 of each year.


The assessments shall be conducted by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency, as defined in subdivision (m) of Section 52163.

A school district may require that the assessment be conducted by persons who hold a valid, regular California teaching credential and who meet the other qualifications specified in this paragraph. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

Any district may elect to follow federal census requirements provided that the language skills described in subdivision (m) of Section 52163 are assessed, and provided that such procedures are consistent with Section 52164, the district shall be exempt from the state census procedures described in subdivisions (a) and (b).

TITLE 5, CALIFORNIA CODE OF REGULATIONS,
SECTION 4303

TITLE 5. Education**Division 1. State Department of Education****Chapter 5. Consolidated Categorical Aid Programs****Subchapter 5. Bilingual Education****Article 3. Program Requirements****§4304. Census.****§ 4304 . Census.**

 • Note • History

- (a) All pupils whose primary language is other than English who have not been previously assessed or are new enrollees to the district shall have their English language skills assessed within 30 school days from the date of initial enrollment.
- (b) The census of English learners required for each school district shall be taken in a form and manner prescribed by the Superintendent in accord with uniform census-taking methods.
- (c) The results of the census shall be reported by grade level on a school-by-school basis to the Department of Education not later than April 30 of each year.


NOTE

Authority cited: former Section 52162 and Sections 33031 and 62000.2, Education Code.
Reference: former Sections 52164-52164.6, Education Code.

HISTORY

1. Amendment filed 9-17-82; effective thirtieth day thereafter (Register 82, No. 38).
2. Amendment of subsections (a) and (b) and amendment of Note filed 6-23-99; operative 7-23-99 (Register 99, No. 26).

§4305. Identification and Assessment.

 • Note • History

*CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT
TEST (CELDT) TRAINING COORDINATOR'S
MANUAL*



**California
English Language
Development Test**

May 2001

Dear District and Site Test Coordinators:

The time for the first administration of the California English Language Development Test (CELDT) has arrived. Beginning May 14, 2001, the CELDT will be used as an Annual Assessment of English proficiency and for Initial Identification of entering students whose Home Language Survey indicates a language other than English.

The enclosed Test Coordinator's Packet contains materials that you will need for packaging and returning your test books for scoring. The enclosed Test Coordinator's Manual will lead you through this process and should answer any questions that you may have. Please take time to read the Test Coordinator's Manual carefully.

Materials enclosed are:

- Test Coordinator's Manual
- Group Information Sheets (Use one per grade per school or testing center.)
- Annual Assessment return labels
- Initial Identification return labels
- School/Group List (Use one per school or testing center.)

Inventory and report back within 48 hours

Please inventory these materials carefully and contact CTB by telephone or fax within 48 hours of receipt if there are discrepancies in the materials you have received.

Please contact the CELDT Help Desk for questions about the materials.

CELDT Help Desk: (800) 994-8594 fax (800) 282-0266

Test materials shipped to district

Your district office will be receiving all test materials for the district. The materials have been packaged in two ways: by district for Initial Identification and by school for Annual Assessment.

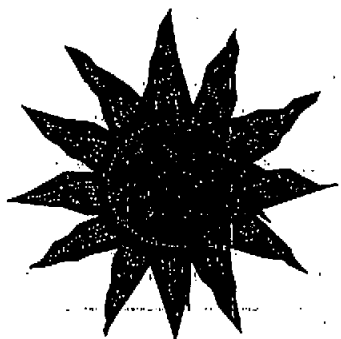
Districts will use only Form A for Initial Assessment. The Initial Identification materials will be kept by the district through Spring of 2002. Completed tests should be sent once each month to CTB for official scoring. Use the Test Coordinator's Manual for all packaging details.

The test window for the Annual Assessment of all English Learners begins May 14 and ends October 31, 2001. Districts that enrolled for the Annual Assessment after August 15, 2001, will receive a separate shipment closer to the testing date. When all tests for the district are complete, no later than November 6, 2001, call CTB for pickup of the Annual Assessment tests. Have all tests from all schools bundled in one shipment from the district to ship to CTB for scoring. Use the Test Coordinator's Manual for all packaging details.

For policies and regulations, please contact the California Department of Education at 916-657-3011.

Thank you for your attention to detail in implementing this new assessment for California's English Learners.

The CELDT Team
CTB/McGraw-Hill



California
English Language
Development Test

California
English Language
Development Test


Test
Coordinator's
Manual

40897

CELDT Important Dates

.....

Annual Testing

May 4, 2001	Test materials delivered to districts for Annual Assessment occurring prior to August 15, 2001, and for all Initial Identification of entering students.
August 6, 2001	Test materials delivered to districts for Annual Assessment occurring after August 15, 2001.
May 9, 2001	Districts to report material shortages to CTB.
May 14 – October 31, 2001	Annual Assessment administration, including scoring of Story Retelling.
June 4 – November 6, 2001	District Test Coordinators contact CTB CELDT Help Desk to arrange for return of materials.
 November 9, 2001	Last day for pick up of test materials.

Important Telephone Numbers

.....



See page 1 (Partners in Your Test Program)

Published by CTB/McGraw-Hill of McGraw-Hill Education, a division of The McGraw-Hill Companies, Inc., 20 Ryan Ranch Road, Monterey, California 93940-5703. Copyright (c) 2001 by California State Department of Education. Some material copyright (c) 2001 by CTB/McGraw-Hill. All rights reserved. No part of this publication may be reproduced or distributed in any form or by any means, downloaded, or stored in a database or retrieval system, without the prior written permission of the publisher.

Contents

.....

	Partners in Your Test Program	1
STEP 1	Preparation for Testing	2
STEP 2	Review Your Test Materials	4
STEP 3	Organize and Distribute Test Materials	6
STEP 4	Check Answer Documents	7
	Physical Condition	8
	Student-Identification Information	9
STEP 5	Complete and Check Group Information Sheets	13
STEP 6	Complete the School/Group List	15
STEP 7	Prepare Completed Test Materials for Shipping	17
STEP 8	Package and Ship Test Documents	18
	Appendix: Customer Checklist	22

Partners in Your Test Program

A Message from the 2001 California English Language Development Test (CELDT) Program Team

We know that your time is valuable and we appreciate having you as a customer. Therefore, this Test Coordinator's Manual (TCM) has been designed to help you quickly and efficiently organize and assemble the CTB test materials that will be sent to CTB for scoring. We have described in sequential order the steps in the checking and assembly process that you should follow and the information that should be included to ensure that the CELDT program is successful for all involved.

If you feel this guide is not clear, or if there is additional information you need, please call us and we will help in any way we can.

Important Telephone Numbers For Shortages and Reports



Before calling the CTB CELDT Help Desk, see "Appendix: Customer Checklist" located in the back of this manual. The checklist will help you prepare information before calling and will help us answer your questions quickly and accurately.

To contact the CTB CELDT Help Desk:

By telephone: (800) 994-8594

By FAX: (800) 282-0266

Representatives are available to customers from 9:00 a.m. to 5:00 p.m. The CTB CELDT FAX is available 24 hours a day.

For questions about policy, please refer to the State Department of Education at (916) 657-3011.

STEP
1

Preparation for Testing

- For Annual Assessment, announce the test dates in advance.
- Prepare students by explaining the purpose of the test.
- Review the Examiner's Manual for all tests and levels, and become thoroughly familiar with their contents. Conduct a workshop with test administrators on all aspects of test administration and scoring.
- Plan the testing schedule. All parts of the test are untimed. All students must attempt all parts of the test except K-1 students who do not take the Reading and Writing tests. The test may be given in several sittings.
- Gather your materials:

Examiner's Manual

The Examiner's Manual is needed for all test administration and scoring.

Test Book

There is one test book per student. The examiner enters the student's Listening and Speaking responses in the test book during the individually administered test. The student uses the same test book during the group-administered Reading and Writing tests.

Audio Cassette with Test Items

One audio tape is supplied with each Examiner's Manual. The tape is used to administer the Listening and Speaking test.

Blank Audio Cassette

A blank audio cassette is provided with each Examiner's Manual and is to be used to tape-record students' responses to the Story Retelling during the Listening and Speaking test. This recording is for the examiner's use to get accurate transcriptions of the students' language samples. The tape is to be retained at the school site. Do not return the blank tape with testing materials.

Listening and Speaking

Provided for the Examiner

- Examiner's Manual
- Test book for each student
- Audio cassette with items
- Blank audio cassette

Additional Materials Needed by the Examiner

- Tape player/recorder
- Pencil (prop for Following Oral Directions)
- Sheet of blank paper (prop for Following Oral Directions)
- No. 2 pencil for marking responses
- Do Not Disturb sign

Reading and Writing

Provided for the Examiner

- Examiner's Manual

Provided for Each Student

- Test book

Additional Materials Needed for Each Student

- No. 2 pencil with eraser
- Extra erasers

STEP
2

Review Your Test Materials

.....

At the district

The District Test Coordinator responsible for CELDT administration should follow these steps to review the test materials:

Annual Assessment

The district will receive Annual Assessment materials packaged by school including a ten percent overage. In addition, the district will receive a five percent overage of Annual Assessment materials to fulfill school shortages.

1. Count all school boxes immediately upon receipt from CTB. Verify that each school has received the correct number of boxes according to the numbers shown on the outside of the boxes, i.e., 1 of 10, 2 of 10.

Note: It is not necessary to inventory contents of school boxes. This is to be completed by the schools.

2. Report missing school boxes to the CELDT Help Desk immediately.
3. Send boxes to schools.
4. Report materials shortages to CTB immediately after notification by school site(s).
5. Review this Test Coordinator's Manual and the Examiner's Manual. Please be sure to familiarize yourself with all testing procedures.

Remember, CELDT materials should be kept secure when not in use.

Initial Identification

The district will receive Initial Identification test materials packaged by district.

1. Count all boxes immediately upon receipt from CTB. Verify that the district has received the correct number of boxes according to the numbers shown on the outside of the boxes, i.e., 1 of 10, 2 of 10.
2. Report missing boxes to the CELDT Help Desk immediately.
3. Locate the packing list enclosed in an envelope within "Box 1."
4. Inventory all test materials against the packing list immediately after receipt and report shortages to CTB within two working days.

5. Review this Test Coordinator's Manual and the Examiner's Manual. Please be sure to familiarize yourself with all testing procedures.
6. **Important:** Save the boxes in which the materials were delivered and use them to return test books to CTB for scoring. If additional boxes become necessary, obtain similar quality, sturdy, dry cardboard boxes.

Remember, CELDT materials should be kept secure when not in use.

At the schools

The School Test Coordinator should follow these steps to prepare for Annual Assessment:

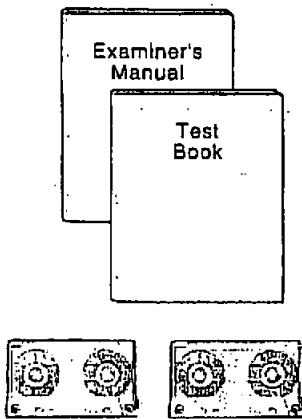
1. Locate the school packing list enclosed in an envelope within "Box 1."
2. Inventory all test materials against the school packing list immediately after receipt from the district and report **shortages** to the District Test Coordinator within **two working days** of the receipt of the shipment at the testing site.
3. **Important:** Schools must save the boxes in which materials were delivered and use them to return the materials to the district after testing. These boxes are of the necessary shipping strength for returning answer documents to CTB for scoring.
4. Review this Test Coordinator's Manual and the Examiner's Manuals.
5. Distribute photocopies of Steps 1, 2, 3, and 4 in this Test Coordinator's Manual to the persons who will administer the test.

STEP
3

Organize and Distribute Test Materials

Before testing, distribute the teacher packages containing all test materials to the teachers who will be administering the test. The School Test Coordinator will retain the precoded Group Information Sheets, the School/Group List, and the Test Booklet Envelopes.

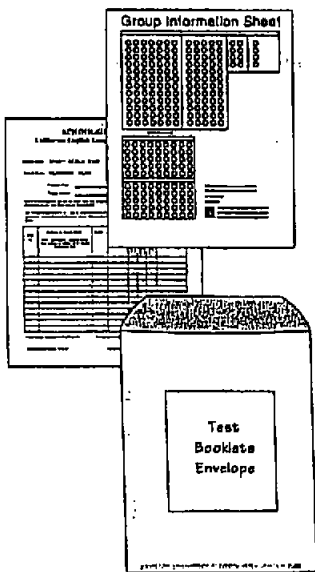
Materials to be given to the teacher or examiner



Test Materials (including: *Test Books, Examiner's Manuals, cassette with recorded items, and blank audio cassette*)

Ensure that each teacher verifies receipt of the appropriate test materials, and that the audio cassette and Examiner's Manual match the test book level to be administered by the teacher or examiner.

Materials to be retained by the School Test Coordinator



Group Information Sheets (GIS)—scannable documents that are submitted with each set of test books to be scored and reported as a single group

Be sure there is one precoded Group Information Sheet per grade being tested and one School/Group List per school.

School/Group List (SGL)—document to check the information used to group the answer documents (one per school)

Do not photocopy these documents or use correction fluid to change information.

Test Booklet Envelopes—used with the GIS and the SGL to group test books for scoring

Note: If you need additional Group Information Sheets and/or envelopes, or you think that the GIS received is incorrect, please call the CELDT Help Desk immediately.

For information on administering the tests, please refer to the appropriate Examiner's Manual.

STEP
4

Check Answer Documents

The teacher or
examiner

After testing, the teacher or examiner collects the test books and checks the physical condition, including dark, clear markings. Then the test books are checked for accurate student-identification information.

Each student's test book must be checked to ensure that

- the **Story Retelling** score is filled in on the Listening and Speaking test.
- all student-identifying information is complete and correct for each test book. Every field is necessary for accurate reporting.
- all circles that students intended to mark are filled in completely.
- all stray pencil marks are erased.
- all erasures are complete.

The School Test
Coordinator

For Annual Assessment, examiners will need to bundle and return all test materials to the School Test Coordinator. Accurate scoring will be dependent on correct packaging of the test books. The School Test Coordinator will use the following materials to package and return the test books to the District Test Coordinator:

- Completed student test books
- White envelopes for test booklets
- Group Information Sheet(s) (GIS)
- School/Group List (SGL)

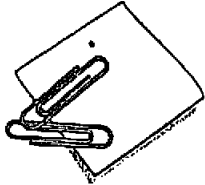
All other materials, including Examiner's Manuals and audio cassettes, must be retained at the school site in a secure location.

Physical Condition

There are some conditions that interfere with the electronic scoring process. Please check documents that are to be machine-scored for the following:

If you find this...

do this:



scratch paper
tape of any kind
Post-it™ Notes
staples
pins
paper clips

Remove them.

A B C ~~D~~

F G H J

A B C D

light marks
incomplete erasures
stray marks

Erase marks or make them heavier as needed.



bent corners
folds in documents
creases in documents
paper damaged by erasures
ripped or torn sheets

Copy the filled-in circles onto a clean, unused document.
Use a No. 2 pencil only.
Use a soft eraser.
Mark responses with solid, dark, filled-in circles.

Note: Please carefully count answer documents to ensure that a test book has been collected from each student who was tested.

Student-Identification Information

If precoded student barcodes will be used by your district, your precode student barcode order will include information and instructions.


Check the student-identification information on all test books. This information should be filled in by hand during the test administration. Review the data for accuracy and check all handwritten entries for legibility. All marks should be solid and dark. **Incorrect or incomplete information will result in inaccurate student data and will have a negative impact on the final reports.**

Below is a sample of the student data grid from the test books. Use it and the explanations on the following pages to check the test books.

Student Data Grid CELDT Test Book (Front Cover)

ONLY FORM A IS TO BE ADMINISTERED TO ENTERING STUDENTS

Place Student ID Label Here



California
English Language
Development Test

2

TEACHER

SCHOOL

DISTRICT

3

DATE OF BIRTH

March	Day	Year	
19			

Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec
 (Precoded bubbles for each month)

4

GENDER

FEMALE MALE

5

GRADE

(Precoded bubbles for grades K-2)

Form A
Level 1
 (Grades K-2)

40889

STUDENT'S NAME	MI		FOR LOCAL USE	
First				
Last				

STUDENT ID NUMBER	
6	

8 PURPOSE OF TEST
(Grid one)

Initial Identification
(Students testing the first time for identification purposes)

Annual Assessment
(All previously identified EL students)

9 DATE TESTING COMPLETED

Month	Day	Year
<input type="radio"/> Jan	0	0 1
<input type="radio"/> Feb	1	1 2
<input type="radio"/> Mar	2	2 3
<input type="radio"/> Apr	3	3 4
<input type="radio"/> May	4	4 5
<input type="radio"/> Jun	5	5
<input type="radio"/> Jul	6	
<input type="radio"/> Aug	7	
<input type="radio"/> Sep	8	
<input type="radio"/> Oct	8	
<input type="radio"/> Nov		
<input type="radio"/> Dec		

10 CA SCHOOL ENROLLMENT
(Grid one)

This student has been enrolled in any CA school district for

Less than one school year

One full school year

Two school years

Three school years

Four school years

Five school years or more

11 PRIMARY RACE/ETHNICITY

A (Grid the one group with which this student most closely identifies)

American Indian or Alaskan Native

Asian/Asian American →

Black/African American

Filipino/Filipino American

Hispanic/Latino

Pacific Islander →

White (not of Hispanic origin)

B (Grid all other groups with which this student identifies)

American Indian or Alaskan Native

Asian/Asian American →

Black/African American

Filipino/Filipino American

Hispanic/Latino

Pacific Islander →

White (not of Hispanic origin)

C If Asian or Pacific Islander is marked on the left, then grid all that apply.

Chinese

Japanese

Korean

Vietnamese

Asian Indian

Hawaiian

Guamanian

Samoan

Tahitian

Laotian

Cambodian

Other Asian or Pacific Islander

12 MOBILITY
(Grid the entry grade from which this student has been continuously enrolled in this school and district)

SCHOOL
K 1 2 3 4 5 6 7 8 9 10 11 12

DISTRICT
K 1 2 3 4 5 6 7 8 9 10 11 12

13 SPECIAL EDUCATION/ 504 STATUS
(Grid all that apply)

This student has an IEP.

This student has a Section 504 Plan.

14 NONSTANDARD TEST ADMINISTRATION
(Grid, if applicable)

This test was administered under conditions that differ significantly from the test administration guidelines, as required by the student's IEP.

15 PROGRAM PARTICIPATION
(Grid all of the specially funded programs in which this student participates this school year)

No Program Participation

Class Size Reduction Program - Option 1 (full day)

Class Size Reduction Program - Option 2 (half day)

ESEA Title I - Schoolwide

ESEA Title I - Targeted

ESEA Title VII

Migrant Education

Indian Education

Gifted and Talented

State Compensatory Education

EL in ELD

EL in Bilingual

EL in SDAIE

16 PRIMARY LANGUAGE
(Grid one)

Spanish

Vietnamese

Hmong

Cantonese

Pilipino

Khmer

Korean

Armenian

Mandarin

Russian

Other

17 PREVIOUS YEAR CELDT LEVEL
(To be completed beginning with the 2002 administration)

This student's CELDT performance level last year was:

Beginner

Early Intermediate

Intermediate

Early Advanced

Advanced

Unknown

Student Data Grid CELDT Test Book (Inside Front Cover)

Fill out all information on the front cover and inside front cover of the test book.

REQUIRED FROM ALL DISTRICTS/SCHOOLS

Please verify the accuracy of the biographic and demographic fields.

When you check this...

look for this:

<p>1 STUDENT'S NAME</p>	<p>Starting at the left, letters must be printed, one per box, above the lettered circles. Under each box, the circle with the same letter must be filled in.</p>
<p>2 TEACHER</p>	<p>Print the name of the teacher in the space labeled teacher. Print the name of the school in the space labeled school. Print the name of the district in the space labeled district.</p>
<p>3 DATE OF BIRTH</p>	<p>The student's date of birth must be printed in the boxes and the corresponding circles filled in. (If the "day" is not a two-digit number, the number must be preceded by a zero.)</p>
<p>4 GENDER</p>	<p>The circle indicating the student's gender must be filled in.</p>
<p>5 GRADE</p>	<p>The circle corresponding to the student's grade must be filled in.</p>
<p>6 STUDENT ID NUMBER</p>	<p>If Student ID Numbers are being used, the first digit of the student's number should correspond with a filled-in circle in the first column; the second in the second column, etc.</p>
<p>7 FOR LOCAL USE</p>	
<p>8 PURPOSE OF TEST</p>	<p>Fill in the appropriate circle for purpose of test.</p>
<p>9 DATE TESTING COMPLETED</p>	<p>Fill in the appropriate circles for the date testing completed.</p>
<p>10 CA SCHOOL ENROLLMENT</p>	<p>Fill in the appropriate circle for the length of time this student has been enrolled in any California school district.</p>

REQUIRED FROM ALL DISTRICTS/SCHOOLS

Please verify the accuracy of the biographic and demographic fields.

When you check this...

look for this:

<p>11 PRIMARY RACE/ ETHNICITY</p>	<p>In box A, fill in the appropriate circle for the race/ethnicity with which the student most closely identifies in the first primary race/ethnicity box. Mark only one circle.</p> <p>In box B, fill in the appropriate circle(s) for all other groups with which the student identifies.</p> <p>If Asian/Asian American or Pacific Islander was marked in box B, fill in the circle(s) in box C for all other groups with which the student identifies.</p>
<p>12 MOBILITY</p>	<p>Fill in the appropriate circle in the mobility section for the entry grade from which this student has been continuously enrolled in this school and the entry grade from which this student has been continuously enrolled in this district.</p>
<p>13 SPECIAL EDUCATION/ 504 STATUS</p>	<p>Fill in the appropriate circle(s) for special education/504 status. Mark all that apply.</p>
<p>14 NONSTANDARD TEST ADMINISTRATION</p>	<p>Fill in this circle if the test was administered under significantly different conditions as required by IEP.</p>
<p>15 PROGRAM PARTICIPATION</p>	<p>Fill in the appropriate circle(s) for the specially funded programs in which the student has participated in the section titled program participation. Mark all that apply.</p>
<p>16 PRIMARY LANGUAGE</p>	<p>Fill in the appropriate circle for primary language. One circle must be marked.</p>
<p>17 PREVIOUS YEAR CELDT LEVEL</p>	<p>This shaded area will be used beginning with the 2002 administration.</p>

When you check this...

look for this:

1 TEACHER NAME

The teacher name has been precoded with the grade.

Important: School Test Coordinators must use the GIS coded with the corresponding grade of students tested.

2 SCHOOL NAME

The school name has been precoded.

3 NUMBER STUDENTS TESTING

The number of students whose answer documents are grouped with this GIS must be printed in the boxes and the corresponding circles filled in.

4 GRADE

The grade designation has been precoded for you.

5 ORGANIZATION NAME
ELEMENT/DIST. NAME
SO #
STATE

Organization Name, Element/District Name, SO #, and State have been precoded.

After a GIS has been checked for accuracy, place it on top of all test books being returned for that grade. Then put the GIS and test books in the appropriate envelope.

When you check this...	look for this:
1 DISTRICT NAME	The district name is preprinted.
2 SCHOOL NAME	The school name is preprinted. Make sure the school name is written as it appears on each Group Information Sheet.
3 CO/DISTRICT NUMBER SCHOOL CODE	The County/District and School Code is preprinted.
4 CONTACT NAME and PHONE NUMBER	Please provide a contact person, either the principal's name or another name, and also the contact person's phone number.
5 TEACHER 6 GRADE 7 NUMBER TESTED	List each group by the grade shown on its Group Information Sheet. Remember, the teacher name on the GIS has been precoded as the grade of students being tested. For each grade, write the number of students tested which must match the number of students tested as indicated on the corresponding Group Information Sheet.

STEP
7

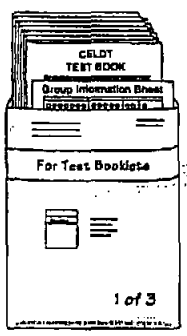
Prepare Completed Test Materials for Shipping

Below are the steps that must be taken to prepare completed test books for shipment to the CTB Scoring Center. To ensure that your test reports give you the full range of information they are designed to provide, proper completion of these steps is essential. Failure to follow these directions may cause a delay in processing your test materials.

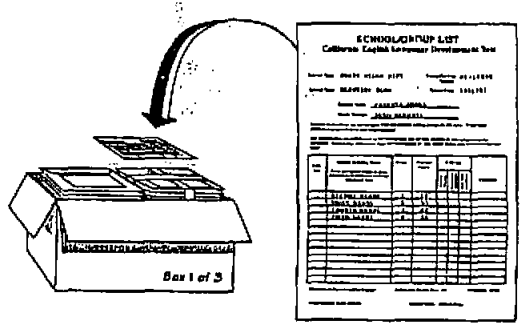
Important Note: The unused test materials should be retained at the school site for possible administration to entering students for Initial Identification (Form A materials only). Completed Initial Identification test materials should be returned monthly.

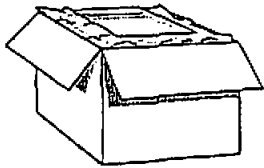
Follow these guidelines . . .

AT THE SCHOOLS



- 1 Complete the required information on the front of each envelope. Each grade should be in a separate envelope. Place test books for each group in envelopes marked "For Test Booklets." Place the Group Information Sheet on top of the test books. If you have a large group and all the test books for that group do not fit in an envelope, use a second envelope for that group. Mark each envelope with a unique number, e.g., "1 of 2" and "2 of 2."
- 2 Place packaged test books in the boxes. Keep groups of documents for the same grade together as you pack. Use as many boxes as necessary. Remove any previous markings and labels from the boxes.
- 3 Indicate the number of boxes used (e.g., "1 of 3," "2 of 3," "3 of 3") on each box containing materials for return to the district.
- 4 The completed School/Group List should be placed on top of the documents in Box 1 of your return shipment.





3 Add enough packing material to hold the documents securely in place during transit. Then seal each box tightly with sealing tape.

4 Affix the appropriate shipping label (Annual Assessment or Initial Identification) to each box. Shipping labels were included in your Test Coordinator's Packet.

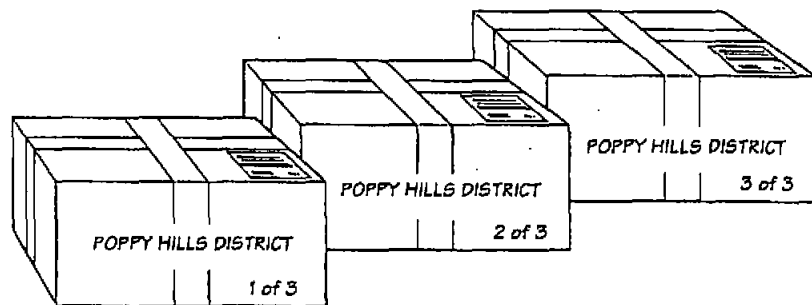
CELDT 2001 ADMINISTRATION 49904		
ANNUAL ASSESSMENT TEST BOOKS ONLY		
DISTRICT NAME	EDUCATIONAL DISTRICT #	
SCHOOL ADDRESS		
CITY	STATE	ZIP CODE
TOTAL SHIPMENT FROM THIS DISTRICT: BOX OF _____		
School Name _____ District _____		
Total Shipments from This School: _____ of _____		
ANNUAL ASSESSMENT TEST BOOKS ONLY		
TO: CTB McGraw-Hill 10234 SPAATZ WAY MATHER CA 95655		

Annual Assessment Label

CELDT 2001-02 ADMINISTRATION 41194		
INITIAL IDENTIFICATION TEST BOOKS ONLY		
DISTRICT NAME	EDUCATIONAL DISTRICT #	
SCHOOL ADDRESS		
CITY	STATE	ZIP CODE
TOTAL SHIPMENT FROM THIS DISTRICT: BOX OF _____		
School Name _____ District _____		
Total Shipments from This School: _____ of _____		
INITIAL IDENTIFICATION TEST BOOKS ONLY		
TO: CTB McGraw-Hill 10234 SPAATZ WAY MATHER CA 95655		

Initial Identification Label

5 On the shipping label, write the number of boxes used (e.g., "1 of 3," "2 of 3," "3 of 3," etc.) for each school. If this is not done, we will be unable to determine if your shipment is complete. If you are reusing boxes that were sent to you from your schools, put an "X" over any school information prior to shipping them to CTB for scoring. Remember, the School/Group Lists for all schools must be placed in Box 1.



Shipping Test Materials

For **Annual Assessment**, please follow the instructions on the Transportation Request Form on the following page.

For **Initial Identification**, please refer to the instructions included in the Test Coordinator's Kit.

Transportation Request Form

For Pickup of Annual Assessment Test Materials

Note: The following procedure must be used when shipping materials back to CTB.

After all test books have been packed into boxes and clearly labeled, you have two options for requesting pickup:

- 1 Call the CTB CELDT Help Desk at (800) 994-8594 and provide all the information requested below, or
- 2 Fill out the information in the "For District Use" box and fax to (800) 282-4279 no later than November 6, 2001. The Transportation Team will call you back with a CTB tracking number and a pickup date.

<i>For District Use</i>	
CDS Number: _____	
District Name: _____	
Contact Person: _____	
(Please provide area code)	Telephone Number: () _____
	Fax Number: () _____
Pickup address/information:	
Street: _____	<i>(print clearly)</i>
City: _____	
State: <u>CA</u> ZIP Code: _____	Business Hours for Pickup: _____
Total Number of Boxes: _____	

<i>For CTB Use</i>	
Receive date: _____	Courier: _____
CTB Number: _____	Pickup Date: _____

Appendix: Customer Checklist

.....

Before calling the CELDT Help Desk (800-994-8594):

Having information prepared before calling the CTB/McGraw-Hill CELDT Help Desk will help us answer your questions quickly and accurately. When you call, please have the following information available:

- The contact person's name _____
- The contact person's phone number _____
- Your FAX number _____
- The name of your school _____
- Your school CDS number _____
- The category of help you need: _____
 - Materials shortages
 - Shipping information
 - Testing schedules
 - Returning answer documents to CTB
 - Explanation of scores and score reports
 - The status of reports

Test Materials

If you have questions regarding test materials, please provide the following additional information:


- Annual Assessment _____
- Initial Identification _____
- Materials title (include Level 1, Level 2, etc.) _____
- Materials code number _____
- Quantity needed _____

CTB/McGraw-Hill

A Division of The McGraw-Hill Companies



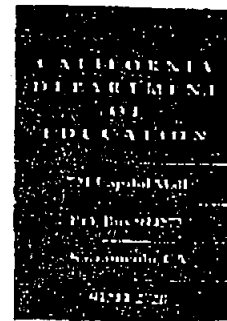
20 Ryan Ranch Road
Monterey, California 93940-5703



MARCH 25, 1997 CALIFORNIA DEPARTMENT OF
EDUCATION LETTER



DELAINE EASTIN
State Superintendent of Public Instruction



March 25, 1997

TO : County and District Superintendents of Schools
Attention: Directors of Bilingual Education

FROM : ^{WSP} William L. Padja, Assistant Superintendent
Research, Evaluation and Technology Division

SUBJECT : DESIGNATION OF INSTRUMENTS FOR USE IN THE CENSUS
OF LIMITED-ENGLISH-SPEAKING PUPILS, 1997-98

Sections 52164 and 52164.1 of the Education Code directs each school district to determine the number of limited-English proficient (LEP) pupils within the district and to classify these students according to their primary language, age, and grade level. The count is known as the "census of Limited-English-Speaking pupils." Pursuant to these sections, the Department is required to designate language assessment instruments and procedures for assessing the English language skills of LEP students.

The purpose of this memorandum is to designate those instruments approved by the State Superintendent of Public Instruction for use in the census. Complete procedures to be used in the identification and redesignation of LEP pupils are contained in the 1996-97 *Coordinated Compliance Review (CCR) Training Guide*.

Only the following oral English proficiency tests are to be used for purposes of the 1997-98 language census. Should you have need for additional testing information, please contact Daniel Zuckerman at (916) 657-4291. For legal waivers concerning alternative testing procedures, contact Gloria Cardenas at (916) 657-3713.

- Basic Inventory of Natural Language (BINL). Use for grades K-12.

Publisher: CHECpoint Systems Inc.
1520 N. Waterman Ave.
San Bernardino, CA 92404
(800) 635-1235

- Bilingual Syntax Measure I (BSM I): Grades K-2 only.
- Bilingual Syntax Measure II (BSM II): Grades 3-12 only.

Publisher: The Psychological Corporation
16935 West Bernardo Dr.; Suite 105
San Diego, CA 92127
(619) 485-7495

(Continued)

- Pre-IPT IDEA Oral Language Proficiency Test: Ages 3-5 only.
- IDEA Oral Language Proficiency Test I (IPT I) - Forms A and B: Grades K-6 only.
- IDEA Oral Language Proficiency Test I (IPT I) - Forms C and D: Grades K-6 only.
- IDEA Oral Language Proficiency Test II (IPT II) - Forms A and B: Grades 7-12 only.

Publisher: Ballard and Tighe, Inc.
480 Atlas Street
Brea, CA 92821
(714) 990-4332

- Preschool English Version of the Language Assessment Scale (Pre-LAS): Ages 4-6.
- Language Assessment Scales I Oral (LAS I) - Forms A and B: Grades 1-5 only.
- Language Assessment Scales I Oral (LAS I) - Forms C and D: Grades 1-6 only.
- Language Assessment Scales II Oral (LAS II) - Forms A and B: Grades 6-12 only.
- Language Assessment Scales II Oral (LAS II) - Forms C and D: Grades 6-12 only.
- Language Assessment Scales I Oral (LAS I) - Short Form: Grades 1-5 only.
- Language Assessment Scales II Oral (LAS II) - Short Form: Grades 6-12 only.

Publisher: CTB/McGraw-Hill
20 Ryan Ranch Road
Monterey, CA 93940
(800) 538-9547

- Quick Start in English (QSE): Grades K-6 only.

Publisher: Quick Start in English
75 North El Monte Avenue
Los Altos, CA 94022
(415) 948-6183

- Woodcock-Munoz Language Survey: Preschool through Grade 12.

Publisher: The Riverside Publishing Company
425 Spring Lake Drive
Itasca, IL 60143-2079
(800) 323-9540

1996-97 COORDINATED COMPLIANCE REVIEW
TRAINING GUIDE (RELEVANT PORTIONS)

Coordinated Compliance Review Training Guide

1996-97

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
<p>I-CON2 (TITLE I Neglected or Delinquent Program) A program evaluation is conducted at least once every three years to determine the program's impact on the ability of the participants to (1) maintain and improve educational achievement; (2) accrue credits toward promotion; (3) make the transition to a regular education program; and (4) complete secondary school requirements and obtain employment after leaving the institution. <i>(new)</i></p> <p>(20 USC 6471; PL 103-382 Section 1431 (a)(1-4))</p>	<p>Site</p> <ul style="list-style-type: none"> - Review evaluation plan to determine effectiveness. - Interview persons responsible for evaluation. <p>ASK:</p> <ul style="list-style-type: none"> - What criteria are established to determine the program's positive impact? - How are the results of the evaluation used to improve the program for students? 	<ul style="list-style-type: none"> - Evidence that the evaluation includes an assessment of achievement, credits earned, transition rates, graduation rates, and employment rates - Evaluation results made available to appropriate staff and to parents of participating children 	
<p>I-CON3 (LEP) Each former LEP student who has been designated to FEP has demonstrated English-language proficiency comparable to that of the average native speakers and can participate equally with average native speakers in the school's regular instructional program. <i>(Formerly LEP.1e)</i></p> <p>(20 USC 1703(f); EC 62002, former EC 52164.6; 5 CCR 4306; see generally <u>Gomez v. Illinois State Bd. of Education</u> (7th Cir. 1987) 811 F.2d 1030, 1041-1042; <u>Castaneda v. Pickard</u> (5th Cir. 1981) 648 F.2d 989, 1009-1010; <u>Keyes v. School Dist. No. 1</u> (D. Colo. 1983) 576 F.Supp. 1503, 1516-1522)</p>	<p>District</p> <ul style="list-style-type: none"> - Review the district policy on language redesignation from LEP to FEP to ascertain whether it addresses both English-language barriers and academic achievement in the regular course of study. <p>Site</p> <ul style="list-style-type: none"> - Take a sample of at least two former LEP students from three different grade levels who have been designated as FEP within the past year. - Review the data collected and considered in deciding to designate a former LEP student as FEP. 	<ul style="list-style-type: none"> - The district's policy includes standard procedures for assessing comprehension and speaking proficiency and academic achievement and may include multiple criteria, such as: <ul style="list-style-type: none"> ■ Teacher evaluation of the student's English-language proficiency and curriculum mastery ■ Objective assessment of the student's English comprehension and speaking proficiency ■ Objective assessment of the student's English writing skills ■ Parental opinion or consultation during a redesignation interview ■ Objective data on the student's academic performance in English ■ Other criteria as adopted - Data and other evidence are available which indicate that the district has used these consistent, verifiable criteria to consider the student's English-language proficiency and academic achievement. 	

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
I-CON3 (continued)		<ul style="list-style-type: none"> - Data indicate that each student in the sample redesignated as FEP has the English-language skills of comprehension, speaking, reading, and writing necessary to succeed in the school's regular instructional program. - The district or site has evidence of how former LEP students as a group are performing in comparison with their native-English-speaking peers in the core curriculum; e.g., GPA, success rate in passing district proficiency tests, norm-referenced test scores, and so forth. This evidence demonstrates that the former LEP students have not been left with any substantive academic deficits. - The district or site has evidence of the rate of LEP student redesignation to FEP; e.g., percentage/year, mean months in the program before redesignation, comparisons with previous years' rates by language group, by grade level, by program type, and so forth. 	

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
<p>III-CON20 (LEP) The district has properly identified, assessed, and reported all students who have a primary language other than English and who are of limited-English proficiency (LEP). (Formerly LEP.1)</p> <p><u>Primary tests</u> III-CON20a (LEP) There is a Home Language Survey (HLS), used to determine the primary language, on file for each student in the district, including migrant, special education, and continuation school enrollees. (Formerly LEP.1a)</p> <p>(EC 62002, former EC 52164.1(a); 5 CCR 4304)</p>	<p>Site</p> <ul style="list-style-type: none"> - Take a sample of at least two LEP and two non-LEP students per grade level from at least three grade levels at the school and ask to see an HLS for each student. - Interview the principal and responsible staff. <p>ASK:</p> <ul style="list-style-type: none"> - What is the method used to determine the primary language of each student? - Does each student in the school have a completed HLS? Where are they filed? - Is the HLS available in the languages of the LEP students enrolled in the school? 	<ul style="list-style-type: none"> - An HLS used to determine the primary language of each student at the time of enrollment is on file, with each state-authorized question answered, and has a signature of parent/guardian. If a signature could not be obtained after reasonable efforts by the district, alternative documentation is on file. 	

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
<p>III-CON20b (LEP) Each student with a home language other than English on the HLS has been assessed within 30 school days of initial enrollment in English comprehension, speaking, reading, and writing. English comprehension and speaking proficiency have been assessed using a state-designated instrument. Each district has established a process by which reading and writing assessments are to be made, including specification of criteria, instruments, procedures, and standards appropriate to each grade level. For purposes of initial identification, English reading and writing assessments are optional for all students in grades K-2. They are also optional for students in grades 3-12 who are identified as LEP on the basis of English comprehension and speaking skills alone. <i>(Formerly LEP.1b)</i></p> <p style="text-align: right;">(EC 62002, former EC 52164.1(b); 5 CCR 4304, 4305)</p> <p>Note: Testing is optional for students whose HLS indicates a language other than English only in response to the fourth question.</p> <p>1996-97 state-authorized tests for comprehension and speaking are:</p> <ul style="list-style-type: none"> - BNL (K-12) - BSM I/II (K-12) - The Pre-IPT (ages 3-5 only) - The IPT I (K-6): Forms A, B, C, and D; - The IPT II (7-12): Forms A and B - The Pre-LAS Oral (ages 4-6 only) - The LAS I/II Oral, Forms A, B, C, and D; the short form (1-12) - Woodcock-Muñoz Language Survey (Pre-12) - The QSE (K-6 only) <p>No other instruments may be used without a state-approved waiver.</p> <p style="text-align: right;">(EC 62002, former EC 52164.1(c))</p>	<p>District or Site</p> <ul style="list-style-type: none"> - Review evidence of the language abilities and training of at least three or 30 percent of the assessors, whichever is less. - Review district policies and procedures for the identification of LEP students. - Interview administrators and persons responsible for assessment. <p>ASK:</p> <ul style="list-style-type: none"> - Who is responsible for assessing the oral English-language proficiency? - How are testers selected, qualified, and trained to administer the English-language assessments? - Which state-authorized test is the district using to assess English-language proficiency in comprehension and speaking? - What tests and cut-off scores does the district use to assess English-language proficiency in reading and writing for students in grades 3-12? - What cut-off scores are used to identify LEP students? FEP students? <p>Site</p> <ul style="list-style-type: none"> - Use the sample of LEP students in test III-CON20a and take a similar sample of fluent-English-proficient (FEP) students (<u>not</u> former LEP students) and review (1) their English-language proficiency test results in comprehension and speaking; (2) English reading and writing test results for students in grades 3-12 who scored fluent on the English-language proficiency test in comprehension and speaking; 	<ul style="list-style-type: none"> - English proficiency tests are administered to each LEP student by staff who are proficient in English and the primary language of the student tested unless the district has an approved waiver to use English-only testers for the current school year. - Each LEP student has a score of less than fluent according to publisher's norms on a state-authorized test of comprehension and speaking proficiency (K-12), or a score of fluent on the English comprehension and speaking proficiency test AND a score below the district-established standards on the district's English reading and writing assessments. For students who, on the basis of comprehension and speaking proficiency alone, are clearly LEP, assessment of reading and writing skills shall be necessary only to the extent required by III-CON20c. These data were collected within 30 school days of enrollment. - Each FEP student has test results on file, collected within 30 school days of enrollment, indicating at least comprehension and speaking proficiency if in K-2 or comprehension and speaking, reading, and writing proficiency if in grades 3-12. 	

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
III-CON20b (continued)	<p>(3) the date the tests were administered; (4) the publisher's norms for the English comprehension and speaking proficiency test; and (5) the district's norms for the English reading and writing tests.</p> <p>Note: FEP refers to all students currently enrolled who were initially identified as FEP or were redesignated from LEP to FEP status.</p> <ul style="list-style-type: none"> - Interview site administrators and assessor(s). <p>ASK:</p> <ul style="list-style-type: none"> - Where are English comprehension and speaking proficiency results recorded for each student tested? (Request actual student samples for LEP and FEP students.) - Who is notified of the results? When? 	<p>Note: Students scoring fluent on English comprehension and speaking proficiency tests in grades 3-12 must pass district-established reading and writing standards comparable to the proficiency of the majority of students in the district of the same age or grade whose primary language is English in order to be designated FEP.</p>	

Compliance item/test	Review level/ How to test for compliance	What to look for	Comments
<p>III-CON20c (LEP) The district has further assessed each LEP student for primary-language proficiency, including comprehension, speaking, reading, and writing, within 90 calendar days of initial enrollment. Parallel forms of the tests to determine English-language proficiency are used if available. (Formerly LEP.1c)</p> <p>(EC 62002, former EC 52161, 52164(c); 5 CCR 4305)</p>	<p>District</p> <ul style="list-style-type: none"> - Review documents of all LEP students related to identification, assessment, and designation of those who require academic instruction through the primary language. - Interview administrators and persons responsible for assessment. <p>ASK:</p> <ul style="list-style-type: none"> - How does the district determine which LEP students will receive primary-language instruction? - What formal tests in the primary language does the district use to assess comprehension, speaking, reading, and writing? <p>Site</p> <ul style="list-style-type: none"> - Use the sample of LEP students in school 90 days or more in test III-CON-20a and review a dated primary-language assessment on file for each student who requires academic instruction through the primary language. - Interview key planners. <p>ASK:</p> <ul style="list-style-type: none"> - How is primary-language proficiency recorded for each LEP student (comprehension, speaking, reading, writing)? 	<ul style="list-style-type: none"> - The district documents contain criteria used to determine which LEP students are to be designated as requiring academic instruction through the primary language, based on assessments in the primary language and in English. - Each LEP student in the sample has formal test results (using parallel forms of the tests used to determine English proficiency, to the degree instruments are available, or, at a minimum, informal diagnostic data) on file regarding the student's primary-language proficiency. These data were collected within 90 calendar days of the student's enrollment. - Each LEP student in the sample has assessment information in English and the primary language which resulted in a designation of the extent to which the student requires academic instruction through the primary language. 	

Service: LEXSTAT®

TOC: United States Code Service: Code, Const, Rules, Conventions & Public Laws : / . . . / : UNLAWFUL PRACTICES : § 1703. Denial of equal educational opportunity prohibited

Citation: 20 uscs 1703

20 USCS § 1703

UNITED STATES CODE SERVICE

Copyright 2001, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 20. EDUCATION

CHAPTER 39. EQUAL EDUCATIONAL OPPORTUNITIES AND TRANSPORTATION OF STUDENTS

EQUAL EDUCATIONAL OPPORTUNITIES
UNLAWFUL PRACTICES

20 USCS § 1703 (2001)

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title [20 USCS § 1712 et seq.], to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

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

HISTORY:

(Aug. 21, 1974, P.L. 93-380, Title II, Part A, Subpart 2, § 204, 88 Stat. 515.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Aug. 21, 1974, P.L. 93-380, § 2(c)(1), 88 Stat. 488, which formerly appeared as 20 USCS § 241b note, provided that this section "shall be effective on and after the sixtieth day after the enactment of this Act.

NOTES:

CROSS REFERENCES

This section is referred to in 20 USCS § 7402.

RESEARCH GUIDE

Federal Procedure:

6 Fed Proc L Ed, Civil Rights §§ 11:216-226.

Am Jur:

15 Am Jur 2d, Civil Rights §§ 281, 282, 327, 350.

68 Am Jur 2d, Schools § 10.

Forms:

5 Fed Procedural Forms L Ed, Civil Rights §§ 10:361, 376, 431.

Law Review Articles:

Rosenfelt. Toward a More Coherent Policy for Funding Indian Education. 40 Law & Contemp Prob 190.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

1. Generally
2. Identification of discriminated class
3. State action requirement

II. PARTICULAR ACTIVITIES REGULATED

4. Intentional segregation
5. Failure to overcome language barriers
6. Education for illegal aliens
7. Transportation plans
8. Graduation requirements

III. ENFORCEMENT, PRACTICE AND PROCEDURE

9. Persons or bodies with enforcement authority
10. Proof
11. Compliance with court orders
12. Collateral estoppel and res judicata effects of prior actions
13. Judicial review

I. IN GENERAL

1. Generally

Discriminatory conduct proscribed by 20 USCS § 1703(d) is coextensive with that prohibited by Fourteenth Amendment and Title VI of Civil Rights Act of 1964 (42 USCS § 2000d et seq.) and does not encompass conduct which might violate Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), and possess same elements for cause of action as Titles VI and VII. Castaneda v Pickard (1981, GA5 Tex) 648 F2d 989.

City school board's pilot program establishing 3 male-only academies for preschool through 5th-grade boys will be enjoined preliminarily, even though court acknowledges status of urban males as "endangered species" due to high unemployment, dropout and homicide rates and appreciates experimental attempts to meet their needs, because that noble purpose is insufficient to override rights of females to equal opportunities under Title

IX (20 USCS §§ 1681 et seq.) and 20 USCS § 1703, Garrett v Board of Educ. of School Dist. (1991, ED Mich) 775 F Supp 1004.

2. Identification of discriminated class

Nothing in Equal Educational Opportunities Act of 1974 (20 USCS §§ 1701 et seq) requires that Attorney General identify those persons on whose behalf action was being brought with sufficient specificity to make it administratively feasible for court to determine whether particular individual was member of group being represented, and statute does not require identification of all actual or potential victims who were denied equal educational opportunity as long as at least one person was arguably denied such opportunity; desegregation suit brought by Attorney General solely under authority of EEOA may not include Fourteenth Amendment claims. United States v. School Dist. (1978, CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid. Serv 225, 47 ALR Fed 294.

Statement in complaint filed by Attorney General adequately describes individuals on whose behalf action is brought where categories of black students in attendance at public elementary schools of defendant's school district, black faculty and staff members assigned to those schools, and other black persons in district similarly situated who are being denied equal educational opportunity are listed. United States v. School Dist. (1978, CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid. Serv 225, 47 ALR Fed 294.

Children with limited English proficiency stated claim under Equal Educational Opportunities Act, 20 USCS § 1701 et seq., against state education officials for their failure to provide local districts with adequate, objective, and uniform guidelines for identifying such children, and Eleventh Amendment would not bar such claim. Gomez v. Illinois State Bd. of Education (1987, CA7 Ill) 811 F2d 1030, 8 FR Serv 3d 973.

3. State action requirement

Use of "State" in 20 USCS § 1703 merely imposes state action requirement in same manner as does similar wording of Fourteenth Amendment, and does not make state proper defendant in each case of denial of Fourteenth Amendment rights; even if state's general power over education is sufficient to make it educational agency which may be charged as party to denial of equal educational opportunity, failure to provide state defendants with notice of action under 20 USCS § 1710 precludes suit against state defendants; Attorney General acquires, under express authorization of 20 USCS § 1706, only standing to allege denials of educational equal opportunity as proscribed by Equal Educational Opportunity Act, and cannot allege other Fourteenth Amendment violations. United States v. School Dist. (1975, ED Mich) 400 F. Supp. 1135, rev'd on other grounds (1978, CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid. Serv. 225, 47 ALR Fed 294.

II. PARTICULAR ACTIVITIES REGULATED

4. Intentional segregation

Intentional segregation in construction and operation of school, and continued segregative effect upon school and school system, existed in view of evidence that school district had staffed school with exclusively black teachers, had fixed attendance boundaries to insure black student body, and had refused to permit transfers from school to adjacent schools even during periods of overcrowding, effect of original segregative purpose not having dissipated given continued functioning of school as all-black school. United States v. School Dist. (1980, CA6 Mich) 616 F2d 895.

5. Failure to overcome language barriers

School district was not required to provide specific program of bilingual-bicultural education to children of Mexican-American and Yaqui Indian origin in order to satisfy "appropriate action" provision of 20 USCS § 1703(f). Guadalupe Organization, Inc. v Tempe Elementary School Dist. (1978, CA9 Ariz) 587 F2d 1022, criticized in Yniguez v Arizonans for Official English (1995, CA9 Ariz) 95 Daily Journal DAR 13253).

State education agency has obligation to supervise local districts to ensure compliance with 20 USCS § 1703(f) requirement that students with limited English language proficiency be given instructions which address their linguistic needs. Idaho Migrant Council v Board of Education (1981, CA9 Idaho) 647 F2d 69.

District Court's determination that school district had met requirements of Equal Educational Opportunities Act, 20 USCS § 1703, is supported by records showing school district's bilingual teachers were fluent or proficient in Spanish, and in-service training of teachers satisfied state law requirements. Castaneda v Pickard (1986, CA5 Tex) 781 F2d 456, 40 BNA FEP Cas 154, 40 CCH EPD P.36253.

Congress, in Equal Educational Opportunities Act, has abrogated states' Eleventh Amendment immunity to extent necessary to effectuate purposes of Act. Although 20 USCS § 1706 does not expressly refer to states, it is clear from language of provision that obligations of § 1703(f) are imposed on states and their agencies. Thus, any action under § 1706 to enforce § 1703(f) can only be maintained against entities that would ordinarily be immune under Eleventh Amendment (unless plaintiffs seek remedy at local level only). Gomez v Illinois State Bd. of Educ. (1987, CA7 Ill) 811 F2d 1030, 8 FR Serv 3d 973.

20 USCS § 1703(f) extended jurisdiction over local board of education and school district as political subdivisions of state in class action seeking declaratory relief that defendants were operating public school system discriminating on basis of national origin and religion, and seeking injunctive relief requiring defendants to provide adequate instruction for non-English-speaking students. Deerfield Hutterian Asso. v Ipswich Board of Education (1978, DC SD) 444 F Supp 159.

Allegations of failure by educational agency to take appropriate action to overcome language barriers of black students which impede their equal participation in instructional program when tied to race allege violation of 20 USCS § 1703(f); it does not appear that existence of dual school system is prerequisite to enforcement of rights established under § 1703; § 1703(f) applied to language barriers of appropriate severity encountered by students who speak vernacular form of English referred to as "Black English." Martin Luther King Junior Elementary School Children etc. v Michigan Board of Education (1978, ED Mich) 451 F Supp 1324.

In action by Puerto Rican and other Hispanic children with English language deficiencies challenging school district's plan to restructure bilingual program, planned program, underlying theory of which was immersion into English language and culture and subordination of Spanish and Hispanic culture with view towards accelerating acquisition of English, was unacceptable in that, while integration was encouraged, there was no assurance that language deficient children in upper grades would be identified, or, if they were, there was continued threat of insufficient remedial assistance; plan should contain more specific methods for identifying upon admission those children who are deficient in English language and for monitoring progress of such children by use of recognized and validated tests to ascertain achievement levels and proficiency in English language, and furthermore, program, which must be both bilingual and bicultural, should provide method for transferring students out of program when necessary level of English proficiency is reached. Cintrón v Brentwood Union Free School Dist. (1978, ED NY) 455 F Supp 57.

In action alleging denial of equal educational opportunity as defined in 20 USCS § 1703 (f), complaint must specifically identify "language barriers" alleged to exist, must allege how language barrier impedes equal participation in instructional program, must set forth appropriate action defendants have allegedly failed to take, specify which defendants have failed to take what action, and must identify connection between defendant's failure to take appropriate action and classifying criterion of race, color, sex, or national origin, although connection between failure to take appropriate action and race need not be in form of allegation of racially discriminatory purpose but may also take form of allegation of racially discriminatory effect; cultural characteristics of plaintiffs are irrelevant to cause of action under § 1703(f) and furthermore, with exception of state officers specified in 20 USCS § 881(k), no natural persons are encompassed within statutory definition of "educational agency," so as to be liable to suit under § 1703(f). Martin Luther King Junior Elementary

School Children v Michigan Board of Education (1978, ED Mich) 463 F Supp 1027.

Refusal of local board of education to provide funds for establishment of school near Hutterite colony did not violate 20 USCS § 1703 in view of board's offer to bus Hutterite children into town, and to establish bilingual and bicultural educational programs; to prove violation of 20 USCS § 1703(f), one must show (1) denial of educational opportunity on account of race, color, sex, or national origin, and (2) educational agency's failure to take action to overcome language barriers that are sufficiently severe so as to impede student's equal participation in instructional programs. Deerfield Hutterian Asso. v Ipswich Board of Education (1979, DC SD) 468 F Supp 1219.

School board's failure to provide leadership and help for its teachers in learning about existence of "black English" as home and community language of many black students and to suggest to those same teachers ways and means of using that knowledge in teaching black children code switching skills in connection with reading standard English was not rational in light of existing knowledge of subject and therefore denied right to equal educational opportunity protected by 20 USCS § 1703(f). Martin Luther King Junior Elementary School Children v Ann Arbor School Dist. Board (1979, ED Mich) 473 F Supp 1371.

Constitution neither requires nor prohibits bilingual and bicultural education but Equal Educational Opportunities Act (20 USCS §§ 1701 et seq.) mandates remedial assistance to students with English language deficits, regardless of number, as long as there is at least one person arguably denied equal educational opportunity; to make out claim under Act student must show denial of educational opportunity on account of race, color, sex or national origin and that failure to take action to overcome language barrier is sufficiently severe to impede equal participation in instructional programs. Heavy Runner v Bremner (1981, DC Mont) 522 F Supp 162.

In order to find violation of 42 USCS § 1703(f) determination must be made as to whether challenged educational program is based on educational theory recognized as sound by some experts, whether such theoretically sound instructional program is being provided with appropriate resources, personnel, and other necessities to transform theory into reality, and whether challenged program, as actually implemented, is failing to accomplish its purpose by overcoming failures it was designed to address; after statutory violation has been detected courts have power to institute measures which will remedy any illegality and bring programs into compliance with remedial decree tailored to address specific violation. United States v Texas (1981, ED Tex) 523 F Supp 703.

In determining whether school district has sufficiently complied with duty to overcome language barriers, court considers whether school system is pursuing program based on educational theory recognized as sound, whether program is reasonably calculated to implement that theory, and whether, after being used for enough time to be legitimate test, program has produced satisfactory results; failure to provide program with adequate resources and personnel, particularly with bilingual teachers, constitutes violation of 20 USCS § 1703; evidence that students with language barriers have tendency to drop out supports finding that transitional bilingual program has not achieved satisfactory results. Keyes v School Dist. (1983, DC Colo) 576 F Supp 1503.

Spanish-speaking children eligible to enroll in public schools, who sought class certification, had adequately alleged failure of state educational bodies to take appropriate action to overcome language barriers. Gomez v Illinois State Bd. of Education (1987, ND Ill) 117 FRD 394.

To prove violation of 20 USCS § 1703(f) for purpose of motion for preliminary injunction against implementation of state statute replacing system of bilingual education with English immersion education, plaintiffs were required to establish that its implementation could not, in any circumstance, constitute "appropriate action" to overcome language barriers. Valeria G. v Wilson (1998, ND Cal) 12 F Supp 2d 1007, 98 Daily Journal DAR 10951.

6. Education for illegal aliens

State statute which permitted exclusion from public schools, absent payment of tuition, of

alien children who had entered country illegally defeated clear implication of federal laws covering education of disadvantaged children. Doe v Plyler (1978, ED Tex) 458 F Supp 569, affd (1980, CA5 Tex) 628 F2d 448, affd (1982) 457 US 202, 72 L Ed 2d 786, 102 S Ct 2382, reh den (1982) 458 US 1131, 73 L Ed 2d 1401, 103 S Ct 14 and reh den (1982) 458 US 1131, 73 L Ed 2d 1401, 103 S Ct 14.

7. Transportation plans

1974 Education Amendments (20 USCS §§ 1701 et seq.) do not support wholesale exclusion of first five grades from desegregation plan; 20 USCS § 1702(a)(5) does not purport to prohibit desegregation of children in first six grades, but merely makes clear that age is one factor in evaluating practicalities of transportation plan. United States v Texas Education Agency etc. (1977, CA5 Tex) 564 F2d 162, reh den (1978, CA5 Tex) 579 F2d 910, cert den (1979) 443 US 915, 61 L Ed 2d 879, 99 S Ct 3106.

Notwithstanding fact that school board felt shrinking enrollments of schools made them economically unfeasible to operate, board's decision to bus only black students, thus ignoring opportunity to bring white students into school with dwindling enrollments and placing burden of integration solely on blacks, was discriminatory; additionally, board's decision to place new faculty in almost entirely black neighborhood, coupled with its manifest intent to operate school strictly as neighborhood school, thus guaranteeing student body over 90 percent minority, was significant evidence of de jure segregation. NAACP v Lansing Board of Education (1976, WD Mich) 429 F Supp 583, affd (1977, CA6 Mich) 559 F2d 1042, cert den (1977) 434 US 997, 54 L Ed 2d 491, 98 S Ct 635 and affd without op (1978, CA6 Mich) 571 F2d 582, cert den (1978) 438 US 907, 57 L Ed 2d 1150, 98 S Ct 3126.

School district plan to bus children to underutilized school as result of overcrowded conditions at closer school is not arbitrary and capricious in view of total lack of evidence that additional time and distance traveled by children would affect children's health or safety and where granting of requested relief would result in resegregation. Joslin v Board of Education (1983, ED Ky) 585 F Supp 37.

Motion seeking supplemental relief to desegregate school system will be denied where system is unitary, desegregated school system is being operated in compliance with Constitution and in complete accord with Equal Educational Opportunities Act of 1974, even though of 108 schools 20 were all black and two all white; massive busing for sole purpose of achieving greater percentage of racial mixing in each school is clearly illegal. Davis v East Baton Rouge Parish School Board (1975, MD La) 398 F Supp 1013, vacated on other grounds (1978, CA5 La) 570 F2d 1260, cert den (1979) 439 US 1114, 59 L Ed 2d 72, 99 S Ct 1016.

8. Graduation requirements

Imposition of exit exam diploma requirement on black students who previously attended substandard segregated schools who were then subjected to tracking system in nons segregated schools violates Equal Educational Opportunities Act (20 USCS §§ 1701 et seq.). Anderson v Banks (1981, SD Ga) 520 F Supp 472.

In context of past purposeful school segregation, utilization of functional literacy test as requirement for receipt of high school diploma was violation of 20 USCS § 1703. Debra P. v Turlington (1979, MD Fla) 474 F Supp 244, affd in part and vacated in part on other grounds (1981, CA5 Fla) 644 F2d 397, reh den (1981, CA5 Fla) 654 F2d 1079.

Requirement that public school students pass functional literacy examination in order to receive state high school diploma is not violative of 20 USCS § 1703; use of such test can be enjoined if test perpetuates effects of past school segregation or if test is not needed to remedy effects of past segregation. Debra P. v Turlington (1983, MD Fla) 564 F Supp 177, 13 Fed Rules Evid Serv 1041, affd (1984, CA11 Fla) 730 F2d 1405, 15 Fed Rules Evid Serv 1175.

III. ENFORCEMENT; PRACTICE AND PROCEDURE

9. Persons or bodies with enforcement authority

20 USCS § 1703 does not require that power to enforce its mandate be vested in any particular state agency, but simply that state insure compliance; state board of education does not have competence to maintain action to insure equality because legislature has vested authority to bring such actions in attorney general. Gomez v Illinois State Bd. of Education (1987, CA7 Ill) 811 F2d 1030, 8 FR Serv 3d 973.

10. Proof

20 USCS § 1703 permits recovery only where intent to discriminate is proven, even if discriminatory impact is established. Otero v Mesa County Valley School Dist. (1979, DC Colo) 470 F Supp 326, 19 BNA FEP Cas 1015, 20 CCH EPD P 30054, affd (1980, CA10 Colo) 628 F2d 1271, 23 BNA FEP Cas 1233, 23 CCH EPD P 31185.

11. Compliance with court orders

Where school district failed to comply with desegregation provision during three of four years in which court-ordered plan has been in effect, majority of members of present board of education ran for election principally on platform which urged stopping of forced busing and returning students to neighborhood schools, compliance with plan was transitory and temporary achievement, and new board of education proposed unacceptable freedom of choice plan dividing district into four racially and ethnically balanced zones and allowing any student to attend any school in his zone with any necessary transportation provided at district expense, district court properly retained jurisdiction of case and refused to terminate injunction; annual readjustment of racial balance of student population is not necessary once court has determined that there has been full and genuine implementation of plan which has eliminated racial discrimination from system with some anticipated permanence. Spangler v Pasadena City Board of Education (1975, CA9 Cal) 519 F2d 430, vacated on other grounds (1976) 427 US 424, 49 L Ed 2d 599, 96 S Ct 2697.

Government's guarantee that board will be funded on priority basis under existing school desegregation programs fulfills government's obligations under consent decree to provide available funds; consent decree does not mandate that government attempt to make funds available through legislative activity so as to provide portion of necessary funding which local school board cannot supply; lobbying activities of executive branch to reduce funds available does not constitute governmental bad faith which justified monetary remedy against government. United States v Board of Educ. (1984, CA7 Ill) 744 F2d 1300, cert den (1985) 471 US 1116, 86 L Ed 2d 259, 105 S Ct 2358.

12. Collateral estoppel and res judicata effects of prior actions

Prior finding in HEW proceeding under 42 USCS § 2000d that school district had conducted elementary school as segregated unit cannot be given collateral estoppel effect in suit by Attorney General for violation of 20 USCS § 1703. United States v School Dist. (1975, ED Mich) 400 F Supp 1141, affd in part and remanded in part (1978, CA6 Mich) 577 F2d 1339, 3 Fed Rules Evid Serv 225, 47 ALR Fed 294.

13. Judicial review

Formulating realistic, practical, and effective remedy involving school desegregation is peculiarly within province of trial court, whose position gives it quantum advantage over appellate court in weighing practicality of situation; thus, appellate court will defer to trial court's exercise of remedial discretion when it has applied proper legal precepts and remained within determined legal boundaries. Evans v Buchanan (1977, CA3 Del) 555 F2d 373, cert den (1977) 434 US 880, 54 L Ed 2d 160, 98 S Ct 235, 98 S Ct 236, reh den (1977) 434 US 944, 54 L Ed 2d 306, 98 S Ct 442, 98 S Ct 443.

Service: LEXSTAT®

TOC: United States Code Service: Code, Const. Rules, Conventions & Public Laws : / / : UNLAWFUL PRACTICES : § 1703. Denial of equal educational opportunity prohibited

Citation: 20 uscs 1703

View: Full

Date/Time: Monday, May 28, 2001 - 5:25 PM EDT

[About LEXIS-NEXIS | Terms and Conditions](#)

Copyright © 2001 LEXIS-NEXIS Group. All rights reserved.

20 UNITED STATES CODE SECTION 1720

Source: [All Sources](#) : / . . . / : [United States Code Service - Titles 1 through 50](#) **f**

TOC: [United States Code Service - Titles 1 through 50](#) : / . . . / : [DEFINITIONS](#) : § 1720. Definitions

20 USCS § 1720

UNITED STATES CODE SERVICE
Copyright 2001, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** CURRENT THROUGH P.L. 107-12, APPROVED 6/3/01 ***

TITLE 20. EDUCATION
CHAPTER 39. EQUAL EDUCATIONAL OPPORTUNITIES AND TRANSPORTATION OF STUDENTS

EQUAL EDUCATIONAL OPPORTUNITIES
DEFINITIONS

20 USCS § 1720 (2001)

§ 1720. Definitions

For the purposes of this part [[20 USCS §§ 1701 et seq.](#)]--

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965.

(b) The term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965.

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 401(b) of the Civil Rights Acts of 1964 [[42 USCS § 2000c\(b\)](#)].

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

HISTORY:

(Aug. 21, 1974, P.L. 93-380, Title II, Part A, Subpart 5, § 221, 88 Stat. 518.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

Sections 801(f) and 801(k) of the Elementary and Secondary Education Act of 1965, referred to in this section, were subsecs. (f) and (k) of § 801 of Act April 11, 1965, P.L. 89-10, Title VIII [VI, VII], 79 Stat. 55, which appeared as [20 USCS § 3381](#)(f) and (k), were omitted in the general revision of such Act by Act Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3519, generally effective July 1, 1995, as provided by § 3(a)(1) of such Act, which appears as [20 USCS § 6301](#) note.

Effective date of section:

Act Aug. 21, 1974, P.L. 93-380, § 2(c)(1), 88 Stat. 488, which formerly appeared as [20 USCS § 241b](#) note, provided that this section "shall be effective on and after the sixtieth day after the enactment of this Act".

NOTES:

20 UNITED STATES CODE SECTION 8801

Service: LEXSTAT®

TOC: United States Code Service: Code, Const, Rules, Conventions & Public Laws : /.../ : DEFINITIONS : § 8801.
Definitions

Citation: 20 USC 8801

20 USCS § 8801

UNITED STATES CODE SERVICE
Copyright 2001, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** CURRENT THROUGH P.L. 107-10, APPROVED 5/28/01 ***

TITLE 20. EDUCATION
CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY
SCHOOLS
GENERAL PROVISIONS
DEFINITIONS

20 USCS § 8801 (2001)

§ 8801. Definitions

Except as otherwise provided, for the purposes of this Act [20 USCS §§ 6301 et seq.], the following terms have the following meanings:

(1) Average daily attendance.

(A) Except as provided otherwise by State law or this paragraph, the term "average daily attendance" means--

(i) the aggregate number of days of attendance of all students during a school year; divided by

(ii) the number of days school is in session during such school year.

(B) The Secretary shall permit the conversion of average daily membership (or other similar data) to average daily attendance for local educational agencies in States that provide State aid to local educational agencies on the basis of average daily membership or such other data.

(C) If the local educational agency in which a child resides makes a tuition or other payment for the free public education of the child in a school located in another school district, the Secretary shall, for purposes of this Act [20 USCS §§ 6301 et seq.]--

(i) consider the child to be in attendance at a school of the agency making such payment; and

(ii) not consider the child to be in attendance at a school of the agency receiving such payment.

(D) If a local educational agency makes a tuition payment to a private school or to a public school of another local educational agency for a child with disabilities, as defined in section 602(a)(1) of the Individuals with Disabilities Education Act [20 USCS § 1401(a)(1)], the Secretary shall, for the purposes of this Act [20 USCS §§ 6301 et seq.], consider such child to be in attendance at a school of the agency making such payment.

(2) Average per-pupil expenditure. The term "average per-pupil expenditure" means, in the case of a State or of the United States--

(A) without regard to the source of funds--

(i) the aggregate current expenditures, during the third fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the State or, in the case of the United States for all States (which, for the purpose of this paragraph, means the 50 States and the District of Columbia); plus

(ii) any direct current expenditures by the State for the operation of such agencies; divided by

(B) the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(3) Child. The term "child" means any person within the age limits for which the State provides free public education.

(4) Community-based organization. The term "community-based organization" means a public or private nonprofit organization of demonstrated effectiveness that--

(A) is representative of a community or significant segments of a community; and

(B) provides educational or related services to individuals in the community.

(5) Consolidated local application. The term "consolidated local application" means an application submitted by a local educational agency pursuant to section 14302 [20 USCS § 8852].

(6) Consolidated local plan. The term "consolidated local plan" means a plan submitted by a local educational agency pursuant to section 14302 [20 USCS § 8852].

(7) Consolidated State application. The term "consolidated State application" means an application submitted by a State educational agency pursuant to section 14302 [20 USCS § 8852].

(8) Consolidated state plan. The term "consolidated State plan" means a plan submitted by a State educational agency pursuant to section 14302 [20 USCS § 8852].

(9) County. The term "county" means one of the divisions of a State used by the Secretary of Commerce in compiling and reporting data regarding counties.

(10) Covered program. The term "covered program" means each of the programs authorized by--

(A) part A of title I [20 USCS §§ 6311 et seq.];

(B) part C of title I [20 USCS §§ 6391 et seq.];

(C) title II [20 USCS §§ 6601 et seq.] (other than section 2103 [20 USCS § 6623] and part D [20 USCS §§ 6671 et seq.];

(D) subpart 2 of part A of title III [20 USCS §§ 6841 et seq.];

(E) part A of title IV [20 USCS §§ 7711 et seq.] (other than section 4114 [20 USCS § 7114]); and

(F) title VI [20 USCS §§ 7301 et seq.].

(11) The term "current expenditures" means expenditures for free public education--

(A) including expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities; but

(B) not including expenditures for community services, capital outlay, and debt service, or any expenditures made from funds received under title I and title VI [20 USCS §§ 6301 et seq. and 7301 et seq.].

(12) Department. The term "Department" means the Department of Education.

(13) Educational service agency. The term "educational service agency" means a regional public multiservice agency authorized by State statute to develop, manage, and provide services or programs to local educational agencies.

(14) Elementary school. The term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

(15) Family literacy services. The term "family literacy services" means services provided to participants on a voluntary basis that are of sufficient intensity in terms of hours, and of sufficient duration, to make sustainable changes in a family, and that integrate all of the following activities:

(A) Interactive literacy activities between parents and their children.

(B) Training for parents regarding how to be the primary teacher for their children and full partners in the education of their children.

(C) Parent literacy training that leads to economic self-sufficiency.

(D) An age-appropriate education to prepare children for success in school and life

experiences.

(16) Free public education. The term "free public education" means education that is provided--

(A) at public expense, under public supervision and direction, and without tuition charge; and

(B) as elementary or secondary school education as determined under applicable State law, except that such term does not include any education provided beyond grade 12.

(17) Gifted and talented. The term "gifted and talented", when used with respect to students, children or youth, means students, children or youth who give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields; and who require services or activities not ordinarily provided by the school in order to fully develop such capabilities.

(18) Institution of higher education. The term "institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1965 [20 USCS § 1001].

(19) Local educational agency.

(A) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

(B) The term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(C) The term includes an elementary or secondary school funded by the Bureau of Indian Affairs but only to the extent that such inclusion makes such school eligible for programs for which specific eligibility is not provided to such school in another provision of law and such school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this Act [20 USCS §§ 6301 et seq.] with the smallest student population, except that such school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.

(20) Mentoring. The term "mentoring" means a program in which an adult works with a child or youth on a 1-to-1 basis, establishing a supportive relationship, providing academic assistance, and introducing the child or youth to new experiences that enhance the child or youth's ability to excel in school and become a responsible citizen.

(21) Other staff. The term "other staff" means pupil services personnel, librarians, career guidance and counseling personnel, education aides, and other instructional and administrative personnel.

(22) Outlying area. The term "outlying area" means the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and for the purpose of section 1121 [20 USCS § 6331] and any other discretionary grant program under this Act [20 USCS §§ 6301 et seq.], the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(23) Parent. The term "parent" includes a legal guardian or other person standing in loco parentis.

(24) Public telecommunication entity. The term "public telecommunication entity" has the same meaning given to such term in section 397(12) of the Communications Act of 1934 [47 USCS § 397(12)].

(25) Pupil services personnel; pupil services.

(A) The term "pupil services personnel" means school counselors, school social workers, school psychologists, and other qualified professional personnel involved in providing assessment, diagnosis, counseling, educational, therapeutic, and other necessary services (including related services as such term is defined in section 602(a)(17) of the Individuals with Disabilities Education Act [20 USCS § 1401(a)(17)]) as part of a comprehensive

program to meet student needs.

(B) The term "pupil services" means the services provided by pupil services personnel.

(26) Secondary school. The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that such term does not include any education beyond grade 12.

(27) Secretary. The term "Secretary" means the Secretary of Education.

(28) State. The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(29) State educational agency. The term "State educational agency" means the agency primarily responsible for the State supervision of public elementary and secondary schools.

(30) Technology. The term "technology" means the latest state-of-the-art technology products and services, such as closed circuit television systems, educational television or radio programs and services, cable television, satellite, copper fiber optic transmission, computer hardware and software, video and audio laser and CD-ROM disks, video and audio tapes, including interactive forms of such products and services, or other technologies.

HISTORY:

(April 11, 1965, P.L. 89-10, Title XIV, Part A, § 14101, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3887.)

(As amended Oct. 7, 1998, P.L. 105-244, Title I, § 102(a)(6)(K), 112 Stat. 1619; Oct. 21, 1998, P.L. 105-277, Div A, § 101(f) [Title VIII, Subtitle I, § 101(b)(5)], 112 Stat. 2681-407; Oct. 22, 1998, P.L. 105-278, § 3(j), 112 Stat. 2688; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The amendments made by § 1(a)(4) of Act Dec. 21, 2000, P.L. 106-554, are based on § 1606(a) of Title XVI of Division B of H.R. 5666 (114 Stat. 2763A-334), as introduced on Dec. 15, 2000, which was enacted into law by such § 1(a)(4).

Effective date of section:

Act April 11, 1965, P.L. 89-10 (20 USCS §§ 6301 et seq.), as added by Title I of Act Oct. 20, 1994, P.L. 103-382, takes effect July 1, 1995, except that provisions applicable to programs under Title VIII of the 1965 Act (20 USCS §§ 7701 et seq.), and to programs under such Act that are conducted on a competitive basis, shall be effective with respect to appropriations for use under such programs for fiscal year 1995 and for subsequent fiscal years, as provided by § 3(a)(1)(A) of Act Oct. 20, 1994, P.L. 103-382, which appears as 20 USCS § 6301 note.

Amendments:

1998. Act Oct. 7, 1998 (effective on 10/1/98, as provided by § 3 of such Act, which appears as 20 USCS § 1001 note), in para. (17), substituted "101" for "1201(a)".

Act Oct. 21, 1998, in para. (10)(C), substituted "part D" for "part C".

Act Oct. 22, 1998, in para. (14), inserted ", including a public elementary charter school," and, in para. (25), inserted ", including a public secondary charter school,".

2000. Act Dec. 21, 2000, redesignated paras. (15)-(29) as paras. (16)-(30), respectively, and inserted new para. (15).

NOTES:

RESEARCH GUIDE

Am Jur:

68 Am Jur 2d, Schools § 327.

INTERPRETIVE NOTES AND DECISIONS

In determining what constitutes agency that actually administers local school, for purpose of Civil Rights suit challenging state's basic skills proficiency test given to teachers, court is required to look to state law to determine what entity is recognized in state as administrative agency for its public schools. Association of Mexican-American Educators v California (1999, CA9 Cal) 183 F3d 1055, 99 CDOS 5497, 99 Daily Journal DAR 7021, 80 BNA FEP Cas 501, 45 FR Serv 3d 391; and, on reconsideration, remanded (1999, CA9 Cal) 195 F3d 465, 99 CDOS 8633, 99 Daily Journal DAR 7021, 99 Daily Journal DAR 11075, 81 BNA FEP Cas 374, 52 Fed Rules Evid Serv 1358, 45 FR Serv 3d 391.

Under requirement of 20 USCS § 8801, court is required to look to state law and practice to determine what entity is recognized in state as administrative agency for its schools and court properly found that public schools in state of California are administered by school districts. Association of Mexican-American Educators v California (1999, CA9 Cal) 195 F3d 465, 99 CDOS 8633, 99 Daily Journal DAR 7021, 99 Daily Journal DAR 11075, 81 BNA FEP Cas 374, 52 Fed Rules Evid Serv 1358, 45 FR Serv 3d 391.

Service: LEXSTAT®

TOC: United States Code Service: Code, Const, Rules, Conventions & Public Laws : / . . . / : DEFINITIONS : § 8801, Definitions

Citation: 20 USC 8801

View: Full

Date/Time: Tuesday, June 12, 2001 - 4:20 PM EDT

[About LEXIS-NEXIS | Terms and Conditions](#)

Copyright © 2001 LEXIS-NEXIS Group. All rights reserved.

LAW OFFICES OF
SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

7 PARK CENTER DRIVE
SACRAMENTO, CALIFORNIA 95825



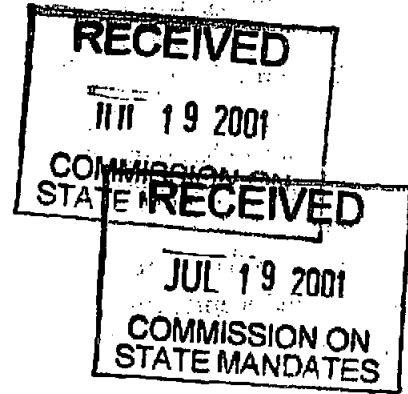
TELEPHONE: (916) 646-1400 • FACSIMILE: (916) 646-1300

PAUL C. MINNEY
JAMES E. YOUNG
MICHAEL S. MIDDLETON
DANIEL I. SPECTOR

AUTHOR'S DIRECT E-MAIL:
pminney@smymllaw.com

July 17, 2001

LISA A. CORR
AMANDA J. McKECHNIE
DAVID E. SCRIBNER
PHILLIP MURRAY
JESSICA J. HAWTHORNE



Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: **Revised Declaration**
California English Language Development Test (CELDT), 00-TC-16
Statutes of 1997, Chapter 936
Statutes of 1999, Chapters 78 and 678
Statutes of 2000, Chapter 71
Education Code Sections 313, 60810, 60811, and 60812

Dear Ms. Higashi:

On June 13, 2001, this office filed the *California English Language Development Test (CELDT)* test claim with the Commission on State Mandates. A declaration was included in that filing by Mr. Lynn Jamison, Director of State and Federal Programs. Enclosed is an amended declaration from Mr. Jamison. Please add this declaration to our original test claim filing.

If you have any questions or comments regarding this letter, please feel free to contact me at (916) 646-1400.

Very Truly Yours,
LAW OFFICES OF SPECTOR,
MIDDLETON, YOUNG & MINNEY, LLP

Paul C. Minney
PAUL C. MINNEY
ATTORNEY AT LAW

Encl. Revised Declaration of Lynn Jamison
cc: Mailing List

Modesto City School District
426 Locust Street
Modesto, California 95351
Telephone: (209) 576-4011
Facsimile: (209) 576-4184

Paul C. Minney, Esq.
SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP
7 Park Center Drive
Sacramento, California 95825
Telephone: (916) 646-1400
Facsimile: (916) 646-1300

Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant
Modesto City School District

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

In Re Test Claim:
Modesto City School District

CSM No. _____

REVISED DECLARATION OF LYNN
JAMISON

*California English Language Development Test
(CELDT)*

I, Lynn Jamison, make the following declaration and statement. As Director of State and Federal Programs, I have knowledge of Modesto City School District's English Language Development testing program. I am familiar with the provisions and requirements of Statutes of 1997, Chapter 936, Statutes of 1999, Chapters 78 and 678, and Statutes of 2000, Chapter 71,

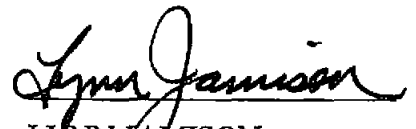
which require school districts to perform the following activities:

1. Initial assessment of all students with a home language other than English in kindergarten through grade 12 using the CELDT; (Ed. Code, §§ 313 and 60810.)
2. Annual assessment of all students not classified as English proficient using the CELDT; (Ed. Code, §§ 313 and 60810.)
3. Adherence to all requirements and performance of all activities detailed in the *CELDT Test Coordinator's Manual* or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements.
4. Designate and train district and school site testing coordinators for the CELDT;
5. Training district and school site staff regarding the test claim activities; and
6. Drafting or modifying policies and procedures to reflect the test claim activities.

I am informed and believe that before the test claim legislation there was no responsibility for the claimant to engage in the activities required to administer the CELDT. It is estimated that the claimant will/has incurred significantly more than \$200.00 to implement these new activities mandated by the state for which the claimant has not been sufficiently reimbursed by any federal, state, or local agency, and for which it cannot otherwise obtain reimbursement.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on June ~~27~~, 2001 in Modesto, California.


LYNN JAMISON
Director of State and Federal
Programs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 7 Park Center Drive, Sacramento, California 95825.

On July 17, 2001, I served the foregoing document(s) described as

**Revised Declaration
California English Language Development Test (CELDT)
CSM 00-TC-16**

to the persons/parties listed on the attached Mailing List and to the Commission on State Mandates via first class mail.

And served via facsimile to the following individuals from the Mailing List:

Mr. Gerry Shelton, Department of Education, School Business Services
Mr. Keith B. Petersen, President, Sixten & Associates
Mr. Jim Spano, State Controller's Office, Division of Audits

X (STATE) I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

____ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 17, 2001, at Sacramento, California.



LANI WOODS

Commission on State Mandates

List Date: 06/15/2001

Mailing Information

Mailing List

Claim Number 00-TC-16 **Claimant** Modesto City School District

Subject Stats of 1997, Ch. 936 (AB 748), Stats of 1999, Ch. 78 (AB 1115) & (SB 678), Stats of 2000, Ch. 71

Issue California English Language Development Test (CELDT)

Harmeet Barkschat,
Mandato Resource Services

8254 Heath Peak Place
Antelope CA 95843

Tel: (916) 727-1350
FAX: (916) 727-1734

Interested Person

Dr. Carol Berg, Ph. D.,
Education Mandated Cost Network

1121 L Street Suite 1060
Sacramento CA 95814

Tel: (916) 446-7517
FAX: (916) 446-2011

Interested Person

Mr. Glenn Hase, Bureau Chief (B-8)

State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

State Agency

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

State Agency

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Party

Claim Number 00-TC-16 Claimant Modesto City School District

Subject Stats of 1997, Ch. 936 (AB 748), Stats of 1999, Ch. 78 (AB 1115) & (SB 678), Stats of 2000, Ch. 71

Issue California English Language Development Test (CELDT)

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Harbor Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Ms. Sandy Reynolds, President (Interested Person)
Reynolds Consulting Group, Inc.

P.O. Box 987
Sun City CA 92586

Tel: (909) 672-9964
FAX: (909) 672-9963

Interested Person

Mr. Garry Shelton, (E-8)
Department of Education
School Business Services
560 J Street Suite 150
Sacramento CA 95814

Tel: (916) 322-1466
FAX: (916) 322-1465

State Agency

Mr. Steve Smith, CBO
Mandated Cost Systems, Inc.

2275 Watt Avenue Suite C
Sacramento CA 95825

Tel: (916) 487-4435
FAX: (916) 487-9662

Interested Person

Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

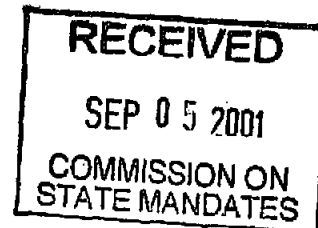


DEPARTMENT OF
FINANCE

GRAY DAVIS, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 29, 2001



Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of June 25, 2001, the Department of Finance has reviewed the test claim submitted by the Modesto City School District (claimant) asking the Commission to determine whether specified costs incurred under Chapter 936, Statutes of 1997, (AB 748, Escutia), Chapter 78, Statutes of 1999, (AB 1115, Strom-Martin), Chapter 678, Statutes of 1999, (SB 638, Alpert), and Chapter 71, Statutes of 2000, (SB 1667, Alpert) are reimbursable state mandated costs (Claim No. CSM-00-TC-16 "California English Language Development Test (CELDT)"). Commencing with page three, of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

A. Field-testing of the CELDT.

The Department of Education has notified Finance that any field-testing of items conducted for the CELDT will be in an embedded format. As such, there is no distinction between testing and field-testing. Field-testing of the CELDT is not a separate activity from testing with the CELDT, which is addressed in the following list of duties being claimed. Therefore, this activity is not a reimbursable state mandate.

B. Initial assessment of all students with a home language other than English in Kindergarten through grade 12 using the CELDT.

Under current law, districts are required to assess students in grades K-12 within 30 days of initial enrollment. Finance notes that federal law also requires newly enrolled students whose home primary language is other than English to be assessed for English proficiency. This claim requests reimbursement for such assessments due to legislation that requires the CELDT to be used as an assessment tool. However, legislation requires the CELDT be used in lieu of, not in addition to, previous assessments. To the extent that districts maintain other assessments not required by law, those activities are voluntary and are not reimbursable. Finance further notes that districts should actually incur savings as the State is providing funding to the Department of Education to cover the costs of test development,

distribution and other related costs, which were previously borne by school districts. Thus, these savings should be used to offset any costs being claimed by the school districts.

The claimants also argue that the CELDT includes English reading and writing for grades 2-12 which previously, were not required and therefore represent new activities. While the CELDT does include English reading and writing, this is to accurately implement federal requirements, not state choice. The Office for Civil Rights (OCR) within the U.S. Department of Education is responsible for enforcing Title VI of the Civil Rights Act of 1964. The OCR has stated unequivocally that assessment of non-English proficient pupils should include reading, writing, and English comprehension. According to the OCR, simply testing a pupil's oral language skills is inadequate. Given the OCR's role and its interpretation of the Civil Rights Act of 1964, schools that do not include reading and writing in their assessments of non-English proficient pupils, may be in violation of federal law. Therefore this activity is not a reimbursable state mandate.

C. Annual assessment of all non-English proficient pupils.

Prior law required the monitoring non-English proficient pupils for the purposes of reclassification. The claimants argue that by requiring districts to administer annual assessments, the State has mandated a higher level of service. However, the OCR has stated that maintaining pupils in an alternative language program longer than necessary to achieve the program's goal could be in violation of the anti-segregation provisions of Title VI regulations. Further, the OCR has stated that exit criteria employed by the district should be based on objective standards, such as standardized test scores. Given the OCR's role and its interpretation of the Civil Rights Act of 1964, schools that do not repeatedly assess their non-English proficient pupils in a timely manner using a standardized test, may be in violation of federal law. Therefore this activity is not a reimbursable state mandate.

D. Adherence to all requirements and performance of all activities detailed in any manual related to CELDT procedures and requirements.

Again, we note that most of the required activities should have been performed by school districts in complying with federal and state laws. To the extent that these activities exceed the previous requirements, the costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

E. Training district staff regarding the test claim activities:

This requirement should have been an inherent part of existing practice. Any marginal costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

F. Drafting or modifying policies and procedures.

This activity should be one-time in nature, and any costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your June 25, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Michael Wilkening, Principal Program Budget Analyst, at (916) 445-0328 or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,



Randal H. Baker
Program Budget Manager

Attachment

Attachment A

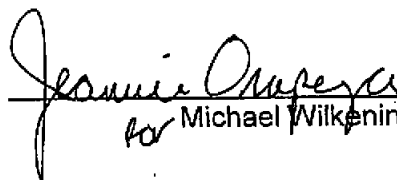
DECLARATION OF MICHAEL WILKENING
DEPARTMENT OF FINANCE
CLAIM NO. CSM-00-TC-16

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.
2. We concur that the Chapter 936, Statutes of 1997, (AB 748, Escutia) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

AUG 29 2001

at Sacramento, CA


for Michael Wilkening

PROOF OF SERVICE

Test Claim Name: "California English Language Development Test (CELDT)"
Test Claim Number: CSM-00-TC-16

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7 Floor, Sacramento, CA 95814.

On August 29, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Glenn Haas
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

E-8
Department of Education
School Business Services
Attention: Gerry Shelton
560 J Street, Suite 150
Sacramento, CA 95814

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue, Suite C
Sacramento, CA 95825

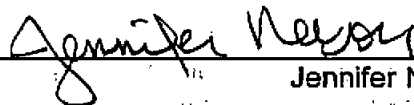
B-8
State Controller's Office
Division of Audits
Attention: Jim Spano
30 Capitol Mall, Suite 518
Sacramento, CA 95814

Spector, Middleton, Young & Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Mandate Resource Services
Attention: Harmeet Barkschat
8254 Heath Peak Place
Antelope, CA 95843

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds
PO Box 987
Sun City, CA 92586

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 29, 2001, at Sacramento, California.



Jennifer Nelson

SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP7 PARK CENTER DRIVE
SACRAMENTO, CALIFORNIA 95825

TELEPHONE: (916) 646-1400 • FACSIMILE: (916) 646-1300

PAUL C. MINNEY
JAMES E. YOUNG
MICHAEL S. MIDDLETON
DANIEL I. SPECTORAUTHOR'S DIRECT E-MAIL:
pminney@smymlaw.com

October 3, 2001

LISA A. CORR
AMANDA J. MCKECHNIE
DAVID E. SCRIBNER
PHILLIP MURRAY
JESSICA J. HAWTHORNE**RECEIVED**

OCT 04 2001

**COMMISSION ON
STATE MANDATES**Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814Re: **Claimant Rebuttal to Department of Finance Opposition**
California English Language Development Test (CELDT)
Statutes of 1997, Chapter 936
Statutes of 1999, Chapters 78 and 678
Statutes of 2000, Chapter 71
Education Code Sections 313, 60810, 60811, and 60812

Dear Ms. Higashi:

On August 29, 2001, the Department of Finance (Finance or DOF) filed comments on the *California English Language Development Test (CELDT) Test Claim*. Finance agrees with the claimant that several activities represent state-mandated activities imposed upon the claimant. However, the Department of Finance disagrees with the claimant that the activities associated with initial and annual assessments of non-English proficient pupils represent reimbursable state-mandated activities imposed upon school districts. The Department of Finance contends that these activities are required under federal law and as such do not represent a state mandate. The claimant disagrees.

The claimant contends that the following activities represent reimbursable state-mandated activities imposed upon school districts:

1. Initially assess every student with a home language other than English in kindergarten through grade 12; (Ed. Code, §§ 313 and 60810.)
2. Annually assess all students not classified as English proficient; and (Ed. Code, §§ 313 and 60810.)

Finance contends that the federal Office for Civil Rights (OCR) and Title VI of the Civil Rights Act of 1964 require school districts to perform these activities and therefore, the activities are federally mandated upon districts.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 2 of 7

As further outlined below, the claimant contends that federal Title VI and the requirements outlined by the Office for Civil Rights do not preclude the Commission from finding that the test claim legislation imposes reimbursable state-mandated activities upon school districts as Finance contends. Rather, the claimant reasserts its contention that the state has gone beyond the requirements found in federal law, thereby imposing a state mandate for the CELDT test claim.

Overview of Title VI of the Civil Rights Act of 1964 and the Office for Civil Rights

Title VI of the Civil Rights Act of 1964 protects people from discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance. Title VI states that:

“No 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.”

Title VI covers programs and activities that receive Federal financial assistance from the United States Department of Education (DOE).

Education Programs and Activities Covered by Title VI

Agencies and institutions that receive DOE funds covered by Title VI include:

- (1) 50 state education agencies, their sub-recipients, and vocational rehabilitation agencies;
- (2) The education and vocational rehabilitation agencies of the District of Columbia and of the territories and possessions of the United States;
- (3) 16,000 local education systems;
- (4) 3,200 colleges and universities;
- (5) 10,000 proprietary institutions; and
- (6) Other institutions, such as libraries and museums that receive ED funds.¹

¹ Information from the Office for Civil Rights, *The Provision of an Equal Education Opportunity to Limited-English Proficient Students*, revised August 2000.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 3 of 7

Programs and activities that receive ED funds must operate in a non-discriminatory manner. These may include, but are not limited to:

- Admissions
- Recruitment
- Financial aid
- Academic programs
- Student treatment and services
- Counseling and guidance
- Discipline
- Classroom assignment
- Grading
- Vocational education
- Recreation
- Physical education
- Athletics
- Housing and employment, if it affects those who are intended to benefit from the Federal funds.²

In addition, a recipient may not retaliate against any person because he or she opposed an unlawful educational practice or policy, or brought charges, testified, or participated in any complaint action under Title VI. For a recipient to retaliate in any way is considered a violation of Title VI. The DOE Title VI regulations provide a detailed discussion of discrimination prohibited by Title VI.³

The Office for Civil Rights Enforces Title VI

The Office for Civil Rights (OCR) is responsible for enforcing Title VI as it applies to programs and activities funded by DOE. The Office for Civil Rights' responsibility to ensure that institutions receiving DOE funds comply with Title VI is carried out through compliance enforcement. The principal enforcement activity is the investigation and resolution of complaints filed by people alleging discrimination based on race, color, or national origin. In addition, through

² *Ibid.*

³ Volume 34, Code of Federal Regulations, Part 100.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 4 of 7

a compliance review program of selected recipients, OCR is able to identify and remedy discrimination that may not be addressed through complaint investigations. Compliance reviews differ from complaint investigations in that OCR has discretion in selecting the institutions it will review.

Given the large number of institutions under its jurisdiction, OCR is unable to investigate and review the policies and practices of all institutions receiving DOE financial assistance. Therefore, through a program of technical assistance, OCR provides guidance and support to recipient institutions to assist them in voluntarily complying with the law. The Office for Civil Rights also informs beneficiaries, such as students and applicants for admission to academic programs, of their rights under Title VI.

OCR has investigated and worked with state and local officials to resolve many kinds of civil rights problems, including the following:

- The failure of some school districts to provide equal educational opportunity for national origin minority students who have a limited proficiency in English.
- The maintenance by some state systems of higher education of separate college facilities for students based on their race, color, or national origin.
- The discriminatory assignment of minority students to classes designed for students who are mentally retarded.⁴

Title VI Applies to School Districts

It is clear from the discussion above that Title VI of the Civil Rights Act of 1964 applies to school districts that receive federal financial assistance. Specifically, the Act requires school districts to provide equal educational opportunities for limited English proficient students. The test claim legislation requires school districts to engage in the following activities:

1. Initially assess every student with a home language other than English in kindergarten through grade 12; (Ed. Code, §§ 313 and 60810.)
2. Annually assess all students not classified as English proficient; and (Ed. Code, §§ 313 and 60810.)

The purpose of federal law is to ensure that all students have the opportunity to participate in states' educational programs and curriculums. The Department of Finance contends, "schools that do not

⁴ Information from the Office for Civil Rights, *The Provision of an Equal Education Opportunity to Limited-English Proficient Students*, revised August 2000.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 5 of 7

include reading and writing in their assessments of non-English proficient pupils, may be in violation of federal law.”⁵ The claimant agrees. However, as discussed below, federal law does not impose a federal mandate upon school districts with regards to the CELDT test. While it may appear that state law meets the requirements outlined in federal law, the state has imposed mandated activities upon school districts related to the CELDT test.

The Fact That School Districts Must Adhere to Title VI Does Not Diminish the Fact That the Test Claim Legislation Imposes Reimbursable State-Mandated Activities Upon School Districts

Government Code section 17556, subdivision (c), provides that the Commission shall not find costs mandated by the state if:

“(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.”

The claimant reasserts its position outlined in the CELDT Test Claim filing: While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state’s core curriculum, these requirements does not preclude reimbursement for the activities and costs imposed upon school districts by the test claim legislation. Moreover, Title VI, and its regulations, as well as OCR, do not specify how states and school districts must comply with the Civil Rights Act of 1964. Rather, OCR will look at the totality of the circumstances to determine if an entity has violated Title VI.

The Office for Civil Rights produced a document entitled, “Questions and Answers on the Rights of Limited-English Proficient Students.”⁶ The document outlines, among other things, federal authority related to English language learners, what federal law requires, and what happens if parents do not want services for their child. More importantly for this test claim, the document provides the following:

“Does OCR require school districts to follow a particular educational approach, such as bilingual education?”

“No. OCR does not require or advocate a particular educational approach to the instruction of ELL students. Districts have substantial flexibility when developing programs to meet the needs of ELL students.

⁵ Department of Finance August 29, 2001 Opposition comments.

⁶ See attached.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 6 of 7

“How long does a district have to provide special services to ELL students?”

“ELL students must be provided with alternative services until they are proficient enough in English to participate meaningfully in the regular program.

“To determine whether a child is ready to exit, a district must consider such factors as the students’ ability to keep up with their non-ELL peers in the regular education program and their ability to participate successfully without the use of adapted or simplified English materials.

“Exit criteria must include some objective measure of a student’s ability to read, write, speak and comprehend English.”

The CELDT Test Claim is not unlike the *Behavioral Intervention Plans* (CSM-4464, BIP) test claim heard and decided by the Commission in September of 2000. In the BIP test claim, the Commission found that:

“[A]lthough the [Individuals with Disabilities Education Act] paints the special education landscape with broad strokes, the specificity in the test claim legislation and implementing regulations do not fit onto the canvass. The state *requires* school districts to engage in functional analysis assessments and implement behavioral intervention plans whenever a disabled child exhibits serious behavior problems. Under [federal law], if a disabled child exhibits such behavior, *school districts are not tied to one response. . . . School districts are free to consider interventions as a possible approach, but are not required to use them.*”⁷ (Emphasis in original, emphasis added.)

The same can be said concerning the CELDT test claim. Although Title VI of the Civil Rights Act of 1964 paints the educational opportunity landscape with broad strokes, the specificity in the test claim legislation does not fit onto the canvass.

Before the enactment of the test claim legislation, state law provided school districts with a choice as to which assessment instrument the district would use to determine students’ English proficiency and subsequent placement in appropriate classes. As outlined in the OCR document above, assessments must include *some* objective measure of students’ English language ability. However, federal law under Title VI and the OCR *do not* require a specific type of assessment that states and school districts must use. Rather, federal law and the OCR provide deference to states

⁷ Statement of Decision adopted on September 28, 2000 and effective September 29, 2000 for the *Behavioral Intervention Plans* test claim (CSM-4464) at page SOD-16.

Letter to Ms. Paula Higashi
Re: CELDT Claimant Rebuttal to DOF
October 3, 2001
Page 7 of 7

and school districts to implement and use any assessment deemed by local entities that meet the federally mandated *goals*.

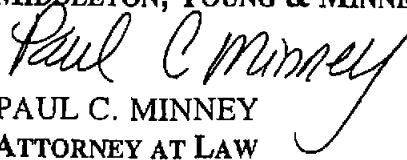
The test claim legislation took away any discretion school districts had under prior law related to assessments and now requires districts to use a single new test without exception. Furthermore, the implementation and use of the CELDT is not required under federal law. Federal law only requires state and local educational agencies to ensure that all students have equal access to a state's core curriculum. This goal can be accomplished in countless ways, through numerous different assessments. California has chosen *one* assessment that *all* school districts must use, the CELDT.

Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment, as is the case with the test claim legislation, represents costs imposed upon school districts by the state. The state, not Title VI or the OCR, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law.

As outlined above, the claimant contends that federal Title VI and the requirements outlined by the Office for Civil Rights do not preclude the Commission from finding that the test claim legislation imposes reimbursable state-mandated activities upon school districts as Finance contends. Rather, the claimant reasserts its that the test claim legislation imposes reimbursable state-mandated activities upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

If you have any questions or comments concerning this rebuttal, please feel free to contact me at (916) 646-1400.

Very truly yours,
LAW OFFICES OF SPECTOR,
MIDDLETON, YOUNG & MINNEY, LLP


PAUL C. MINNEY
ATTORNEY AT LAW

Enc: Office for Civil Rights FAQ Sheet

Cc: Lynn Jamison, Director of State and Federal Programs, Modesto City School District
Steve Smith, Mandated Cost Systems, Inc.
Mailing List

Questions and Answers on the Rights of Limited-English Proficient Students

What happens to limited-English proficient (LEP) students who are not offered services to help them overcome language barriers?

Limited-English proficient students (also sometimes referred to as English-language learners) may suffer repeated failure in the classroom, falling behind in grade, and dropping out of school if they are not provided services to overcome language barriers. Students who are not proficient in English and sometimes inappropriately placed in special education classes. Also, because of their lack of English proficiency, qualified students often do not have access to high track courses or Gifted and Talented programs.

What is the federal authority requiring districts to address the needs of English language learners?

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin. In *Lau v. Nichols*, the U.S. Supreme Court affirmed the Department of Education memorandum of May 25, 1970, which directed school districts to take steps to help limited-English proficient (LEP) students overcome language barriers and to ensure that they can participate meaningfully in the district's educational programs

What does Title VI of the Civil Rights Act of 1964 require for English-language learner students?

Federal law requires programs that educate children with limited English proficiency to be:

1. based on a sound educational theory;
2. adequately supported, with adequate and effective staff and resources, so that the program has a realistic chance of success; and
3. periodically evaluated and, if necessary, revised.

Does OCR require districts to follow a particular educational approach, such as bilingual education?

No. OCR does not require or advocate a particular educational approach to the instruction of ELL students. Districts have substantial flexibility when developing programs to meet the needs of ELL students.

What if parents do not want their child to have services to address their English needs?

English needs:

Parents can opt to not have their children enrolled in an ELL program.

When a parent declines participation, the district retains a responsibility to ensure that the student has an equal opportunity to have his or her English language and academic needs met. Districts can meet this obligation in a variety of ways (e.g. adequate training to classroom teachers on second language acquisition; monitoring the educational progress of the student).

How long does a district have to provide special services to ELL students?

ELL students must be provided with alternative services until they are proficient enough in English to participate meaningfully in the regular program.

To determine whether a child is ready to exit, a district must consider such factors as the students' ability to keep up with their non-ELL peers in the regular education program and their ability to participate successfully without the use of adapted or simplified English materials.

Exit criteria must include some objective measure of a student's ability to read, write, speak and comprehend English.



[\[Know Your Rights\]](#) [\[Prevention\]](#) [\[Civil Rights Data\]](#) [\[About OCR\]](#) [\[Reading Room\]](#) [\[Related Links\]](#) [\[Previous Page\]](#)

This page last modified February 12, 2001 (sbd)

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 7 Park Center Drive, Sacramento, California 95825.

On October 3, 2001, I served the foregoing document(s) described as

**Claimant Rebuttal to Department of Finance Opposition
California English Language Development Test (CELDT)
CSM 00-TC-16**

to the persons/parties listed on the attached Mailing List and to the Commission on State Mandates via first class mail.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 3, 2001, at Sacramento, California.



LANI WOODS

Commission on State Mandates

List Date: 06/15/2001

Mailing Information

Mailing List

Claim Number

00-TC-16

Claimant

Modesto City School District

Subject

Stats of 1997, Ch. 936 (AB 748), Stats of 1999, Ch. 78 (AB 1115) & (SB 678), Stats of 2000, Ch. 71

Issue

California English Language Development Test (CELDT)

Harmeet Bertschat,
Mandate Resource Services

8254 Heath Peak Place
Antelope CA 95843

Tel: (916) 727-1350
FAX: (916) 727-1734

Interested Person

Dr. Carol Berg, Ph. D,
Education Mandated Cost Network

1121 L Street Suite 1060
Sacramento CA 95814

Tel: (916) 446-7517
FAX: (916) 446-2011

Interested Person

Mr. Glenn Heas, Bureau Chief (B-8)

State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento CA 95816

Tel: (916) 445-8756
FAX: (916) 323-4807

State Agency

Mr. James Lombard, Principal Analyst (A-15)
Department of Finance

915 L Street
Sacramento CA 95814

Tel: (916) 445-8913
FAX: (916) 327-0225

State Agency

Mr. Paul Minney,
Spector, Middictson, Young & Minney, LLP

7 Park Center Drive
Sacramento Ca 95825

Tel: (916) 646-1400
FAX: (916) 646-1300

Interested Party

Claim Number 00-TC-16 Claimant Modesto City School District

Subject Stats of 1997, Ch. 936 (AB 748), Stats of 1999, Ch. 78 (AB 1115) & (SB 678), Stats of 2000, Ch. 71

Issue California English Language Development Test (CELDT)

Mr. Keith B. Petersen, President
Sixten & Associates

5252 Balboa Avenue Suite 807
San Diego CA 92117

Tel: (858) 514-8605
FAX: (858) 514-8645

Interested Person

Ms. Sandy Reynolds, President (Interested Person)
Reynolds Consulting Group, Inc.

P.O. Box 987
Sun City CA 92586

Tel: (909) 672-9964
FAX: (909) 672-9963

Interested Person

Mr. Gerry Shelton, (E-B)
Department of Education
School Business Services
560 J Street Suite 150
Sacramento CA 95814

Tel: (916) 322-1466
FAX: (916) 322-1465

State Agency

Mr. Steve Smith, CBO
Mandated Cost Systems, Inc.

2275 Wax Avenue Suite C
Sacramento CA 95825

Tel: (916) 487-4435
FAX: (916) 487-9662

Interested Person

Jim Spano,
State Controller's Office
Division of Audit (B-8)
300 Capitol Mall, Suite 518 P.O. Box 942850
Sacramento CA 95814

Tel: (916) 323-5849
FAX: (916) 324-7223

State Agency

SixTen and Associates

Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 7, 2004

RECEIVED

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

JUN 09 2004

COMMISSION ON
STATE MANDATES

Re: Test Claim 00-TC-16
Modesto City School District
California English Language Development Test

Test Claim 03-TC-06
Castro Valley Unified School District
California English Language Development Test II

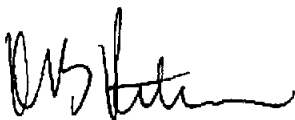
Dear Ms. Higashi:

I have received your letter dated June 3, 2004 which proposes to sever a portion (certain Title 5 Regulations) of the Castro Valley test claim and consolidate only that portion with the test claim of Modesto City School District.

Castro Valley Unified School District objects to this procedure. Castro Valley believes that it would be a better procedure to consolidate the two test claims in their entirety, or not at all.

Both test claims allege identical portions of the Education Code and a ruling on those Education Code sections should be made at the same time. The proposed severance would also deprive Castro Valley of being a party to the proceedings on regulations which it has alleged as part of its test claim.

Sincerely,



Keith B. Petersen

Commission on State Mandates

Original List Date: 9/30/2003 Mailing Information: Other
Last Updated: 6/3/2004
List Print Date: 06/03/2004 Mailing List
Claim Number: 03-TC-06
Issue: California English Language Development Test - 2

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant Representative Tel: (858) 514-8605 Fax: (858) 514-8645
--	--

Mr. Jerry Macy Castro Valley Unified School District 4400 Alma Avenue Castro Valley, CA 94546	Claimant Tel: (510) 537-3335 Fax: (510) 888-7529
--	---

Dr. Carol Berg Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: (916) 446-7517 Fax: (916) 446-2011
--	--

Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Tel: (916) 646-1400 Fax: (916) 646-1300
---	--

Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916) 727-1350 Fax: (916) 727-1734
---	--

Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Tel: (909) 672-9964 Fax: (909) 672-9963
---	--

Mr. Steve Smith

Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Tel: (916) 483-4231

Fax: (916) 483-1403

Mr. Arthur Paikowitz

San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Tel: (619) 725-7565

Fax: (619) 725-7569

Mr. Steve Shields

Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310

Fax: (916) 454-7312

Ms. Beth Hunter

Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642

Fax: (866) 481-5383

Mr. Gerald Shelton

California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554

Fax: (916) 327-8306

Mr. Keith Gmeinder

Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. David E. Scribner

Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels

State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Deborah S. Bailey

Modesto City School District
426 Locust Street
Modesto, CA 95351

Tel: (209) 576-4196

Fax:

Commission on State Mandates

Original List Date: 6/15/2001 Mailing Information: Other
Last Updated: 6/1/2004
List Print Date: 06/03/2004 Mailing List
Claim Number: 00-TC-16
Issue: California English Language Development Test (CELDT)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Tel: (916) 446-7517
Fax: (916) 446-2011

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642
Fax: (866) 481-5383

Ms. Sandy Reynolds

Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964

Fax: (909) 672-9963

Mr. Steve Smith

Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Claimant Representative

Tel: (916) 483-4231

Fax: (916) 483-1403

Ms. Harmeet Barkschat

Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350

Fax: (916) 727-1734

Mr. Keith Gmeinder

Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. Keith B. Petersen

SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605

Fax: (858) 514-8645

Ms. Lynn Jamison

Modesto City School District
426 Locust Street
Modesto, CA 95351

Claimant

Tel: (209) 576-4196

Fax:

Ms. Alexandra Condon

California Teachers Association
6 Red River Ct
Sacramento, CA 95831-3036

Tel: (707) 468-7877

Fax:

Mr. David E. Scribner

Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels

State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Deborah S. Bailey

Modesto City School District
426 Locust Street

Tel: (209) 576-4196

Fax:

SixTen and Associates

Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 23, 2004

RECEIVED

JUN 25 2004

**COMMISSION ON
STATE MANDATES**

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 00-TC-16
Modesto City School District
California English Language Development Test

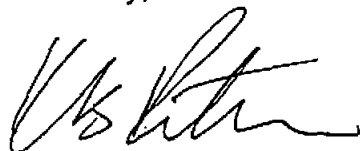
Test Claim 03-TC-06
Castro Valley Unified School District
California English Language Development Test II

Dear Ms. Higashi:

Please find enclosed the original (unbound) and seven copies of the Notice of Appeal and Appeal of Decision of Executive Director Severing Portion of Test Claim and Consolidating That Portion With Another Test Claim. As requested in the body of the instrument, a hearing on the appeal is requested for July 29, 2004.

Pursuant to Title 2, California Code of Regulations, section 1181.2(b)(c), I have served a copy by first-class mail on the other parties and interested parties to the claims who are identified on the mailing lists provided by the Commission.

Sincerely,



Keith B. Petersen

1 Prepared By:
2 Keith B. Petersen
3 SixTen and Associates
4 5252 Balboa Avenue, Suite 807
5 San Diego, CA 92117
6 Voice: (858) 514-8605
7

8 BEFORE THE
9
10 COMMISSION ON STATE MANDATES
11
12 STATE OF CALIFORNIA
13

14 Test Claim of:)
15) No. CSM 03-TC-06
16)
17) California English Language
18) Development Test II (CELDT II)
19)
20) Notice of Appeal
21 Castro Valley Unified School District,) and
22) Appeal of Decision
23) of
24) Executive Director
25 Test Claimant.) Severing Portion of Test Claim
26) And Consolidating That Portion
27) With Another Test Claim
28)
29) Date of Hearing: _____
30) Time of Hearing: _____
31 _____)

32 **To: Commission on State Mandates and to all parties listed on the attached**
33 **Mailing List:**
34

35 Test Claimant Castro Valley Unified School District hereby appeals the decision of your
36 Executive Director wherein she severed Sections 11510 through 11517 of Title 5,
37 California Code of Regulations, from its Test Claim 03-TC-06 ("California English
38 Language Development Test II" - "CELDT II") and consolidated only those sections with
39 Test Claim 00-TC-16 ("California English Language Development Test" - "CELDT").

1 Since the hearing on "CELDT" is tentatively set for hearing on September 30, 2004,
2 Test Claimant requests that this appeal be heard by the Commission at its regularly
3 scheduled hearing on July 29, 2004.

4
5 Statement of Facts
6

7 1. On June 13, 2001, Modesto City School District filed test claim 00-TC-16,
8 "California English Language Development Test" ("CELDT"), alleging that activities
9 mandated by Education Code sections 313, 60810, 60811 and 60812 required school
10 districts and county offices of education to incur costs which are reimbursable by the
11 California Constitution, Article XIII B, section 6.

12 2. On September 22, 2003, Test Claimant, Castro Valley Unified School District,
13 filed test claim 03-TC-06, "California English Language Development Test II" ("CELDT
14 II"), alleging that activities mandated by Education Code sections 48985, 52164,
15 52164.1, 52164.2, 52164.3, 52164.5 and 52164.6 and by Title 5, California Code of
16 Regulations, sections 11301 through 11316 and 11510 through 11517 (not
17 consecutive) required school districts and county offices of education to incur costs
18 which are reimbursable by the California Constitution, Article XIII B, section 6.

19 3. Both test claims, CELDT and CELDT II, have the California English Language
20 Development Test as their legal and factual nexus.

21 4. On June 3, 2004, the Executive Director of this Commission mailed a notice of
22 her intention to sever sections 11510 through 11517 of Title 5, California Code of

1 Regulations, from test claim 03-TC-06 and consolidate only those severed sections with
2 test claim 00-TC-16. A copy of the notice of the Executive Director is attached hereto
3 as Exhibit "A" and is incorporated herein by reference.

4 5. The Exhibit "A" letter states, in part: "If the parties in interest do not object, this
5 consolidation would be effective June 15, 2004."

6 6. By letter dated June 7, 2004, test claimant objected to the proposed severance
7 and consolidation. A copy of the letter of objection dated June 7, 2004 is attached
8 hereto as Exhibit "B" and is incorporated herein by reference.

9 7. Since your Executive Director has not responded to test claimant's letter of
10 objection, test claimant must assume that the objection has been overruled.

11 8. Therefore, test claimant must make this appeal to the Commission.

12 **II**
13 **Regulatory Authority**
14

15 Title 2, California Code of Regulations, Section 1183.06¹, subdivision (a),

¹ Title 2, California Code of Regulations, Section 1183.06:

"(a) The executive director may consolidate part or all of any test claim with another test claim, if necessary to ensure the complete, fair, or timely consideration of any test claim.

(b) At least ten (10) days before the action is taken, the executive director shall simultaneously serve on the parties and interested parties notice of any proposed action to consolidate.

(c) Test claims may be consolidated if submitted by two or more claimants and if the following exist in the filings: the test claimants allege state mandated costs resulting from the same statute or executive order; and the claimants have designated one contact person to act as the resource for information regarding the test claim.

(d) Any party may appeal to the commission for review of the actions and

1 provides that the Executive Director may consolidate part or all of any test claim with
2 another test claim, if necessary to ensure the complete, fair, or timely consideration of
3 any test claim. Subdivision (b) provides that the Executive Director shall simultaneously
4 serve on the parties and interested parties a notice of any proposed action to
5 consolidate at least ten (10) days before the action is taken. Subdivision (d) provides
6 that any party may appeal the actions and decisions of the Executive Director to the
7 commission, pursuant to Section 1181 of these regulations. Section 1181², subdivision

decisions of the executive director under this Section pursuant to Section 1181 of these regulations."

1. New section filed 7-23-96; operative 7-23-96. Submitted to OAL for printing only (Register 96, No. 30).
2. Amendment of subsection (c) and new subsection (d) filed 9-13-99; operative 9-13-99. Submitted to OAL for printing only pursuant to Government Code section 17527 (Register 99, No. 38).

² Title 2, California Code of Regulations, Section 1181:

"(a) Whenever it is stated in these rules that the "commission" may or shall exercise or discharge any power, duty, purpose, function, or jurisdiction, the Commission on State Mandates specifically has reserved the same for its own exclusive action.

(b) Whenever it is stated the "executive director" may or shall exercise or discharge any power, duty, purpose, function, or jurisdiction, or it is not expressly stated that the commission itself shall so act, the executive director of the commission has the authority to act thereon.

(c) Any party in interest may appeal to the commission for review of the actions and decisions of the executive director.

(d) Nothing herein prohibits the executive director from delegating to his/her subordinates as provided in Section 18572 of the Government Code."

1. New Chapter 2.5 (Articles 1-4 and 6-8, Sections 1181-1189.5, not consecutive) filed 7-8-85; effective thirtieth day thereafter. Submitted to OAL for filing and printing only

1 (c), provides that any party in interest may appeal the actions and decisions of the
2 Executive Director directly to the Commission for review,

3 III
4 **Statement of Grounds**
5

6 The executive director is empowered to consolidate part or all of any test claim
7 with another test claim to ensure the complete, fair, or timely consideration of any test
8 claim. Test claimant appeals the decision of the Executive Director on the grounds that
9 the proposed severance and consolidation is not complete, fair or timely.

10 Both test claims have, as a nexus, the California English Language Development
11 Test. Neither test claim can stand alone without reference to the California English
12 Language Development Test. Test claimant requests the Commission to take notice of
13 the following:

- 14 1. A hearing and decision on "CELDT", as proposed by the Executive Director,
15 without a concurrent hearing and decision on "CELDT II", would be a waste of the
16 Commission's valuable time and limited resources as it would then be required to hear
17 and consider some of the same issues twice.
- 18 2. A hearing and decision on "CELDT", as proposed by the Executive Director,
19 without a concurrent hearing and decision on "CELDT II" would deny this test claimant
20 substantive due process of law in that issues common to both test claims would be

pursuant to Government Code Section 17517(g) (Register 85, No. 28). For history of
former Chapter 2.5, see Registers 80, No. 17 and 77, No. 2).

1 heard and decided without the participation of this test claimant. Test claimant would
2 be estopped or barred from asserting or arguing those issues at a second hearing on its
3 test claim.

4 3. A hearing and decision on "CELDT", as proposed by the Executive Director,
5 without a concurrent hearing and decision on "CELDT II" would deny this test claimant
6 substantive and procedural due process of law in that issues raised only by this test
7 claimant would be severed and thereby heard and decided without the participation of
8 this test claimant.

9 4. The best and most efficient way of ensuring the complete, fair and timely
10 consideration of these matters would be to consolidate both test claims in their entirety
11 and have the heard and considered concurrently.

12 **IV**
13 **Requested Action**
14

15 Wherefore, this test claimant requests the Commission to issue its order that the
16 decision of the Executive Director to sever and consolidate, as proposed in her notice
17 dated June 3, 2004, be vacated and that she be instructed instead to consolidate both
18 test claims for hearing and decision.

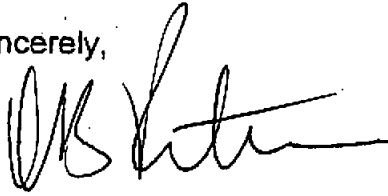
19 Dated: June 23, 2004

20 **V**
21 **CERTIFICATION**
22

23 I certify by my signature below, under penalty of perjury under the laws of the State of
24 California, that the statements made in this document are true and complete to the best

1 of my own personal knowledge or information and belief.

2
3 Sincerely,

4 
5
6
7

8 Keith B. Petersen

9
10 C: Per Mailing List Attached
11

DECLARATION OF SERVICE

RE: California English Language Development Test II 03-TC-06
CLAIMANT: Castro Valley Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of June 23, 2004, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

AND per mailing list attached

FAX: (916) 445-0278

U.S. MAIL: I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

FACSIMILE TRANSMISSION: On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

OTHER SERVICE: I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

 (Describe)

A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

PERSONAL SERVICE: By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 6/24/04, at San Diego, California.


Diane Bramwell

Commission on State Mandates

Original List Date: 6/15/2001 Mailing information: Other
Last Updated: 6/1/2004
List Print Date: 06/03/2004 Mailing List
Claim Number: 00-TC-16
Issue: California English Language Development Test (CELDT)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816
Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814
Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814
Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814
Tel: (916) 446-7517
Fax: (916) 446-2011

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730
Tel: (866) 481-2642
Fax: (866) 481-5383

Ms. Sandy Reynolds

Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964

Fax: (909) 672-9963

Mr. Steve Smith

Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Claimant Representative

Tel: (916) 483-4231

Fax: (916) 483-1403

Ms. Harneet Barkschat

Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350

Fax: (916) 727-1734

Mr. Keith Gmeinder

Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. Keith B. Petersen

SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605

Fax: (858) 514-8645

Ms. Lynn Jamison

Modesto City School District
426 Locust Street
Modesto, CA 95351

Claimant

Tel: (209) 576-4196

Fax:

Ms. Alexandra Condon

California Teachers Association
6 Red River Ct
Sacramento, CA 95831-3036

Tel: (707) 468-7877

Fax:

Mr. David E. Scribner

Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels

State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Deborah S. Bailey

Modesto City School District
426 Locust Street

Tel: (209) 576-4196

Fax:



Commission on State Mandates

Original List Date: 9/30/2003 Mailing Information: Other
Last Updated: 6/3/2004
List Print Date: 06/03/2004 Mailing List
Claim Number: 03-TC-06
Issue: California English Language Development Test - 2

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant Representative Tel: (858) 514-8605 Fax: (858) 514-8645
--	--

Mr. Jerry Macy Castro Valley Unified School District 4400 Alma Avenue Castro Valley, CA 94546	Claimant Tel: (510) 537-3335 Fax: (510) 886-7529
--	---

Carol Berg Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: (916) 446-7517 Fax: (916) 446-2011
--	--

Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Tel: (916) 646-1400 Fax: (916) 646-1300
---	--

Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916) 727-1350 Fax: (916) 727-1734
---	--

Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Tel: (909) 672-9964 Fax: (909) 672-9963
---	--

Mr. Steve Smith

Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Tel: (916) 483-4231

Fax: (916) 483-1403

Mr. Arthur Palkowitz

San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Tel: (619) 725-7565

Fax: (619) 725-7569

Mr. Steve Shields

Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310

Fax: (916) 454-7312

Ms. Beth Hunter

Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642

Fax: (866) 481-5383

Mr. Gerald Shelton

California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554

Fax: (916) 327-8306

Mr. Keith Gmeinder

Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. David E. Scribner

Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels

State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Deborah S. Bailey

Modesto City School District
426 Locust Street
Modesto, CA 95351

Tel: (209) 576-4196

Fax:

EXHIBIT "A"
NOTICE DATED JUNE 3, 2004

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
 SACRAMENTO, CA 95814
 PHONE: (916) 323-3562
 FAX: (916) 445-0278
 E-mail: csminfo@csm.ca.gov



June 3, 2004

Keith Petersen, President
 SixTen and Associates
 5252 Balboa Ave, Suite 807
 San Diego, CA 92117

Deborah S. Bailey
 Associate Superintendent of Business
 Services
 Modesto City School District
 426 Locust Street
 Modesto, CA 95351

And interested parties – see enclosed mailing list

Re: Notice to sever Title 5, California Code of Regulations sections 11510 – 11517 from 03-TC-06, *California English Language Development Test II* and consolidate them with 00-TC-16, *California English Language Development Test*

On June 13, 2001, claimant Modesto City School District filed test claim 00-TC-16, *California English Language Development Test* ("CELDT"). Claimant did not plead the regulations implementing the program: California Code of Regulations, title 5, sections 11510 - 11517. The CELDT claim is tentatively scheduled for hearing on September 30, 2004.

On September 22, 2003, claimant Castro Valley Unified School District filed test claim 03-TC-06, *California English Language Development Test II* ("CELDT II"). In its claim, claimant included sections 11510 - 11517 of the title 5 regulations, which implement the program pled in CELDT.

Therefore, California Code of Regulations, title 5, sections 11510 – 11517 are being severed from the CELDT II test claim and consolidated with the CELDT test claim. This is pursuant to the Executive Director's authority to consolidate all or part of a claim "to ensure the complete, fair, or timely consideration" of the claim. (Cal. Code Regs., tit. 2, § 1183.06, subd. (a)). If the parties in interest do not object, this consolidation would be effective June 15, 2004.

The parties in interest may appeal any decision of the Executive Director pursuant to California Code of Regulations, title 2, section 1181, subdivision (c).

Please contact Eric Feller, (916) 323-8221, if you have any questions.

Sincerely,

PAULA HIGASHI
 Executive Director

J:\mandates\2003\tc\03-tc-06\severltr.doc

Commission of State Mandates

Original List Date: 9/30/2003
Last Updated: 6/3/2004
Last Print Date: 06/03/2004
Claim Number: 03-TC-06
Issue: California English Language Development Test - 2

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant Representative Tel: (858) 514-8605 Fax: (858) 514-8645
--	--

Mr. Jerry Macy Castro Valley Unified School District 4400 Alma Avenue Castro Valley, CA 94546	Claimant Tel: (510) 537-3335 Fax: (510) 886-7529
--	---

Mr. Carol Berg Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: (916) 446-7517 Fax: (916) 446-2011
--	--

Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Tel: (916) 646-1400 Fax: (916) 646-1300
---	--

Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916) 727-1350 Fax: (916) 727-1734
---	--

Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Tel: (909) 672-9964 Fax: (909) 672-9963
---	--

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Tel: (916) 483-4231

Fax: (916) 483-1403

Mr. Arthur Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Tel: (619) 725-7565

Fax: (619) 725-7569

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310

Fax: (916) 454-7312

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642

Fax: (866) 481-5383

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554

Fax: (916) 327-8306

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256

Fax: (916) 323-6527

Ms. Deborah S. Bailey
Modesto City School District
426 Locust Street
Modesto, CA 95351

Tel: (209) 576-4196

Fax:

Commission on State Mandates

Original List Date: 6/15/2001 Mailing Information: Other
Last Updated: 6/1/2004
Last Print Date: 06/03/2004 Mailing List
Claim Number: 00-TC-16
Issue: California English Language Development Test (CELDT)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816
Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814
Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814
Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814
Tel: (916) 446-7517
Fax: (916) 446-2011

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730
Tel: (866) 481-2642
Fax: (866) 481-5383

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964
Fax: (909) 672-9963

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Claimant Representative
Tel: (916) 483-4231
Fax: (916) 483-1403

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913
Fax: (916) 327-0225

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605
Fax: (858) 514-8645

Ms. Lynn Jamison
Modesto City School District
426 Locust Street
Modesto, CA 95351

Claimant
Tel: (209) 576-4196
Fax:

Ms. Alexandra Condon
California Teachers Association
6 Red River Ct
Sacramento, CA 95831-3036

Tel: (707) 468-7877
Fax:

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060
Fax: (916) 373-1070

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax: (916) 323-6527

Ms. Deborah S. Bailey
Modesto City School District
426 Locust Street

Tel: (209) 576-4196
Fax:



EXHIBIT "B"
LETTER DATED JUNE 7, 2004

SixTen and Associates

Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

June 7, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 00-TC-16
Modesto City School District
California English Language Development Test

Test Claim 03-TC-06
Castro Valley Unified School District
California English Language Development Test II

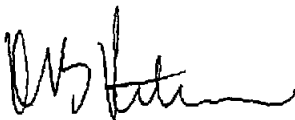
Dear Ms. Higashi:

I have received your letter dated June 3, 2004 which proposes to sever a portion (certain Title 5 Regulations) of the Castro Valley test claim and consolidate only that portion with the test claim of Modesto City School District.

Castro Valley Unified School District objects to this procedure. Castro Valley believes that it would be a better procedure to consolidate the two test claims in their entirety, or not at all.

Both test claims allege identical portions of the Education Code and a ruling on those Education Code sections should be made at the same time. The proposed severance would also deprive Castro Valley of being a party to the proceedings on regulations which it has alleged as part of its test claim.

Sincerely,



Keith B. Petersen

Commission on State Mandates

Original List Date: 9/30/2003 Mailing Information: Other
Last Updated: 6/3/2004
List Print Date: 06/03/2004 Mailing List
Claim Number: 03-TC-06
Issue: California English Language Development Test - 2

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Keith B. Petersen SixTen & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Claimant Representative Tel: (858) 514-8605 Fax: (858) 514-8645
--	--

Mr. Jerry Macy Castro Valley Unified School District 4400 Alma Avenue Castro Valley, CA 94546	Claimant Tel: (510) 537-3335 Fax: (510) 886-7529
--	---

Dr. Carol Berg Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: (916) 446-7517 Fax: (916) 446-2011
--	--

Mr. Paul Minney Spector, Middleton, Young & Minney, LLP 7 Park Center Drive Sacramento, CA 95825	Tel: (916) 646-1400 Fax: (916) 646-1300
---	--

Ms. Harmeet Barkschat Mandate Resource Services 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916) 727-1350 Fax: (916) 727-1734
---	--

Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 987 Sun City, CA 92586	Tel: (909) 672-9964 Fax: (909) 672-9963
---	--

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4533 Whitney Avenue, Suite A
Sacramento, CA 95821

Tel: (916) 483-4231
Fax: (916) 483-1403

Mr. Arthur Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Tel: (619) 725-7565
Fax: (619) 725-7569

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642
Fax: (866) 481-5383

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Keith Gmeinder
Department of Finance (A-15)
5 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913
Fax: (916) 327-0225

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060
Fax: (916) 373-1070

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax: (916) 323-6527

Ms. Deborah S. Bailey
Modesto City School District
426 Locust Street
Modesto, CA 95351

Tel: (209) 576-4196
Fax:

Commission on State Mandates

Original List Date: 6/15/2001
Last Updated: 6/1/2004
List Print Date: 06/03/2004
Claim Number: 00-TC-16
Issue: California English Language Development Test (CELDT)

Mailing Information: Other
Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 324-4888

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

Tel: (916) 446-7517
Fax: (916) 446-2011

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Tel: (866) 481-2642
Fax: (866) 481-5383

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964
Fax: (909) 672-9963

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Claimant Representative
Tel: (916) 483-4231
Fax: (916) 483-1403

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913
Fax: (916) 327-0225

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605
Fax: (858) 514-8645

Ms. Lynn Jamison
Modesto City School District
426 Locust Street
Modesto, CA 95351

Claimant
Tel: (209) 576-4196
Fax:

Ms. Alexandra Condon
California Teachers Association
6 Red River Ct
Sacramento, CA 95831-3036

Tel: (707) 468-7877
Fax:

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060
Fax: (916) 373-1070

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax: (916) 323-6527

Ms. Deborah S. Bailey
Modesto City School District
426 Locust Street

Tel: (209) 576-4196
Fax:



**COMMISSION ON STATE MANDATES**

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csmInfo@csm.ca.gov

July 28, 2004

Ms. Lynn Jamison
Director of State and Federal Programs
Modesto City School District
426 Locust Street
Modesto, CA 95351

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: **Draft Staff Analysis and Hearing Date**
California English Language Development Test, 00-TC-16
Modesto City School District, Claimant
Education Code sections 313, 60810, 60811, 60812
Statutes 1997, chapter 936, Statutes 1999, chapter 78, Statutes 1999, chapter 678,
Statutes 2000, chapter 71

Dear Ms. Jamison:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **August 18, 2004**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is tentatively set for hearing on **Thursday, September 30, 2004** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about September 9, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Ms. Lynn Jamison

July 28, 2004

Page 2.

If you have any questions on the above, please contact Eric Feller at (916) 323-8221.

Sincerely,



PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

j:\mandates\2000\tc\00tc14\corres\dsaltr.doc

MAILED: Mail List FAXED: _____
DATE: 7/28/04 INITIAL: LJ
CHRON: _____ FILE: X
WORKING BINDER: _____

ITEM __

**TEST CLAIM
DRAFT STAFF ANALYSIS**

Education Code Sections 313, 60810, 60811, 60812
Statutes 1997, Chapter 936, Statutes 1999, Chapter 78, Statutes 1999, Chapter 678, Statutes
2000, Chapter 71

California English Language Development Test (00-TC-16)

Modesto City School District, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS

STAFF ANALYSIS

Claimant

Modesto City School District

Chronology

- 06/13/01 Claimant Modesto City School District files test claim with the Commission on State Mandates (Commission)
- 07/17/01 Claimant files an amended declaration with the Commission
- 08/31/01 Department of Finance (DOF) files comments on test claim with the Commission
- 10/04/01 Claimant files response to DOF's comments
- 09/03/03 MCS Education Services files notification that it is seeking authorization to act as claimant representative, and requests to be added to the mailing list
- 09/05/03 Paul Minney files notice of withdrawal as claimant representative and requests to be removed from the mailing list
- 06/03/04 Commission files notice to sever Title 5, California Code of Regulations sections 11510 – 11517 from 03-TC-06, *California English Language Development Test II (CELDT II)* and consolidate them with 00-TC-16, *California English Language Development Test (CELDT)*
- 06/09/04 Keith Petersen, claimant representative for CELDT II test claim, files objection to severance and consolidation
- 06/25/04 Keith Petersen files appeal of the decision to sever and consolidate, and motion to consolidate both CELDT and CELDT II test claims.
- 07/01/04 Commission rescinds decision to sever Title 5, California Code of Regulations sections 11510 – 11517 from 03-TC-06, CELDT II and consolidate them with 00-TC-16, CELDT.
- 07/28/04 Commission issues draft staff analysis

Background

A. Test Claim Legislation

The legislative history of Assembly Bill No. 748 (Stats. 1997, ch. 936) outlined the challenge posed by English-learner pupils as follows:

Approximately 1.3 million students enrolled in California's public K-12 system are English learners (also called "limited-English-proficient," or LEP pupils). This amounts to approximately 20% of the K-12 population. English learners also make up approximately 40% of the population in the first two grades of school. Approximately 78% of English learners statewide speak Spanish as their primary

language, and roughly 4% of English learners speak Vietnamese as their primary language.¹

The California English Language Development Test (CELDT) was instituted for the following reasons:

- (1) To identify pupils who are limited English proficient.
- (2) To determine the level of English language proficiency of pupils who are limited English proficient.
- (3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.²

Statutes 1997, chapter 936 requires the Superintendent of Public Instruction (SPI) to review existing tests that assess English-language development (of limited English proficient or L.E.P. or English-learner pupils) for specified criteria, and to report to the Legislature with recommendations. If no existing test meets the criteria, the SPI is required to explore the option of a collaborative effort with other states to develop a standardized test or series of tests and authorizes the SPI to contract with a local education agency to develop the test or series of tests or to contract to modify an existing test or series of tests (§ 60810).³ It also requires the State Board of Education (SBE) to approve standards for English-language development for pupils whose primary language is other than English (§ 60811).

Statutes 1999, chapter 78 amended section 60810 to require the SPI and SBE to release a request for proposals for the development of the test no later than August 15, 1999, and select a contractor by September 15, 1999, for the test to be available for administration during the 2000-01 school year. It also amends section 60811 to require the SPI to develop the standards for English-language development by July 1, 1999.

Statutes 1999, chapter 678 added section 313 to require English-learner pupils be tested upon enrollment and annually until they are redesignated as English proficient. Section 60812 was also added to require the SPI to post the test results on the Internet. Finally, the bill included the statement:

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.⁴

Statutes 2000, chapter 71 amended section 313 to clarify that the English-language assessment must be conducted at a time appointed by the SPI, and clarifies that districts are authorized to test more than once.

¹ Assembly Floor analysis, Assembly Bill No. 748 (1997-1998 Reg. Sess.) as amended September 4, 1997, page 3.

² Education Code section 60810, subdivision (d).

³ Statutory references are to the Education Code unless otherwise indicated.

⁴ Statutes 1999, chapter 678, section 4.

B. Prior and Preexisting State Law

The Chacon – Moscone Bilingual Bicultural Education Act of 1976 (§§ 52160-52178), as amended,

[S]et forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs [sic] was to increase fluency in the English language for L.E.P. students. Secondly, the ‘programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement,...’ (§ 52161).⁵

The Chacon - Moscone Act was sunset in 1987 (§ 62000.2, subd. (d)), but funding continued “for the intended purposes of the program.” As stated in one of the sunset statutes, “The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative....” (§ 62002). The sunset statute also provided for termination of bilingual education categorical funding, as follows:

[I]f the [SPI] determines that a school district or county superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the [SPI] may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year.⁶

Thus, “even after the Act’s provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002.” In 1987, the California Department of Education (CDE) issued a program advisory on how the sunset statutes affected bilingual education.⁸ The advisory outlined the funding requirements for bilingual education, including spending funds for the general purposes of the program and identification and allocation formulas.

In 1998, Proposition 227 (§§ 300 – 340, not including § 313) was adopted by the voters. It requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year.⁹ The requirement may be waived if parents or guardians

⁵ *McLaughlin v. State Board of Education* (1999) 75 Cal.App. 4th 196, 203-204.

⁶ Education Code section 62005.5.

⁷ *McLaughlin v. State Board of Education, supra*, 75 Cal.App. 4th 196, 204.

⁸ Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2, California State Department of Education, August 26, 1987.

⁹ Education Code section 305.

show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.¹⁰ Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English.¹¹

The regulations implementing Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300 – 11316) cover topics such as how to determine whether the pupil is English proficient, duration of services, reclassification, monitoring, documentation, annual assessment, census, advisory committees, parental exception waivers, community-based English tutoring, and notice to parents or guardians.¹²

Statutes 1999, chapter 678, the test claim statute that added section 313, included a statement that it was supplementary to rather than amendatory of Proposition 227.¹³

C. Preexisting Federal Law

Title VI of the Civil Rights Act (42 U.S.C. § 2000 (d)) prohibits discrimination under any program or activity receiving federal financial assistance.

In *Lau v. Nichols* (1974) 414 U.S. 563, the U.S. Supreme Court held that San Francisco's failure to provide supplemental English-language instruction to students of Chinese ancestry violated Title VI of the Civil Rights Act. The Court stated that those students were denied a meaningful opportunity to participate in the public educational program.¹⁴

The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal opportunity for national origin minority students. It states, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ ... ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

The term "appropriate action" used in that provision indicates that the federal legislature did not mandate a specific program for language instruction, but rather conferred substantial latitude on state and local educational authorities in

¹⁰ *McLaughlin v. State Board of Education, supra*, 75 Cal.App. 4th 196, 217.

¹¹ Education Code section 305.

¹² These were pled as part of Test Claim 03-TC-06, *California English Language Development Test II*.

¹³ "The Legislature finds and declares that this act provides an assessment mechanism that is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227, approved by the voters at the June 2, 1998, primary election)." Statutes 1999, chapter 678, section 3.

¹⁴ However, *Lau* has been overruled to the extent that discriminatory intent must be shown for a Title VI or Equal Protection Clause violation, rather than discriminatory impact (*Washington v. Davis* (1976) 426 U.S. 229; *University of California Regents v. Bakke* (1978) 438 U.S. 265, 352).

choosing their programs to meet the obligations imposed by federal law. *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F. 2d 1030, 1040.

There have been federal cases to interpret section 1703 (f), including: *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989; and *Keyes v. School Dist. No. 1* ((D. Colo. 1983) 576 F. Supp. 1503). According to *Castaneda*, "...proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."¹⁵ The *Castaneda* court also devised a three-part test to determine whether a program complies with section 1703 (f). The court must examine carefully the following: (1) the evidence in record concerning the soundness of the educational theory of principles upon which the challenged program is based, and (2) whether the programs and practices actually used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school. And (3) if a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may no longer constitute appropriate action as far as that school is concerned.¹⁶

In *Keyes*, the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "flawed by the failure to adopt adequate tests to measure the results of what the district is doing. ...The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy" (p. 1518).

In 1994, Congress enacted the Improving America's School's Act (IASA) that required an annual assessment of English proficiency.¹⁷ In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. NCLB requires states, by school year 2002-2003, to "provide for an annual assessment of English proficiency ... of all students with limited English proficiency ..." (20 U.S.C. § 6311 (b)(7)). One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371).

D. Related Test Claims

In March 2004, the Commission adopted a Statement of Decision on test claim 00-TC-06, High School Exit Examination (HSEE). The decision includes a finding on California Code of Regulations, title 5, section 1217.5, which requires school districts to evaluate pupils to determine if they possess sufficient English-language skills at the time of the HSEE to be assessed with the test. Because former Education Code section 51216 already required English-language assessments, the Commission found that section 1217.5

¹⁵ *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989, 1014. 1009-1010.

¹⁶ *Id.* at pages 1009-1010.

constitutes a reimbursable mandate only for the activity of determining whether an English-learner pupil possesses sufficient English-language skills at the time of the HSEE to be assessed with it.

A more recent (pending) test claim, 03-TC-06, *California English Language Development Test II*, pled the other statutes¹⁷ and regulations¹⁸ related to the California English Language Development Test. The CELDT II claimant alleges activities such as parent notices, language census, determination of primary language, assessment of language skills, census review and correction, designation of pupils as limited English proficient, reports to CDE, and reclassification of pupils.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

- Field testing the CELDT as required by the CDE,
- Initial assessment of all K-12 students with a home language other than English,
- Annual assessment of all students not classified as English proficient using the CELDT,
- Adherence to all requirements and performance of all activities detailed in the CELDT Test Coordinator's Manual or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements,
- Training district staff regarding the test claim activities,
- Drafting or modifying policies and procedures to reflect the test claim activities, and
- Any additional activities identified as reimbursable during the parameters and guidelines phase.

Claimant responds to DOF's comments (summarized below) that the CELDT is not federally mandated. Claimant contends that the following activities represent reimbursable state-mandated activities: (1) initial assessing every K-12 student with a home language other than English, and (2) annually assessing all students not classified as English proficient. Claimant argues that the state has gone beyond the requirements found in federal law, imposing a state mandate for the CELDT. Specifically, claimant asserts:

While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, these requirements does [sic] not preclude reimbursement for the

¹⁷ Education Code sections 48985 and 52164 – 52164.6.

¹⁸ California Code of Regulations, title 5, sections 11300 – 11316. Test claim 03-TC-06 also includes the title 5 regulations (§§ 11510 – 11517) for the CELDT, such as parental notification, record keeping, test security, and district and test site coordinators' duties.

activities and costs imposed upon school districts by the test claim legislation. Moreover, Title VI, and its regulations, as well as OCR, [Office of Civil Rights of the U.S. Department of Education] do not specify how states and school districts must comply with the Civil Rights Act of 1964. ...

Claimant points out that before enactment of the test claim legislation, school districts had a choice as to which assessment instrument the district would use to determine students' English proficiency and subsequent placement in appropriate classes. According to OCR, assessments must include some objective measure of the student's English-language ability, but does not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. Claimant states that CELDT is not required under federal law.

According to claimant:

Federal law only requires state and local educational agencies to ensure that all students have equal access to a state's core curriculum. This goal can be accomplished in countless ways, through numerous different assessments. California has chosen *one* assessment that *all* school districts must use, the CELDT. [Emphasis in original.] ... Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment [the CELDT] ... represents costs imposed upon school districts by the state. The state, not Title VI or the OCR, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law.

Staff notes that claimant did not plead activities regarding reclassification of pupils from English learner to English proficient. Therefore, this claim makes no findings on Education Code section 313, subdivision (d) regarding classification procedures.¹⁹

State Agency Position

In its August 2001 comments on the test claim, DOF comments individually on the activities claimant pled as follows. First, field-testing is embedded in the testing and not separate from it. Second, federal law also requires students to be assessed for English proficiency. Districts should incur savings as the state is providing funding to the CDE to cover the costs of test development, distribution and related costs previously borne by school districts. CELDT's inclusion of reading and writing implements federal requirements. The OCR enforces Title VI of the Civil Rights Act of 1964, and has stated that assessment of non-English proficient pupils should include reading, writing, and comprehension. OCR has stated that oral language testing only is inadequate, so this is a federal and not a state mandate. Third, regarding annual assessment, OCR has stated that maintaining pupils in an alternative language program longer than necessary to achieve the

¹⁹ It is likely that reclassification would be analyzed in test claim 03-TC-06, *California English Language Development Test II*, as one of the activities pled pursuant to California Code of Regulations, title 5, section 1.1303.

program's goal could violate anti-segregation provisions of Title VI regulations. Further, the OCR has stated that exit criteria employed by the district should be based on objective standards, such as standardized test scores. Thus, schools that do not repeatedly assess their non-English speaking students in a timely manner using a standardized test may violate federal law. Thus, annual assessment is not a state mandate. Fourth, adherence to CDE or publisher manuals should be offset by the current per pupil district apportionment²⁰ to the extent these activities exceed the previous requirements. Fifth, as to training and policies and procedures, any marginal costs should be offset by the current CELDT per pupil district apportionment and any savings resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

No other state agency commented on the test claim.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution²¹ recognizes the state constitutional restrictions on the powers of local government to tax and spend.²² "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."²³ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.²⁴ In addition, the required activity or task must be

²⁰ Although not stated by DOF, the state budget apportioned \$5 per pupil for the English Language Development Test during Fiscal Years 2002-2003, and 2003-2004.

²¹ Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

²² *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

²³ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²⁴ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state

new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.²⁵

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.²⁶ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.²⁷ Finally, the newly required activity or increased level of service must impose costs mandated by the state.²⁸

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.²⁹ In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."³⁰

Issue 1: Does the test claim legislation impose state-mandated activities on school districts within the meaning of article XIII B, section 6?

The issue is whether any of the following statutes constitute state-mandated activities that are subject to article XIII B, section 6.

A. Duties of the Superintendent of Public Instruction (§§ 60810 subs. (a) (c) & (d), 60811 & 60812)

These sections require the SPI to develop the test, create standards for English-language development, and post test results on the website. They also specify the criteria for the SPI-developed test. Because these provisions do not mandate school districts to perform an activity, sections 60810 – 60812 (except § 60810, subd. (b)) are not subject to article XIII B, section 6.

mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.* at p. 754.)

²⁵ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

²⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835.

²⁷ *Lucia Mar Unified School District, supra*, at page 835.

²⁸ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

²⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

³⁰ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma v. Commission on State Mandates, supra*, 84 Cal.App.4th at page 1280.

B. Initial and annual assessment (§§ 313 & 60810 subd. (b))

Subdivision (b) of section 313 requires the SPI to develop procedures for conducting English-language assessment and reclassification. Subdivisions (a) and (c) of section 313 require school districts to assess English-language proficiency for English-learner pupils, and subdivision (c) requires the CELDT to be administered to English-learner pupils upon initial enrollment and annually thereafter until the pupil is redesignated as English proficient. Subdivision (b) of section 60810 specifies the subjects to be tested, such as:

English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English. (§ 60810, subd. (b)).

Therefore, the issues are whether English-language assessment for English-learner pupils is a state-mandated activity subject to article XIII B, section 6, and whether it is a new program or higher level of service.

Staff finds that English-language assessment provisions of section 313 and 60810, subdivision (b) do not constitute a state-mandate on two independent grounds. First, the English-language assessment requirements of Education Code sections 313 and 60810, subdivision (b), do not impose state-mandated activities because their requirements are in preexisting federal law. Second, English-Language assessment is not a new program or higher level of service because it was required by prior and preexisting state law.

Preexisting Federal Law Requires English-language Assessment

If an activity is required by federal law, it does not impose state-mandated duties.³¹ In *City of Sacramento v. State of California*,³² local governments sued for subvention of costs for implementing a 1978 statute that required extending mandatory coverage under the state's unemployment insurance law to state and local governments and nonprofit corporations. The California Supreme Court held that the state statute implemented a federal mandate within the meaning of article XIII B, section 9 (b) of the California Constitution,³³ and therefore does not impose a state mandate.

³¹ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70. *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1581. *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816.

³² *City of Sacramento v. State of California*, *supra*; 50 Cal.3d 51, 70.

³³ "Article XIII B, section 9 (b), defines federally mandated appropriations as those 'required for purposes of complying with mandates of...the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.'" *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 70.

Similarly, in *Hayes v. Commission on State Mandates*, the court held that the federal Education of the Handicapped Act (EHA) is a federal mandate.³⁴ Citing the *City of Sacramento* case, the *Hayes* court held, "state subvention is not required when the federal government imposes new costs on local governments." *Hayes* also held,

To the extent the state implemented the act [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such ... are state mandated and subject to subvention.³⁵

Claimant argues that although federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, this does not preclude reimbursement. Claimant asserts that Title VI of the EEOA and its regulations do not specify how states and school districts must comply with the Civil Rights Act of 1964.

Staff disagrees. Section 1703 (f) of the EEOA, as interpreted by the *Castaneda* and *Keyes* cases cited below, requires states and school districts to conduct English-language assessments to comply with Title VI of the EEOA.

The EEOA (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. The provision at issue is, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ ... ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

In *Castaneda v. Pickard*,³⁶ the Fifth Circuit Court of Appeals interpreted section 1703 (f) of the EEOA in examining English-learner programs of the Raymondville, Texas Independent School District. The court devised the three-part test cited above in determining whether the district's program complies with section 1703 (g).³⁷ According to *Castaneda*, "... proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."³⁸ The court also stated:

Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts.

³⁴ *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564, 1592.

³⁵ *Id.* at page 1594.

³⁶ *Castaneda v. Pickard, supra*, 648 F. 2d 989.

³⁷ *Id.* at pages 1009-1010.

³⁸ *Id.* at page 1014.

Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred.³⁹

Additionally, in order to implement the third prong of the *Castaneda* test - that is, to determine whether the school's program is failing to overcome language barriers after enough time for a legitimate trial - schools must assess pupils' language abilities.⁴⁰

Moreover, in *Keyes v. School Dist. No. 1*,⁴¹ the court held a Denver school district violated section 1703 of the EEOA, in part because of the district's,

...failure to adopt adequate tests to measure the results of what the district is doing. ...The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy.⁴²

Castaneda and *Keyes* affirm that a language assessment test such as the CELDT is required to comply with the EEOA, or more specifically, 20 U.S.C. § 1703 (f). It is noteworthy that *Castaneda* is relied on by CDE as authority for various English-language learner education regulations,⁴³ and *Keyes* and *Castaneda* were relied on in a CDE program advisory⁴⁴ regarding the minimum school districts were required to do in light of the 1987 sunset of the bilingual education statutes.⁴⁵ This indicates CDE's position that *Castaneda* and *Keyes* must be followed. CDE's interpretation of the law in this area is entitled to deference.⁴⁶

As stated above, in *Hayes* the court ruled that to the extent the state implements federal law by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and

³⁹ *Ibid.*

⁴⁰ *Teresa P. v. Berkeley Unified School Dist.* (1989) 724 F. Supp. 698, 715-716.

⁴¹ *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503.

⁴² *Id.* at page 1518.

⁴³ For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

⁴⁴ Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, pursuant to Education Code sections 62000 and 62000.2, California State Department of Education, August 26, 1987, pages 17-18.

⁴⁵ Education Code sections 62000.2 and 62002.

⁴⁶ *Yamaha v. State Board of Equalization* (1998) 19 Cal. 4th 1, 6-7.

subject to subvention.⁴⁷ However, there is no evidence that the state implemented federal law by choosing to impose any newly required acts. The Legislature included the following statement enacted as part of Statutes 1999, chapter 678 (that added section 313).

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.⁴⁸

This statement is evidence of legislative intent to comply with, but not exceed, federal requirements for assessing English-learner pupils. Specifically, it indicates that the state has not chosen to implement federal law by imposing any requirements on school districts beyond the requirements of 20 U.S.C. § 1703 (f) and the cases cited above.

Therefore, staff finds that sections 313 and 60810, subdivision (b), do not impose state-mandated duties on school districts within the meaning of article XIII B, section 6 because preexisting federal law requires testing.

Issue 2: Does the test claim statute impose a new program or higher level of service on school districts subject to article XIII B, section 6?

Staff also finds, as alternative grounds for denial, that English-language assessment is not a reimbursable state mandate because it is not a new program or higher level of service.

To determine if the "program" is new or imposes a higher level of service subject to article XIII B, section 6, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.⁴⁹

In rebuttal comments, claimant argues that while assessments must include some objective measure of the student's English-language ability, they do not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. In the test claim, claimant cited prior law as Education Code section 52164.1 and California Code of Regulations, title 5, section 4303, arguing that although language assessment was required under prior law, the CELDT is a new instrument. Claimant also argues that the CELDT requires assessing students in grade 2 in reading and writing as well as listening and speaking, whereas section 52164.1 did not require reading and writing skills to be assessed for pupils in grades 1 and 2.

Staff does not rely on section 52164.1 or section 4303 of the title 5 regulations because these were sunset in 1987.⁵⁰ As to claimant's argument regarding a school district losing

⁴⁷ *Hayes v. Commission on State Mandates*, supra, 11 Cal. App. 4th 1564, 1594.

⁴⁸ Statutes 1999, chapter 678, section 4.

⁴⁹ *Lucia Mar Unified School Dist. v. Honig*, supra, 44 Cal.3d 830, 835.

⁵⁰ Education Code section 62000.2, subdivision (d). Also, section 62002 states, "The funds shall be used for the intended purposes of the program, but *all relevant statutes and*

the option of which assessment it may choose, that is not reason to find a reimbursable mandate. In *County of Los Angeles v. Commission State Mandates* (2003) 110 Cal. App. 4th 1176, 1194, the court held that a loss of flexibility does not rise to the level of a state-mandated reimbursable program.

Before enactment of the test claim statute, language assessments were required on request by the pupil or parent, and required to obtain a diploma. (Former § 51216, subds. (a) & (b), which were not part of the bilingual education act that sunset in 1987.) There is nothing in the record to indicate that the CBLDT is a higher level of service than the school districts' assessments under prior law.

Moreover, before the test claim statute was enacted, the voters enacted Proposition 227 in 1998.⁵¹ In CDE's regulations on Proposition 227, CDE interpreted the initiative to require English-language assessments. California Code of Regulations, title 5, section 11301,⁵² subdivision (a) states:

For purposes of "a good working knowledge of English" pursuant to Education Code Section 305 and "reasonable fluency in English" pursuant to Education Code Section 306 (c), an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments.

This regulation was operative July 23, 1998, well before January 2000 effective date of section 313 (Stats. 1999, ch. 678). Therefore, because English language assessment required by the test claim statute is not a new program or higher level of service, staff finds that it is not a reimbursable state-mandated program.

CONCLUSION

Therefore, staff finds that Education Code sections 313, 60810, 60811, and 60812, as added or amended by Statutes 1997, chapter 936, Statutes 1999, chapters 78 and 678, and Statutes 2000, chapter 71, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and deny the test claim.

regulations adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5." [Emphasis added.] Section 62002.5 concerns parent advisory committees and school site councils.

⁵¹ Proposition 227 was effective June 3, 1998. Section 313 of the Education Code was enacted by Statutes 1999, chapter 678, effective January 1, 2000.

⁵² This regulation was pled as part of Test Claim 03-TC-06, *California English Language Development Test II*.

AB 748

Page 1

CONCURRENCE IN SENATE AMENDMENTS

AB 748 (Escutia)

As Amended September 4, 1997

Majority vote

ASSEMBLY: 41-30 (June 4, 1997) SENATE: 24-14 (September 8, 1997)Original Committee Reference: ED.

SUMMARY : Requires the adoption of a statewide test of English language development for English learners and requires the State Board of Education to adopt standards for English language development for English learners.

The Senate amendments :

- 1) Eliminate the requirement that the Superintendent of Public Instruction (SPI) develop a test of English language development and instead require the SPI to review existing tests to determine whether any meet specified criteria and report to the Legislature. The SPI may also enter a collaborative effort with other states to develop a test, or contract with a local education agency to develop a test. Requires the SPI to report to the Legislature on its progress by January 1, 1998 and to adopt or develop a test by January 1, 1999.
- 2) Eliminate the requirement that all districts use this English language development test for all their English learners and instead make its use optional for districts.
- 3) Slightly change the purposes for the statewide English language development test by eliminating the following purposes: determining when a pupil should be included in the statewide assessment of academic skills, and determining in what language pupils should be tested for academic achievement.

EXISTING LAW :

- 1) Does not identify a statewide uniform assessment tool for districts to use to identify English learners, although it does require districts to assess English language fluency in some way to identify English learners.
- 2) Governing bilingual education in California has been inoperative (i.e., sunset in 1987); however, the law is still contained in the Education Code as the Chacon-Moscone Bilingual-Bicultural Education Act of 1976.

Commission on State Mandates

Original List Date: 6/15/2001 Mailing Information: Draft Staff Analysis
Last Updated: 6/3/2004
List Print Date: 07/28/2004 Mailing List
Claim Number: 00-TC-16
Issue: California English Language Development Test (CELDT)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816
Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814
Tel: (916) 323-5849
Fax: (916) 327-0832

Mr. Gerald Shelton
California Department of Education (E-08)
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814
Tel: (916) 445-0554
Fax: (916) 327-8306

Mr. Bob Campbell
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

Dr. Carol Berg
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814
Tel: (916) 446-7517
Fax: (916) 446-2011

Ms. Beth Hunter
Centration, Inc.
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730
Tel: (866) 481-2642
Fax: (866) 481-5383

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

Tel: (909) 672-9964

Fax: (909) 672-9963

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Suite A
Sacramento, CA 95821

Tel: (916) 483-4231

Fax: (916) 483-1403

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350

Fax: (916) 727-1734

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Tel: (916) 445-8913

Fax: (916) 327-0225

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Tel: (858) 514-8605

Fax: (858) 514-8645

Ms. Lynn Jamison
Modesto City School District
426 Locust Street
Modesto, CA 95351

Claimant

Tel: (209) 576-4196

Fax:

Ms. Alexandra Condon
California Teachers Association
6 Red River Ct
Sacramento, CA 95831-3036

Tel: (707) 468-7877

Fax:

Mr. David E. Scribner
Schools Mandate Group
3113 Catalina Island Road
West Sacramento, CA 95691

Tel: (916) 373-1060

Fax: (916) 373-1070

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0258

Fax: (916) 323-6527

Ms. Deborah S. Bailey
Modesto City School District
426 Locust Street

Tel: (209) 576-4196

Fax:

AB 748

Page 1

CONCURRENCE IN SENATE AMENDMENTS

AB 748 (Escutia)

As Amended September 4, 1997

Majority vote

ASSEMBLY: 41-30 (June 4, 1997) SENATE: 24-14 (September 8, 1997)Original Committee Reference: ED.

SUMMARY : Requires the adoption of a statewide test of English language development for English learners and requires the State Board of Education to adopt standards for English language development for English learners.

The Senate amendments :

- 1) Eliminate the requirement that the Superintendent of Public Instruction (SPI) develop a test of English language development and instead require the SPI to review existing tests to determine whether any meet specified criteria and report to the Legislature. The SPI may also enter a collaborative effort with other states to develop a test, or contract with a local education agency to develop a test. Requires the SPI to report to the Legislature on its progress by January 1, 1998 and to adopt or develop a test by January 1, 1999.
- 2) Eliminate the requirement that all districts use this English language development test for all their English learners and instead make its use optional for districts.
- 3) Slightly change the purposes for the statewide English language development test by eliminating the following purposes: determining when a pupil should be included in the statewide assessment of academic skills, and determining in what language pupils should be tested for academic achievement.

EXISTING LAW :

- 1) Does not identify a statewide uniform assessment tool for districts to use to identify English learners, although it does require districts to assess English language fluency in some way to identify English learners.
- 2) Governing bilingual education in California has been inoperative (i.e., sunset in 1987); however, the law is still contained in the Education Code as the Chacon-Moscone Bilingual-Bicultural Education Act of 1976.

AB 748

Page 2

AS PASSED BY THE ASSEMBLY , this bill:

- 1) Required the SPI to develop a test or tests to assess the English language development of pupils in grades K-12 whose primary language is not English (English learners). Required the SPI to utilize standards developed by the State Board of Education (SBE) for English learners in the development of that test. Requires that such a test or tests meet certain requirements. Requires SPI to make the test or tests available to districts free of charge.
- 2) Required the SPI to review existing tests to determine if they meet state standards for English learners, and allowed her/him to contract for the rights of the tests to meet the above requirement.
- 3) Required all school districts to administer the above test or tests to all English learners upon their enrollment and then on an annual basis, for the following purposes:
 - a) To identify English learners;
 - b) To determine the most appropriate instructional program for English learners;
 - c) To assess the progress of English learners in acquiring reading, writing and speaking skills in English;
 - d) To determine when English learners should be included in the annual administration of the statewide test of applied academic skills; and
 - e) To determine in what language English learners should be tested to assess their achievement in basic academic skills.
- 4) Required SBE to approve standards for English language development for English learners. Required that these standards be comparable in rigor to the statewide standards for English language arts (soon to be adopted).
- 5) Required that English learners meet the statewide academically rigorous content and performance standards (soon to be adopted), except where they differ from the standards for English learners.

FISCAL EFFECT : According to the Assembly Appropriations Committee analysis, this bill costs \$500,000 in General Fund (GF) for the

development of the English language development test and \$300,000 in GF for related administrative expenses. This amount (\$800,000) was

□

AB 748

Page 3

appropriated in the Education Trailer bill (AB 1578) and vetoed by the Governor, for restoration pending enactment of legislation meeting the Governor's requirements for pupil testing.

COMMENTS : Approximately 1.3 million students enrolled in California's public K-12 system are English learners (also called "limited-English-proficient," or LEP pupils). This amounts to approximately 20% of the K-12 population. English learners also make up approximately 40% of the population in the first two grades of school. Approximately 78% of English learners statewide speak Spanish as their primary language, and roughly 4% of English learners speak Vietnamese as their primary language.

Analysis prepared by : Leonor Ehling / aed / (916) 445-9431

036271

FN

Westlaw.

75 Cal.App.4th 196

Page 1

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

HJACK McLAUGHLIN et al., Plaintiffs and
Respondents,

v.

STATE BOARD OF EDUCATION et al.,
Defendants and Appellants.

No. A084730.

Court of Appeal, First District, Division 2,
California.

Sept. 27, 1999.

SUMMARY

Several local school districts sought a petition for a writ of mandate commanding the State Board of Education (state board) to accept, consider, and approve requests for general waivers of Prop. 227, the English Language in Public Schools initiative statute (Ed. Code, § 300 et seq.), pursuant to the general waiver provision of Ed. Code, § 33050, which generally allows local school districts to apply to the state board for waivers from program requirements of the Education Code not enumerated in that section. Prop. 227 requires public school children who are of limited English proficiency (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. The trial court granted a writ of mandamus, ordering the state board to consider the general waivers previously submitted. The trial court found that there was nothing in Ed. Code, § 300 et seq. that addressed the general waiver provision of Ed. Code, § 33050, that Ed. Code, § 33050, authorized a waiver procedure as to all or any part of any section of the Education Code, and that the parental waiver exception of Prop. 227 was coexistent with the general waiver procedure outlined in Ed. Code, § 33050. (Superior Court of Alameda County, No. 8008105, Henry E. Needham, Jr., Judge.)

The Court of Appeal reversed the writ of mandamus, and remanded to the trial court with directions. The court held that the general waiver embodied in Ed. Code, § 33050, may not be used as a means to avoid Prop. 227's mandate that, in the absence of parental waivers, LEP students shall be taught English by being taught in English. First, the two statutes could not be harmonized, and the failure to specifically amend Ed. Code, § 33050, to add the core provisions of Prop. 227 was due to an oversight by the initiative's drafters. Second, the subject of public school instruction of LEP students is narrowly addressed by Prop. 227. Combined with the initiative's parental waiver provisions, Prop. 227 is immeasurably more specific than the broad, general references to all or any part of the Education Code contained in *197Ed. Code, § 33050. As such, and given the clear conflict created by the two statutes, the language of Prop. 227 controlled. (Opinion by Ruvolo, J., with Kline, P. J., and Haerle, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Legislature § 5--Powers--Scope--Public School System: Initiative and Referendum § 6--State Elections--Initiative Measures Authority of Voters--Education.

The Legislature's power over the public school system is exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. The voters, acting through the initiative process in enacting statutory law, fulfill the same function and wield the same ultimate legal authority in matters of education as does the Legislature.

(2) Appellate Review § 145--Scope of Review--Questions of Law and Fact-- Function of Appellate Court--Statutory Construction.

Issues of statutory construction are questions of law to which the appellate court accords a de novo standard of review.

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 2

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

(3) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, the court begins by examining the language of the statute. However, language of a statute should not be given a literal meaning if doing so would result in absurd consequences unintended by the Legislature. Thus, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Finally, the courts do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. Moreover, in looking at the relationship between two statutes, literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. An interpretation that renders related provisions nugatory must be avoided. Each sentence must be read not in isolation but in the light of the statutory scheme, and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. *198

(4a, 4b, 4c, 4d) Schools § 66--Activities--Initiative Statute Limited English Proficiency Students to Be Taught in English--Applicability of Preexisting General Waiver Provision: Initiative and Referendum § 6--State Elections--Initiative Measures--English Language in Public Schools.

The trial court erred in granting local school districts' petition for a writ of mandamus commanding the State Board of Education (state board) to accept, consider, and approve requests for general waivers of Prop. 227, the English Language in Public Schools initiative statute (Ed. Code, § 300 et seq.), pursuant to the general waiver provision of Ed. Code, § 33050, which generally allows local school districts to apply to the state board for waivers from program requirements of the Education Code not enumerated in that section. Prop. 227 requires public school children who are of limited English proficiency (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. The general waiver embodied in Ed. Code, § 33050, may not be used as a means to avoid Prop. 227's

mandate that, in the absence of parental waivers, LEP students shall be taught English by being taught in English. First, the two statutes could not be harmonized, and the failure to specifically amend Ed. Code, § 33050, to add the core provisions of Prop. 227 was due to an oversight by the initiative's drafters. Second, the subject of public school instruction of LEP students is narrowly addressed by Prop. 227. Combined with the initiative's parental waiver provisions, Prop. 227 is immeasurably more specific than the broad, general references to all or any part of the Education Code contained in Ed. Code, § 33050. As such, and given the clear conflict created by the two statutes, the language of Prop. 227 controlled.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 120, 121.]

(5) Statutes § 45--Construction--Presumptions--Existing Laws: Initiative and Referendum § 1--Construction.

Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them.

(6) Statutes § 46--Construction--Presumptions--Legislative Intent--Silence.

Legislative silence after a court has construed a statute at *199 most gives rise to an arguable inference of acquiescence or passive approval.

(7) Statutes § 19--Construction--Initiative Measures--Ambiguity: Initiative and Referendum § 1--Construction.

Where statutory language is clear and unambiguous, there is no need to construct the statute, and resort to legislative materials or other external sources is unnecessary. Absent ambiguity, the voters are presumed to have intended the meaning apparent on the face of an initiative measure, and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. In construing the statute, the words must be read in context, considering the nature and purpose of the statutory enactment. However, where the language may appear to be

75 Cal.App.4th 196

Page 3

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

unambiguous and yet a latent ambiguity exists, the courts must go behind the literal language and analyze the intent of the law utilizing customary rules of statutory construction or legislative history for guidance. This may include reference to ballot materials in the case of initiatives in order to discern what the average voter would understand to be the intent of the law upon which he or she was voting.

(8) Statutes § 51--Construction--Codes--Conflicting Provisions--Implied Amendment or Exception.

An act adding new provisions to and affecting the application of an existing statute in a sense amends that statute. An implied amendment is an act that creates an addition, omission, modification, or substitution and changes the scope or effect of an existing statute. Like the related principles of repeal by implication and drafters' oversight, amendments by implication are disfavored but are allowed to preserve statutory harmony and effectuate the intent of the Legislature. The principle of amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(9) Statutes § 19--Construction--Background, Purpose, and Intent of Enactment--General Principles.

One discovers the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. An interpretation *200 that is repugnant to the purpose of the statute would permit the very mischief the statute was designed to prevent. Such a view conflicts with the basic principle of statutory interpretation that provisions of statutes are to be interpreted to effectuate the purpose of the law.

(10) Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions.

Where a general statute standing alone would

include the same matter as a special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one. Furthermore, where a general statute conflicts with a specific statute, the specific statute controls the general one. The referent of general and specific is subject matter. Unless repealed expressly or by necessary implication, a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. This is the case regardless of whether the special provision is enacted before or after the general one, and notwithstanding that the general provision, standing alone, would be broad enough to include the subject to which the more particular one relates.

COUNSEL

Daniel E. Lungren and Bill Lockyer, Attorneys General, Charlton G. Holland III, Chief Assistant Attorney General, Frank S. Furtek, Paul Reynaga and Angela M. Botelho, Deputy Attorneys General, for Defendants and Appellants.

Robert Pongetti, Peter Simshauser and Paul M. Eckles for One Nation/One California, Las Familias del Pueblo, Gloria Matta Tuchman and Travell Louie as Amici Curiae on behalf of Defendants and Appellants.

Sharon L. Browne and Mark T. Gallagher for Pacific Research Institute for Public Policy and Center for Equal Opportunity as Amicus Curiae on behalf of Defendants and Appellants.

Ruiz & Sperow, Celia M. Ruiz, Laura Schulkind and Jennifer M. Joaquin for Plaintiffs and Respondents.

Joseph Jaramillo for Mexican American Legal Defense and Educational Fund as Amicus Curiae on behalf of Plaintiffs and Respondents.

Olson, Hegel, Leidigh, Waters & Fishburn, N. Eugene Hill, George Waters and Abhas Hajela for

75 Cal.App.4th 196

Page 4

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

Education Legal Alliance of the California School Board Association as Amicus Curiae on behalf of Plaintiffs and Respondents. *201

Barbosa Garcia, Jonathan B. Stone and Benjamin D. Nieberg for Sweetwater Union High School District as Amicus Curiae on behalf of Plaintiffs and Respondents.

RUVOLO, J.

I.

Introduction

In the Primary Election held in June 1998, the voters of California passed Proposition 227, the "English Language in Public Schools" initiative statute, creating a new chapter in California's Education Code [FN1] (the Chapter). The enacted statutory scheme requires children in California's public schools who are of "Limited English Proficiency" (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. We are asked to decide solely [FN2] whether the Chapter is subject to the waiver provision of Education Code [FN3] section 33050, which generally allows local school districts to apply to the State Board of Education (State Board) for waivers from program requirements of the Education Code not enumerated in that section. [FN4] The parties and amici curiae [FN5] agree that Proposition 227 is silent as to section 33050.

[FN1] Title 1, division 1, chapter 3, articles 1-9, codified at Education Code sections 300-340.

[FN2] We are neither asked nor required to pass on the constitutionality of Proposition 227. Facial constitutional challenges to Proposition 227 on the grounds that it violates the supremacy clause (art. VI, cl. 2) and the equal protection clause (14th Amend., § 1) of the United States Constitution, as well as the federal Equal Educational Opportunities Act (20 U.S.C. § 1701 et seq.), and title VI of the federal

Civil Rights Act (42 U.S.C. § 2000d) have already been made and rejected in federal court. (*Valeria G. v. Wilson* (N.D.Cal. 1998) 12 F.Supp.2d 1007.)

FN3 All further undesignated statutory references are to the Education Code.

FN4 None of the statutory provisions comprising Proposition 227 are included within the list of exceptions to the general waiver in section 33050.

FN5 Amicus curiae briefs have been filed by the Mexican American Legal Defense and Educational Fund (MALDEF); the Education Legal Alliance of the California School Boards Association (Education Legal Alliance); the Pacific Research Institute for Public Policy and Center for Equal Opportunity (PRI); One Nation/One California, Las Familias del Pueblo, Gloria Matta Tuchman, and Travell Louie; and the Sweetwater Union High School District (Sweetwater).

We conclude that the plain meaning of Proposition 227 was to guarantee that LEP students would receive educational instruction in the English language, and that English immersion programs would be provided to facilitate their transition into English-only classes. Proposition 227 also vests parents of LEP students with the *sole* right to seek a waiver from the Chapter's provision requiring English-only instruction for their own children. The Chapter's language permits no other means by which the program *202 requirements may be waived, and in fact, allows for civil action against school districts, educators, and administrators who fail or refuse to provide English-only instruction (§ 320). To the extent there is any ambiguity as to the intent of Proposition 227, the legislative history clarifies that the Chapter was designed to wrest from school boards and administrators decisionmaking authority for selecting between LEP educational options, and repose this power exclusively in parents of LEP students. Thus, the

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 5

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

Chapter is in direct and irreconcilable conflict with section 33050. In the face of such a " ' "positive repugnancy" ' " (*Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102, 134 [95 S.Ct. 335, 354, 42 L.Ed.2d 320]), under well-recognized principles of statutory construction, the enactment of the Chapter amends by implication section 33050 to except these core provisions of the Chapter from the general waiver process.

Therefore, respondent school boards cannot apply for waivers from the requirements of the entire Chapter under the general waiver authority of section 33050, and the writ of mandamus granted by the trial court is hereby reversed. [FN6] The case is remanded to the trial court with directions to vacate its writ, and instead to issue an order denying the petition.

FN6 As we explain, because the waivers submitted by respondents apparently were general and sought exemption from *all* of the Chapter's sections, in reversing, we take no position as to whether there may be individual sections or subsections of the Chapter which may be waivable. For this reason, and because it is not before this court as a party, we need not decide the merits of amicus curiae Sweetwater's request for a partial waiver of the Chapter's requirements as discussed in its brief.

II.

Factual History

A. Pre-Proposition 227 History of LEP Education in California

(1) It has been repeated innumerable times that "the Legislature's power over the public school system [i]s 'exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints.' [Citations.]" (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 754 [16 Cal.Rptr.2d 727].) Of course, the voters, acting through the initiative process in enacting statutory law, fulfill the same function and wield the same ultimate legal authority in matters of education, as does the Legislature. (Cal. Const., art. II, §§ 1 and 8 ; *Ross v. Brown* (1995) 9 Cal.4th 688 [38

Cal.Rptr.2d 363, 889 P.2d 557].)

The administration of California's public school system by the executive branch has been, and is, vested in four primary public entities; three at the *203 state level, and one at the local level. At the local level, the functioning of districtwide (unified school districts) or countywide schools is administered by school boards elected by their respective voter constituencies (school districts). (See generally, Cal. Const., art. IX, § 3.2; § 35100 et seq.; Elec. Code, § 1302.2.) At the state level, administrative authority is primarily vested in the State Board, which is comprised of 10 persons appointed by the Governor with the advice and consent of two-thirds of the California State Senate. (§§ 33000, 33030-33031.) The chief executive of the public school system is the elected state Superintendent of Public Instruction (Superintendent) (except where a vacancy exists allowing the Governor to make an interim appointment under (§ 33100). (Cal. Const., art. IX, § 2.) The executive branch of state government also includes within its departmental ranks the State Department of Education (Department) (§ 33300).

The State Board exercises direct administrative control over local school districts by adopting rules and regulations consistent with state law for the governance of local schools and school districts. (§ 33031.) How the state entities and offices are allocated or share responsibilities for public instruction in our state would entail a complex discourse that is mercifully unnecessary to our analysis. (But see generally, *State Bd. of Education v. Honig*, *supra*, 13 Cal.App.4th 720.) It is enough to quote the holding of the Third District in *State Bd. of Education v. Honig*, which summarized the hierarchical relationship of the three state entities as follows: "We conclude the Legislature intended the Board to establish goals affecting public education in California, principles to guide the operations of the Department, and approaches for achieving the stated goals. Its role as 'the governing ... body of the department' (§ 33301, subd. (a)) refers to governance in the broad sense by virtue of its policymaking authority. The Legislature did not intend the Board to involve itself in 'micro-management.' Thus, its responsibility to 'direct and control' the Department (Black's Law Dict., [(5th ed. 1979)] p. 625[, col. 2]) necessarily

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 6

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

involves general program and budget oversight as a means of monitoring the effectiveness of its policies. [¶] By contrast, the Legislature intended the Superintendent to be involved in 'the practical management and direction of the executive department.' (Black's Law Dict., *supra*, p. 41.) In this role, the Superintendent is responsible for day-to-day execution of Board policies, supervision of staff, and more detailed aspects of program and budget oversight." (*Id.* at p. 766, italics omitted.)

Relevant recent legal history of public instruction of LEP students in California begins with enactment of the Bilingual-Bicultural Education Act of 1976 (§ 52160 et seq.) (the Act). The Act set forth a comprehensive legislative structure designed to provide funding and to train bilingual *204 teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs was to increase fluency in the English language for LEP students. Secondly, the "programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, ..." (§ 52161.)

The Act remained in effect until its sunset by subsequent law on June 30, 1987. (§ 62000.2, subd. (e).) While still in effect, certain central provisions of the Act were enumerated as exceptions to the waiver provision of section 33050. (§ 33050, subd. (a)(8).) Even after the Act's provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002: "If the Legislature does not enact legislation to continue a program listed in Sections 62000.1 to 62000.5, inclusive, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program.... The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5."

Bilingual education continued through extended funding under section 62002 until Proposition 227

was passed. Inexplicably, although the operative sections of the Act lapsed with the sunset of the law in 1987, school districts continued to request waivers from the State Board under section 33050 seeking to opt out of their bilingual programs. Equally inexplicably, the State Board continued to grant waivers from the defunct law until March 1998, when the State Board rescinded this practice.

B. The Chapter's Salient Provisions

Chief among those provisions of the Chapter important to our review is section 300, "Findings and declarations," [FN7] which states: "The People of California find and declare as follows:

FN7 Section 340 states: "Under circumstances in which portions of this statute are subject to conflicting interpretations, Section 300 shall be assumed to contain the governing intent of the statute."

"(a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for *205 science, technology, and international business, thereby being the language of economic opportunity; and

"(b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and

"(c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and

"(d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly

75 Cal.App.4th 196

Page 7

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10;133

(Cite as: 75 Cal.App.4th 196)

experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and

"(e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.

"(f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible."

Section 305 requires that "all children in California public schools *shall* be taught English by being taught in English..." (Italics added.) This requirement is "[s]ubject to the exceptions provided in Article 3 [Parental Exceptions]." The requirements for this parental waiver are spelled out in section 310, [FN8] and are themselves limited to the circumstances described in *206 section 311. [FN9] No other mechanism for exception from the Chapter's requirements is specified.

FN8 Section 310 states: "The requirements of Section 305 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian under the circumstances specified below and in Section 311. Such informed consent shall require that said parents or legal guardian personally visit the school to apply for the waiver and that they there be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. Under such parental waiver conditions, children may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer such a class; otherwise, they must allow the pupils to transfer to a public school in which such a class is offered."

FN9 Section 311 provides: "The circumstances in which a parental exception waiver may be granted under Section 310 are as follows: [¶] (a) Children who already know English: the child already possesses good English language skills, as measured by standardized tests of English vocabulary comprehension, reading, and writing, in which the child scores at or above the state average for his or her grade level or at or above the 5th grade average, whichever is lower; or

"(b) Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or

"(c) Children with special needs: the child already has been placed for a period of not less than thirty days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development. A written description of these special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local Board of Education and ultimately the State Board of Education. The existence of such special needs shall not compel issuance of a waiver; and the parents shall be fully informed of their right to refuse to agree to a waiver."

Section 320 affords parents a right to sue if their child or children are not provided English-only instruction: "As detailed in Article 2 (commencing with Section 305) and Article 3 (commencing with Section 310), all California school children have the right to be provided with an English language

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 8

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

public education. If a California school child has been denied the option of an English language instructional curriculum in public school, the child's parent or legal guardian shall have legal standing to sue for enforcement of the provisions of this statute, and if successful shall be awarded normal and customary attorney's fees and actual damages, but not punitive or consequential damages. Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parents or legal guardian."

Finally, amendment of the Chapter is limited to enactment of further voter initiative, or a bill passed by two-thirds of each house of the state Legislature and signed by the Governor. (§ 335.)

C: History of Section 33050

The current version of section 33050 contains the following waiver language: "(a) The governing board of a school district or a county board of *207 education may, on a districtwide or countywide basis or on behalf of one or more of its schools or programs, after a public hearing on the matter, request the State Board of Education to waive all or part of any section of this code or any regulation adopted by the State Board of Education that implements a provision of this code that may be waived, except: ..." [FN10]

FN10 While the language "that may be waived" appears by grammar and punctuation to modify both "all or part of any section of this code" as well as "any regulation ... that implements a provision of this code," that language was added in 1988, when the waiver statute was expanded to include regulations. Therefore, it appears clear from the history of this change that the Legislature intended the phrase "that may be waived" to modify only regulations.

Once a section 33050 waiver application is

presented, the State Board is required to approve it unless the State Board specifically finds, among other things: "(1) The educational needs of the pupils are not adequately addressed. [¶] (2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request. [¶] ... [¶] (5) Guarantees of parental involvement are jeopardized...." (§ 33051, subd. (a).) Failure by the State Board to take action within two regular meetings on a fully documented waiver request received by the Department shall be deemed to be approval of the waiver for a period of one year. (§ 33052, subd. (a).)

The progenitor of section 33050 is former section 52820, enacted in 1981 (Stats. 1981, ch. 100, § 25, p. 680). Like section 33050 today, this former statute provided that the "governing board may, on a districtwide basis or on behalf of one or more of its schools, request the State Board of Education to waive all or part of any section of this code, ..." Despite its broad language, there is little doubt that the initial reach of this statute was intended to extend only to relieve local schools of the spending limitations imposed by categorical aid programs:

For example, the California State Assembly Education Committee reported that the intent behind section 52820 was to "provide districts with increased flexibility in *categorical aid programs* by ... (c) empowering the Department of Education [*sic*] to waive virtually any Education Code requirements in order to improve the operation of a local program." (Former § 52820, subd. (a), italics added; see Assem. Ed. Com., Rep. on Assem. Bill No. 777 (1981-1982 Reg. Sess.) p. 2.) Indeed, once passed, the statute became part of chapter 12 of the Education Code, entitled the School-Based Program Coordination Act, which was enacted "to provide greater flexibility for schools and school districts to better coordinate the categorical funds they receive while ensuring that schools continue to receive categorical funds to meet their needs." (§ 52800.) *208

This ancestral version of the general waiver statute also limited, but did not eliminate, the ability of school districts to seek waivers of the requirements for bilingual education (former § 52820, subd. (a)(1)). A more limited waiver for bilingual

75 Cal.App.4th 196

Page 9

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

education came the following year in 1982, when former section 52820 was replaced by section 33050 (Sen. Bill No. 968 (1981-1982 Reg. Sess.), enacted as Stats. 1982, ch. 1298, § 1, p. 4787).

Among the matters addressed in Senate Bill No. 968, which purported to be a "clean-up bill," to Assembly Bill No. 777 (former § 52820), was the inclusion of certain provisions of the Act as exceptions to the general waiver provision of the statute. (See Enrolled Bill Mem. to Governor, Sen. Bill No. 968 (1981-1982 Reg. Sess.) Sept. 9, 1982.) Additionally, the waiver statute was moved from chapter 12 of the Education Code (School-Based Program Coordination Act of 1976), and placed in that chapter which deals with the enumeration of powers of state educational agencies (tit. 2, div. 2, pt. 20, ch. 1, art. 3, codified at § 33050).

The significance of this transfer appears in section 17 of the new law: "The Legislature hereby finds and declares that the waiver authority granted to the State Board of Education pursuant to Chapter 100 of the Statutes of 1981 [Assembly Bill No. 777, enacted as former section 52820] is not limited to those programs specified in Chapter 12 (commencing with Section 52800) [School-Based Program Coordination Act] of Part 28 of the Education Code. [¶] Therefore, the changes made by Sections 1 and 2 of this act, which renumber the waiver provisions to clarify the authority of the State Board of Education, do not constitute a change in, but are declaratory of, existing law." (Stats. 1982, ch. 1298, § 17, p. 4794.)

Therefore, while originating as a means by which school districts could overcome restrictions placed on funds earmarked for categorical aid programs, the present version of the waiver statute is broader in scope. Moreover, the history makes clear that while extending application of section 33050 to programs beyond those forming part of the School-Based Program Coordination Act of 1976, the core elements of LEP education were specifically excepted from the waiver procedure, thereby alienating LEP educational choices from local control.

With this history, we turn to the present litigation and the issue it raises.

III. Procedural History

Anticipating the passage of Proposition 227, respondents Oakland, Berkeley, and Hayward school districts submitted the contested waiver requests *209 one week before the June 1998 Primary Election. However, after Proposition 227 passed, the State Board concluded that it did not have authority to grant waivers from the Chapter. Therefore, it refused to consider waiver requests from any school districts, and returned them to respondents.

On July 16, 1998, respondents filed a petition for writ of mandamus and complaint for declaratory and injunctive relief in the Alameda County Superior Court. Although not physically attached to the petition, respondents characterized their waiver requests as "requests for general waivers of California Education Code sections 300, *et seq.*" (Original italics.) Throughout the petition's allegations the requests were described as "general waiver request[s]." The cause of action for declaratory relief sought a determination that the State Board had a mandatory duty to "accept, consider and approve requests for general waivers of the newly adopted Education Code sections 300, *et seq.*," while the prayer for mandamus asked for a writ "commanding the State Board to accept, consider and approve requests for general waivers of Education Code sections 300, *et seq.*" (Original italics.)

At the hearing on the petition held on August 27, 1998, respondents suggested for the first time that their waiver requests did not seek to prevent parents from opting to have their LEP children educated in an English-only program, or from maintaining an action for damages for failing to provide such a program. [FN11] Appellants countered that the trial court should limit respondents to their pleadings because respondents had consistently characterized their waiver requests as "seeking to waive all of [sections] 300 *et seq.*, ..." and failed to provide appellants with their actual waiver requests. [FN12]

FN11 Counsel for respondents stated: "As to parents' options, parents have the option. There is a parental enforcement

provision in 227. Any parent who wants a child in a[n] English program has a right that is enforceable by an action in damages. We don't seek to waive that. [¶] If a parent doesn't want their child in a program, we're seeking to continue, and they have the right if we don't do what they want to sue us and sue us for an action of damages." Yet despite this remark, respondents did not seek leave to amend or to supplement their petition. Instead, they attempted to justify their failure to append the waiver requests to their petition by arguing: "[Appellants] had an opportunity to see them. If they don't know what's in them, it's because they chose to send them back to sender."

FN12 The conclusion that the waiver requests at issue sought relief from the "entire scheme of Proposition 227" was shared by counsel for the Superintendent at the hearing.

The trial court apparently rejected these untimely, unsupported comments of counsel, and instead based its decision on the record, including respondents' pleadings. Because the petition unambiguously states that respondents were seeking general waivers from "sections 300, *et seq.*," and the actual waiver requests were never made part of the record, like the trial judge, we base our decision on the record evidence indicating that the waiver requests *210 submitted by respondents to the State Board sought refuge from all of the provisions of the Chapter, sections 300 through and including 340, for purposes of this appeal.

After oral argument, the trial court granted mandamus, ordering the State Board to consider the waivers previously submitted. [FN13] The court explained the basis for its grant of mandamus relief in an 11-page statement of decision. The trial court concluded there was nothing in the Chapter that addressed the general waiver provision, and that section 33050 authorized a waiver procedure as to "all or any part of any section" of the Education Code. The court noted case law requiring seemingly conflicting statutes to be read in a manner which

harmonized them, giving each as much effect as permissible. By relying on this rule of statutory construction, as well as that which presumes the electorate was aware of the existence of the general waiver statute when the Chapter was enacted, the court determined that the parental waiver exception contained in the Chapter was co-existent with the waiver procedure outlined in section 33050; that is, the voters did not intend the Chapter to vitiate the ability of school districts as well as parents to obtain waivers. [FN14]

FN13 The court also refused petitioners' request for a ruling that the waiver requests were deemed denied by the State Board and for a preliminary injunction. However, we need not address these rulings because they were not challenged in this appeal.

FN14 At the hearing, both the Superintendent and the Department confirmed that they were not opposed to the relief requested by petitioners. Thus, only the State Board and its amici curiae opposed the request for mandamus below and by way of this appeal.

This timely appeal by the State Board followed.

IV.

Discussion

A. Standard of Review

(2) Issues of statutory construction are questions of law to which we accord a de novo standard of review. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856].)

(3) While it is not the prerogative of the judiciary to rewrite legislation to conform to a presumed intent (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [59 Cal.Rptr.2d 671, 927 P.2d 1175]), the Supreme Court reminds us that the primary purpose of statutory construction is for the courts to determine and effectuate *211 the purpose of the law as enacted: "The fundamental purpose of

statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] ... Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [276 Cal.Rptr. 918; 802 P.2d 420].)

Moreover, in looking at the relationship between two statutes, "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter; and the letter will, if possible, be so read as to conform to the spirit of the act." [Citations.] An interpretation that renders related provisions nugatory must be avoided. [Citation.] ... [E]ach sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

Therefore, in order to accomplish our task we must consider the following questions: What was the intent of each statute under consideration? Can the two be harmonized so that the legal effect intended by each can be carried out? If not, what is the legal significance of such a statutory conflict, and how should it be resolved?

B. The Intent of the Chapter and Section 33050

The Chapter's mandate that all public instruction in California be administered in the English language appears absolute, and with one exception, unconditional: "... all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all

children be placed in English language classrooms...." (§ 305.) For those in need, "sheltered English immersion" programs normally of a year in length shall be provided to assist in their transition to English-only classrooms. (*Ibid.*) As noted, the only exception to this fiat is through the approval of a parental waiver request.

Should the school district fail or refuse to provide the option of English language instruction, the Chapter empowers the parents of any LEP student *212 to bring a civil suit to enforce the Chapter's provisions, and to seek actual damages and attorney fees. In instances where the failure or refusal is "willful[] and repeated[]," the action may proceed personally against elected officials, school board members, school administrators, and teachers responsible for noncompliance. (§ 320.) This right to sue is premised on the statutory finding that "all California school children have the right to be provided with an English language public education." (*Ibid.*) Amendment of the Chapter is limited to enactment of further voter initiative, or a bill passed by two-thirds vote of each house of the state Legislature and signed by the Governor. (§ 335.)

Thus, the Chapter on its face ensures in the strongest terms that English instruction of LEP students will be made available, even under pain of a potential lawsuit, except in those instances where the parents or guardian of the affected student request and qualify for a statutory waiver. No other form of waiver or exception from the dictates of the Chapter is available under this law.

Not dissimilarly, section 33050 appears unequivocal in the breadth of the right it extends to school districts to seek waivers from code requirements: "(a) The governing board of a school district ... may ... request the State Board of Education to waive all or part of any section of this code...."

(4a) Despite the seemingly contradictory intentions implicit in the plain language of both the Chapter and section 33050, respondents and their amici curiae contend that because there is no explicit reference to section 33050 in the Chapter, the voters intended to allow for the continued use by school districts of the general waiver process because they

75 Cal.App.4th 196

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

Page 12

were presumed to be aware of section 33050's existence when the Chapter was passed into law.

(5) Respondents' contention relies on the general presumption in law that: "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 ...; *People v. Weidert* (1985) 39 Cal.3d 836, 844 ...; *People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1628 ...) " (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332 [275 Cal.Rptr. 302].)

But none of the cases they cite apply to instances where the courts have been faced with interpreting a new statute which patently conflicts with *213 existing law. For example, in *Williams v. County of San Joaquin, supra*, 225 Cal.App.3d 1326, the issue was whether criminal prosecutors were required to receive advance notice of a defendant's request for OR (own recognizance) release where the governing statute was silent on the point. An existing statute (Pen. Code, § 1274) required notice in cases where bail was sought. Noting the difference between a request for OR release and monetary bail, the Third District concluded that the Legislature's failure to incorporate the bail notice requirement into the OR release statute evidenced an intent not to do so, because the Legislature was presumed to know of the existence and content of the bail statute when the OR statute was passed. (225 Cal.App.3d at p. 1333.)

Other cited decisions relied on the presumption in similar contexts (*People v. Weidert* (1985) 39 Cal.3d 836 [218 Cal.Rptr. 57, 705 P.2d 380] [relying on existing law excepting juvenile proceedings from the definition of criminal proceedings to interpret new law that killing a witness to prevent testimony in a juvenile case was not the equivalent to a criminal proceeding that would subject defendant to death penalty]; *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602 [257 Cal.Rptr. 320, 770 P.2d 732] [amendment to law extending statute of limitations for purposes of discipline under Contractors' State License Law for breach of warranty adopted in light of existing judicial decision defining "warranty"]).

Still other high court opinions question the conclusiveness of this presumption, particularly where legislative intent is presumed from inaction in the face of judicial decisions. (*People v. Morante* (1999) 20 Cal.4th 403, 429-430 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614, 805 P.2d 873].) (6) Legislative silence after a court has construed a statute at most gives rise to "an arguable inference of acquiescence or passive approval [citations]." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 563 [71 Cal.Rptr.2d 731, 950 P.2d 1086].)

Thus, unlike cases where lawmakers can be presumed to borrow from existing law to supply omitted meaning to later enactments, the presumption that one legislates with full knowledge of existing law is not conclusive, and not even helpful, in cases where a later enactment directly conflicts with an earlier law. No facile legal maxim exists to resolve such conflicts.

To the contrary, while exalted as being a core right of a democratic society (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 683 [284 Cal.Rptr. 655] *214 disapproved on another point in *People v. Tillis* (1998) 18 Cal.4th 284, 295 [75 Cal.Rptr.2d 447, 956 P.2d 409]), the voter initiative process is not without flaws. Although not deciding the validity of the legislative presumption as it applies to voter initiatives, the Supreme Court has acknowledged there exists qualitative and quantitative differences between the state of knowledge of informed voters and that of elected members of the Legislature. (*People v. Davenport* (1985) 41 Cal.3d 247, 263, fn. 6 [221 Cal.Rptr. 794, 710 P.2d 861].)

More to the point is the frank comment in the concurring and dissenting opinion by Justice Broussard in *People v. Pieters, supra*, 52 Cal.3d 894, concerning the limitations on legislative review inherent in the initiative process: "We hold initiatives to a different standard than enactments by the Legislature because of the nature of the initiative process. Initiatives are the direct expression of the people, typically drafted without

extended discussion or debate. Of Proposition 8, a far-reaching criminal initiative passed in 1982, we have recognized that 'it would have been wholly unrealistic to require the proponents of Proposition 8 to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that measure.' (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 257) In contrast to the proponents of initiatives, legislators and their staffs are entirely devoted to the analysis and evaluation of proposed laws. Indeed, we presume that the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws. (See, e.g., *Estate of McDill* (1975) 14 Cal.3d 831, 839)" (*People v. Pieters, supra*, 52 Cal.3d at p. 907 (conc. and dis. opn. of Broussard, J.)) [FN15]

FN15 Interestingly, Justice Broussard made these observations while analyzing whether the drafters' oversight principle should be reserved for initiative-based lawmaking only.

Lawmakers themselves recognize the practical limits of legislating while avoiding the creation of conflicts in the law, whether by elected officials or the initiative process. For example, Assemblywoman Sheila James Kuehl, the current Chair of the Assembly Judiciary Committee, has written commentary recently, which emphasizes the need to recognize there are important limitations on the initiative process (Kuehl, *Either Way You Get Sausages: One Legislator's View of the Initiative Process* (1998) 31 Loyola L.A. L.Rev. 1327). One of these limitations is the absence of rigorous legislative review to ensure that the initiative's provisions are consistent with existing laws. Without such review, it is unlikely that other laws will be amended to avoid conflicts with the new rule of law announced in the initiative. Her hypothetical is prescient and apropos of the predicament created by Proposition 227: "For example, imagine an initiative that would require California to give full faith and credit to any domestic violence restraining order issued *215 by another state, territory, or tribal court. The proposed draft may be deficient in that there may be several sections of, either the Family Code or the Code of Civil Procedure that

would need to be amended while the draft addresses only two. Or, the proposed draft may require more deference to the other state than the Constitution allows or may fail to comport with a federal statute. A pre-initiative review by the Legislative Counsel's office would bring to light such deficiencies early in the process, give proponents the opportunity to correct such deficiencies early in the process, and give proponents the opportunity to structure the initiative's language to achieve their goals without violating the state or federal constitutions." (*Id.* at pp. 1331-1332.)

The point is, of course, that the initiative process itself, particularly when viewed in light of the number of existing laws that may be affected by any new law and that may require amendment or repeal to avoid creating conflicts, makes conflicts between the new law and existing laws virtually inevitable. [FN16] Therefore, we cannot simply rely on the legislative presumption of knowledge of existing law in deciding this case, for to do so here would exceed the tensility of this presumption, and ignore other principles of statutory construction developed in recognition of the fallibility of lawmaking.

FN16 While many sections have been repealed or reserved, it is noteworthy that the prodigious Education Code alone runs from section 1 to section 100560.

C. Resort to the History of Proposition 227 Is Appropriate

(7) Where statutory language is clear and unambiguous, there is no need to construct the statute, and resort to legislative materials or other external sources is unnecessary. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371 [64 Cal.Rptr.2d 741]). "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." [Citations.] Of course, in construing the statute, "[t]he words ... must be read in context, considering the nature and purpose of the statutory enactment." [Citation.]" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 [58

75 Cal.App.4th 196
 89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
 (Cite as: 75 Cal.App.4th 196)

Page 14

Cal.Rptr.2d 855, 926 P.2d 1042].)

But where the language may appear to be unambiguous yet a latent ambiguity exists, the courts must go behind the literal language and analyze the intent of the law utilizing "customary rules of statutory construction or legislative history for guidance. [Citation.]" (*Quarterman v. Kefauver, supra*, 55 Cal.App.4th at p. 1371.) This may include reference to ballot materials in *216 the case of initiatives in order to discern what the average voter would understand to be the intent of the law upon which he or she was voting. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505 [286 Cal.Rptr. 283, 816 P.2d 1309].)

One such case involving a latent ambiguity in statutory language created by the initiative process was *Legislature v. Eu, supra*, 54 Cal.3d 492, in which the Supreme Court was asked to determine the electorate's intent in passing the legislators' terms-limits initiative ("The Political Reform Act of 1990," designated on the ballot as Proposition 140). An argument advanced by opponents of the initiative was that the term limits ban applied only to consecutive terms, and did not prevent a legislator from seeking elected office if that legislator was not holding office at the time of election. (*Id.* at p. 503.) In concluding the term "lifetime ban" was ambiguous in light of the issue raised, the court reviewed the ballot materials presented to the voters. After noting that such materials must be viewed with some degree of caution because the "fears and doubts" expressed in ballot arguments may be "overstate[d]," the court was impressed by the "forceful[]" and "repeated []" statement to the voters that the initiative would result in a "lifetime ban" on officeholders whose terms expired under the proposed law. (*Id.* at p. 505.) Therefore, the court concluded "[w]e think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served." (*Ibid.*; see also *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11 [120 Cal.Rptr. 94, 533 P.2d 222]; *In re Quinn* (1973) 35 Cal.App.3d 473, 483 [110 Cal.Rptr. 881] disapproved on another point in *State v. San Luis Obispo Sportsman's Assn.* (1978) 22 Cal.3d 440,

447 [149 Cal.Rptr. 482, 584 P.2d 1088].)

Similarly, the seemingly absolute language of both the Chapter and section 33050 creates a latent ambiguity, certainly at least as to whether the Chapter's failure to refer specifically to section 33050 evinces an intent to have its mandate nevertheless subject to school district waivers. In light of this ambiguity, resort to the voter history of the Chapter is necessary and appropriate.

D. The Campaign for Passage of Proposition 227

Perhaps it rings of understatement to suggest that Proposition 227 was a controversial initiative. Advancing a debate that continues through today, and is reflected in the briefs of the parties and amici curiae, the campaigns *217 both supporting and opposing the proposition's passage disagreed vehemently as to the success or failure of bilingual education in California. [FN17] The ballot materials furnished all voters reflects a deep division of viewpoints as to whether LEP students should be predominantly taught in English, or in the students' native languages.

FN17 Directed primarily to the issue of irreparable harm as an element of petitioners' request for a preliminary injunction, the parties submitted learned treatises and declarations from social scientists and educators taking both sides of the issue. As explained, *post*, the prayer for a preliminary injunction is not before us today. Thus, amici curiae's reference to the merits of the underlying educational programs is neither appropriate nor useful in deciding the narrow question of statutory construction before this court.

The proposition summary contained in the ballot pamphlet materials noted the proposed new law: "Requires all public school instruction be conducted in English. [¶] Requirement may be waived if parents or guardian show that child already knows English, or has special needs, or would learn English faster through alternate instructional technique." (Ballot Pamp., Prop. 227, Primary Elec. (June 2, 1998) p. 32.) The analysis by the

75 Cal.App.4th 196

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

Legislative Analyst included the note: "Schools must allow parents to choose whether or not their children are in bilingual programs." (Legis. Analyst, Analysis of Prop. 227, Ballot Pamp., Primary Elec., *supra*, at p. 32.)

The "Proposal" is described, in part, as "[r]equir[ing] California public schools to teach LEP students in special classes that are taught nearly all in English. This would eliminate 'bilingual' classes in most cases." Under "Exceptions," the analyst notes "Schools would be permitted to provide classes in a language other than English if the child's parent or guardian asks the school to put him or her in such a class and one of the following happens: ..." (Legis. Analyst, Analysis of Prop. 227, Ballot Pamp., Primary Elec., *supra*, at p. 33, original italics.) The ballot argument in favor of Proposition 227 was signed by "Alice Callaghan, Director, Las Familias del Pueblo[,] Ron Unz, Chairman, English for the Children[,] and] Fernando Vega, Past Redwood City School Board Member." The argument begins by arguing bilingual education has failed in California, "but the politicians and administrators have refused to admit this failure." Under "What 'English For The Children' Will Do," the argument states in part: "Allow parents to request a special waiver for children with individual educational needs who would benefit from another method." (Ballot Pamp., argument in favor of Prop. 227, Primary Elec., *supra*, at p. 34.)

The rebuttal argument was authored by John D'Amelio, president of the California School Boards Association, Mary Bergan, president of the California Federation of Teachers, AFL-CIO, and Jennifer J. Looney, president of the Association of California School Administrators. It begins by recounting the variety of programs used throughout California to teach LEP students. It then proclaims that "Proposition 227 outlaws all of these programs," and warns that if Proposition 227 passes, "[a]nd if it doesn't work, *218 we're stuck with it anyway." After describing funding sources for the campaign in favor of Proposition 227, the argument concludes: "These are not people who should dictate a single teaching method for California's schools. [¶] If the law allows different methods, we can use what works. Vote No on Proposition 227." (Ballot Pamp., rebuttal to argument in favor of Prop. 227 as presented to

voters, Primary Elec., *supra*, at p. 34.)

Similarly, the ballot pamphlet's "Argument Against Proposition 227" [FN18] again cautioned that passage of the proposition would "outlaw[] the best local programs for teaching English." (Ballot Pamp., argument against Prop. 227 as presented to voters, Primary Elec., *supra*, at p. 35, original italics.) "A growing number of school districts are working with new English teaching methods. Proposition 227 stops them. [¶] ... 'School districts should decide for themselves.'" (*Ibid.*)

FN18 Its authors are the same as the rebuttal except Lois Tinson, president of the California Teachers Association, replaced Jennifer Looney.

Finally, Los Angeles teacher Jaime A. Escalante penned the proponents' "Rebuttal," which included the following: "Today, California schools are forced to use bilingual education despite parental opposition. We give choice to parents, not administrators." (Ballot Pamp., rebuttal to argument against Prop. 227 as presented to voters, Primary Elec., *supra*, at p. 35.)

Proposition 227 passed by a margin of 61 percent "yes" votes, to 31 percent "no" votes. (*Valeria G. v. Wilson, supra*, 12 F.Supp.2d 1007, 1012.)

If anything, this history only magnifies the conflict between the Chapter and section 33050. Among other things, the ballot materials reveal that voters were promised passage of Proposition 227 would establish an LEP method of instruction which would heavily favor use of English only, and would bestow the bilingual education "choice" to parents only. Even opponents of the initiative conceded that the proposed Chapter would "outlaw[]" decisionmaking by school districts, to provide non-English instruction and, once passed, the electorate would be "stuck with it." They argued that passage of the proposition should be defeated so that "School districts [c]ould decide for themselves" what form of LEP instruction to provide. In a revealing rebuttal, the proponents concluded that the proposed new law "[would] give choice to parents, not administrators."

75 Cal.App.4th 196

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

Page 16

While undoubtedly florid in tone, the substance of the ballot arguments leads unwaveringly to the conclusion that voters believed Proposition 227 would ensure school districts could not escape the obligation to provide English language public education for LEP students in the absence of *219 parental waivers. Any other form of LEP education would be "outlaw[ed]." Voters would only be reinforced in this belief by reading the text of the proposition itself, which included such features as a right of action against school officials for failing or refusing to provide English instruction, and a requirement that amendment of the new law be limited to further voter initiative or a two-thirds vote of both state legislative houses.

(4b) In light of these facts and the unavoidable conclusions we must draw from them, there is simply no rational way to reconcile or harmonize the Chapter as an integrated whole with section 33050. One cannot uphold the clear and positive expression of intent in the Chapter, which mandates a strong English-based system of education subject only to parental waiver, while supporting the right of school districts to avoid the Chapter's decree through waivers. The statutes are in such irreparable conflict that to allow one would render the other "nugatory." (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735.)

How do courts respond to these conflicts? Are there rules of statutory interpretation that can be brought to bear to resolve the conflict? Since actual conflicts are inevitable given the breadth of California's extensive statutory law, courts have developed several applicable interpretative paradigms by which a later-enacted law in conflict with an existing statute may be given effect.

E. The Chapter Amends Section 33050 by Implication

(8) California courts have long recognized that "an act adding new provisions to and affecting the application of an existing statute 'in a sense' amends that statute...." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 773 [282 Cal.Rptr. 664] (*Huening*), quoting *Hellman v. Shoulters* (1896) 114 Cal. 136, 152 [45 P. 1057].) An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope

or effect of an existing statute. (*Huening, supra*, at p. 774; *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776 [145 Cal.Rptr. 819] [court found an implied amendment but invalidated it on constitutional grounds]; see generally, 1A Sutherland, *Statutory Construction* (5th ed. 1993) Amendatory Acts, § 22.13, p. 215.) Like the related principles of "[r]epeal[] by implication" (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]), and "draft[ers'] oversight" (*People v. Jackson* (1985) 37 Cal.3d 826, 838, fn. 15 [210 Cal.Rptr. 623, 694 P.2d 736], disapproved on another point in *People v. Guerrero* (1988) 44 Cal.3d 343, 348 [243 Cal.Rptr. 688, 748 P.2d 1150]), "amendments by implication" are disfavored but are allowed to preserve statutory harmony and effectuate the *220 intent of the Legislature (*Myers v. King* (1969) 272 Cal.App.2d 571, 579 [77 Cal.Rptr. 625]).

In *People v. Jackson, supra*, 37 Cal.3d at page 838, the Supreme Court concluded that the general sentencing limitation of double-the-base-term limit (Pen. Code, § 1170.1, subd. (g)) did not apply to restrict imposition of five-year enhancements for serious felonies (added as Pen. Code, § 667 under the voter initiative Proposition 8), and that the failure to specifically address Penal Code section 667 in Penal Code section 1170.1, subdivision (g) was the result of "draft[ers'] oversight." [FN19] (37 Cal.3d at p. 838, fn. 15.) Although the two statutes were not strictly in conflict, in order to give full effect to the apparent intention of the voters, the Supreme Court declared: "We conclude that enhancements for serious felonies under section 667 were not intended to be subject to the double base term limitation of [Penal Code] section 1170.1, subdivision (g). To carry out the intention of the enactment, we read section 1170.1, subdivision (g), as if it contained an exception for enhancements for serious felonies pursuant to section 667, comparable to the explicit exception for enhancements for violent felonies under section 667.5." (37 Cal.3d at p. 838.)

FN19 The phrases "drafter's oversight" and "drafters' oversight" are used in the cases analyzed and discussed herein. For purposes of uniformity in this opinion, we

75 Cal.App.4th 196

Page 17

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

adopt usage of the plural form throughout our discussion *post*.

Similarly, in *People v. Pieters, supra*, 52 Cal.3d 894, the Supreme Court found a three-year enhancement for cocaine offenses involving more than 10 pounds of the drug was impliedly excepted from the same general double-the-base-term limit for sentencing (Pen. Code, § 1170.1, subd. (g)), thereby allowing a criminal defendant to be sentenced to a full three-year consecutive prison term enhancement under Health and Safety Code section 11370.4, subdivision (a)(2). In doing so, the high court explained that by determining section 11370.4 was limited by the general sentencing limit for subordinate terms, the "manifest intention" of the Legislature that dealers in large quantities of drugs would be more severely punished would be undermined. (52 Cal.3d at p. 901.) Therefore, it relied on the same "draft[ers]' oversight" it had articulated in *Jackson* in finding an implied exception to the general sentencing law for this new enhancement. (*Ibid.*) [FN20]

FN20 In so concluding, the court distinguished *People v. Siko* (1988) 45 Cal.3d 820 [248 Cal.Rptr. 110, 755 P.2d 294], which is also relied on by respondents and their amici here. It noted, and we accept as equally applicable, that *Siko* did not involve the interpretation of a statute whose purpose would be "undermined" by the failure to find an implied exception. (*Id.* at p. 902.)

A somewhat different analysis had been employed by the Supreme Court a year earlier in *People v. Prather* (1990) 50 Cal.3d 428 [*221267 Cal.Rptr. 605, 787 P.2d 1012]. In *Prather*, the Supreme Court was confronted with the question of whether one provision of then newly enacted Proposition 8 (Cal. Const., art. I, § 28, subd. (f)), which allowed prior felony convictions to be used for sentence enhancement purposes "without limitation" was subject to the general sentencing limitation to double-the-base-term (Pen. Code, § 1170.1, subd. (g)). In that case, the enhancement under scrutiny was Penal Code section 667.5, subdivision (b),

which allowed for a one-year enhancement to any felony sentence if the current offense occurred within five years from the defendant's prior confinement in state prison.

The Supreme Court determined that it could not rely on the "draft[ers]' oversight" rule set forth in *People v. Jackson, supra*, 37 Cal.3d 826, because there was insufficient evidence that the Legislature intended to except this enhancement from the general sentencing limitation, but failed to provide for it because of a "draft[ers]' oversight." Nevertheless, the court concluded that in order to effectuate the intent of the Legislature in enacting the enhancement, it was necessary to impliedly except section 667.5, subdivision (b) from the new limitation. (*People v. Prather, supra*, 50 Cal.3d at pp. 433-434, 439.)

Likewise, in *Huening, supra*, 231 Cal.App.3d 766, the court was faced with harmonizing the then newly enacted Elections Code former section 3564.1 with chapter 8 of the Political Reform Act of 1974, codified at Government Code section 81000 et seq., which generally regulates the content of ballot pamphlets. (231 Cal.App.3d at p. 778.) Elections Code former section 3564.1 prohibited the nonconsensual identification of a person in the ballot arguments as for or against the ballot measure. (231 Cal.App.3d at p. 769.) Chapter 8, in contrast, does not contain any limitation on the content of ballot arguments. (231 Cal.App.3d at p. 778.) To avoid the inherent conflict created when the two statutes were simultaneously applied, the court found that Elections Code former section 3564.1 impliedly amended chapter 8. (231 Cal.App.3d at p. 779.) [FN21]

FN21 However, Elections Code former section 3564.1 was invalidated on other grounds. (*Huening, supra*, 231 Cal.App.3d at p. 779.)

Respondents urge us to avoid invoking the principle of "drafters' oversight" or amendment by implication because the two statutes at issue here can be harmonized. (*Nickelsberg v. Workers' Comp. Appeals Bd., supra*, 54 Cal.3d at p. 298.) In part, respondents contend that section 33050 is limited

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 18

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

by section 33051, which places restrictions on the granting of waiver *222 requests. [FN22] Therefore, respondents and their amici curiae argue that appellants' concern that waivers will be granted without considering the views of LEP student parents are unfounded. Amicus curiae Education Legal Alliance of the California School Board Association similarly contends parental preferences will be considered as part of the public hearing requirement antecedent to any application for a general waiver (§ 33050, subds. (a) and (f)), while MALDEF asserts parental oversight is achieved through participation in schoolsite advisory boards or parent associations.

FN22 In relevant part section 33051 states:

"(a) The State Board of Education shall approve any and all requests for waivers except in those cases where the board specifically finds any of the following:

"(1) The educational needs of the pupils are not adequately addressed.

"(2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request.

"(3) The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees.

"(4) Pupil or school personnel protections are jeopardized.

"(5) Guarantees of parental involvement are jeopardized.

"(6) The request would substantially increase state costs.

"(7) The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, was not a participant in the development of the waiver...."

However, these observations miss the mark. The intent of the Chapter is not simply to ensure parental input into instructional decisions by local

school boards. The Chapter's intent is that English instruction will be provided *in all cases* except those where parental waivers are made. Parents favoring English instruction for their children are assured by law that it will be provided without the need to lobby school boards or form parent groups. The Chapter inflexibly declares that, absent a parental waiver, the interests of LEP children are always best served by English-only instruction. It is only when a parent decides that English-only instruction is not appropriate for his or her child that an individual waiver need be sought. While public participation in local school affairs is to be encouraged and is arguably indispensable to achieving educational goals, it is not directly germane to the Chapter's legal operation. This new law vests decisionmaking over the method of LEP instruction exclusively with *individual* parents of LEP students—not committees, associations, parent groups, school board members, principals or teachers.

We are mindful that the principle of amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are "irreconcilable, *223 clearly repugnant, and so inconsistent that the two cannot have concurrent operation...." (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].)

(9) "One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. [Citations.]" (*Santa Barbara County Taxpayers Assn. v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, 680 [239 Cal.Rptr. 769] (*Santa Barbara County Taxpayers Assn.*); *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]). "An interpretation which is repugnant to the purpose of the initiative would permit the very mischief the initiative was designed to prevent. [Citation.] Such a view conflicts with the basic principle of statutory interpretation, *supra*, that provisions of statutes are

75 Cal.App.4th 196

Page 19

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

to be interpreted to effectuate the purpose of the law." (*Santa Barbara County Taxpayers Assn.*, *supra*, 194 Cal.App.3d at p. 681.)

(4c) In our view, the intention of the voters in passing Proposition 227 could hardly be clearer (except if they had directly addressed its relation to section 33050). We see no way that the guarantee of English-only instruction subject solely to parental waiver can be accomplished if school boards are allowed to avoid compliance with the entire Chapter by seeking waivers, no matter how well intentioned administrators may be in doing so. Under these circumstances, we conclude that the failure to specifically amend section 33050 to add the core provisions of the Chapter [FN23] was due to an oversight by the initiative's drafters.

FN23 We emphasize that our analysis accepts the premise that the waiver requests at issue went to *all* of the Chapter's sections. There may be waiver requests as to discrete sections or subsections of the Chapter that could be submitted without conflicting with the intent of the electorate, and indeed, may facilitate its implementation, which are not before us today.

Relevant to our invocation of "drafters' oversight" is the fact that the history of section 33050 and its precursor statute have historically protected LEP education from the waiver process. Respondents argue this history favors their position that, by enacting Proposition 227, the electorate intentionally chose to release English-only LEP education from waiver protection. But in light of the abolitionist tone of the proposition, including the ballot pamphlet materials, we believe the only reasonable conclusion is that the initiative's failure to conform section 33050 to the Chapter was simply the product of neglect.

We reach this same result by employing yet another, but related, rule of statutory construction. (10) "It is the general rule that where the general *224 statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to

the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; ..." (*In re Williamson* (1954) 43 Cal.2d 651, 654 [276 P.2d 593], quoting *People v. Breyer* (1934) 139 Cal.App. 547, 550 [34 P.2d 1065].) In *Williamson*, the court compared Business and Professions Code section 7030, which specifically punishes violations of the Business and Professions Code as misdemeanors, with Penal Code section 182, which punishes any conspiracy as a felony. There, the court found Business and Professions Code section 7030 to be the more specific and controlling statute. (*In re Williamson*, *supra*, 43 Cal.2d at p. 654.)

Also illustrative of this interpretative axiom is *Tapia v. Pohlmann* (1998) 68 Cal.App.4th 1126 [81 Cal.Rptr.2d 1] (*Tapia*). In *Tapia*, Division One of the Fourth District was faced with apparently conflicting statutes that appeared to relate to the satisfaction of California Children's Services Program medical treatment liens. [FN24] The public entity that held the lien relied on two statutes, which specifically provided for the payment of the lien amount out of any recovery by the minor patient from a third party source. (Gov. Code, § 23004.1; Health & Saf. Code, § 123982.) The minor contended that because the value of his claim had to be compromised due to inadequate insurance, the amount of the lien was subject to a reduction under the general statute applicable to minors' compromises. (Prob. Code, § 3601.)

FN24 Health and Safety Code section 123872.

In reversing the trial court's order reducing the lien, the court noted that to the extent the statutes were in conflict, the more specific statute applicable to the subject matter would control. "Where 'a general statute conflicts with a specific statute the specific statute controls the general one.' [Citations.] The referent of 'general' and 'specific' is subject matter." (*People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1577-1578 ...; see also *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178-179 ...; *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 748 ...;

Copr. © Bancroft-Whitney and West Group 1998

75 Cal.App.4th 196

Page 20

89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

(Cite as: 75 Cal.App.4th 196)

Conservatorship of Ivey (1986) 186 Cal.App.3d 1559, 1565" (*Tapia, supra*, 68 Cal.App.4th at p. 1133, fn. omitted.) The court explained, "Unless repealed expressly or by necessary implication, a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. [Citations.] This is the case regardless of whether the special provision is enacted before or after the general one [citation], and notwithstanding that the general provision, standing alone, would be broad enough to include the *225 subject to which the more particular one relates." ([*Conservatorship of Ivey, supra*, 186 Cal.App.3d] at p. 1565.)" (*Tapia, supra*, 68 Cal.App.4th at p. 1133, fn. 11.)

END OF DOCUMENT

We find these decisions and their rationale equally compelling here. (4d) In the instant case, the subject of public school instruction of LEP students is directly and narrowly addressed by the Chapter. Combined with the waiver provisions enumerated in sections 310 and 311, the Chapter is immeasurably more specific than the broad, general references to "all or any part of" the Education Code contained in section 33050. As such, and given the clear conflict created by the two statutes, the language of the Chapter controls. For this additional reason, we conclude the general waiver embodied in section 33050 may not be used as a means to avoid the Chapter's mandate that, in the absence of parental waivers, LEP students "shall be taught English by being taught in English." (§ 305.)

V. Conclusion

The writ of mandamus granted by the trial court is hereby reversed. The case is remanded to the trial court with directions to vacate its writ, and instead to issue an order denying the petition.

Kline, P. J., and Haerle, J., concurred.

Respondents' petition for review by the Supreme Court was denied December 21, 1999. *226

Cal.App.1.Dist., 1999.

McLaughlin v. State Bd. of Educ.

Copr. © Bancroft-Whitney and West Group 1998

BILL HONIG
SUPERINTENDENT OF PUBLIC INSTRUCTION

FSB: 87/8-2

DATE: August 26, 1987

PROGRAM: Five Education Programs Which Have Sunset

CONTACT: See Page 23

PHONE: See Page 23

PROGRAM ADVISORY

CALIFORNIA STATE DEPARTMENT OF EDUCATION
721 CAPITOL MALL, SACRAMENTO, CA 95814

August 26, 1987

To: County and District Superintendents
Attention: Consolidated Programs Directors and Directors of Indian Early Childhood Education Programs

From: *Bill Honig*
Bill Honig, Superintendent of Public Instruction

Subject: EDUCATION PROGRAMS FOR WHICH SUNSET PROVISIONS TOOK EFFECT ON JUNE 30, 1987, PURSUANT TO EDUCATION CODE SECTIONS 62000 AND 62000.2

The purpose of this Advisory is to provide districts with advice related to the five categorical programs affected by the June 30, 1987 "sunset" provision of Education Code Section 62000.2.¹ The programs are: 1) Miller-Unruh Basic Reading Act of 1965, 2) School Improvement Program, 3) Indian Early Childhood Education, 4) Economic Impact Aid, and 5) Bilingual Education.²

¹Unless otherwise specified, all statutory references are to the Education Code.

A.B. 37 would have extended these five programs to June 30, 1992. The Governor vetoed A.B. 37 on July 24, 1987. The level of funding for each of the five programs under the 1987-1988 fiscal year budget was not affected by this veto.

²Education Code sections regarding the A.B. 777 School-Based Program Coordination Act (Sections 52800-52904) and the S.B. 65 School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Sections 54720-54734) have not expired. The Department is planning to issue an Advisory on these two programs as soon as possible in light of Sections 62000-62007.

August 26, 1987
Page 2

GENERAL CONSIDERATIONS FOR THE PROGRAMS WHICH SUNSET:

There are eight general considerations which the Department believes are important to the continuing operation of the five affected programs. Each is discussed briefly below.

1. Flow of Funds to Each Program Does Not Change

The funds for the five affected programs will

be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative pursuant to Sections 62000.1 to 62000.5, inclusive, both with regard to state-to-district and district-to-school disbursements. (Section 62002; emphasis supplied.)

In sum, the identification criteria and allocation funding formulas for the five programs have not been affected by Sections 62000-62007. All previous fiscal statutes and regulations continue to apply.

2. Funds Must Be Used For the "General Purposes" of Programs

Section 62002 requires that funds must be used "for the general purposes" or "intended purposes" of the program but eliminates "all relevant statutes and regulations adopted...regarding the use of the funds." (Emphasis supplied.) Because no previous education program has been required to operate under these conditions, there is no precedent to guide understanding of this statute. Section 62002 eliminates the specific statutory authorization for many of the operational procedures of each of the five programs. Thus, local schools and districts clearly have more overall programmatic discretion now that the specific program laws and regulations have expired. That discretion is not unlimited, however. There is the statutory requirement that ~~the funds be used for the "general" or "intended" purposes of the~~ program, and there are also federal legal requirements with which state and local educational agencies must comply. For example, categorical funds may not be used for general fund purposes. Funds for each of these five programs must be used to provide supplementary assistance, such as resource teachers, aides, and training materials, but may not be used for general fund purposes such as teacher salary increases. This Advisory provides guidance for each of the five programs in pages 6 - 22.

August 26, 1987
Page 3

3. Parent Advisory Committees and School Site Councils Continue

Section 62002.5 provides:

Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to the termination of funding for the programs sunsetted by this chapter. Any school receiving funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunsetting of these programs as provided in this chapter, shall establish a school site council in conformance with the requirements in Section 52012. The functions and responsibilities of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979. (Section 62002.5; emphasis supplied.)

This statute requires all presently operating parent advisory committees and school site councils to continue to operate with the same composition required prior to June 30, 1987. If a school receives new EIA (state compensatory education or limited English proficient) funds after June 30, 1987, and does not already have a school site council, the school must establish a school site council in conformance with former Section 52012--the statute which governs school site councils for the School Improvement Program under Section 62002.5.

4. Audits and Compliance Reviews Are Required

The Department must "apportion the funds specified in Section 62002 to school districts" and "audit the use of such funds to ensure that such funds are expended for eligible pupils according to the purposes for which the legislation was originally established for such programs." (Section 62003; emphasis supplied.) "If the Superintendent of Public Instruction determines that a school district did not comply with the provisions of [Sections 62000-62007], any apportionment subsequently made pursuant to Section 62003 shall be reduced by two times the amount the superintendent determines was not used in compliance with the provisions of [Sections 62000-62007]." (Section 62005; emphasis supplied.) "[I]f the Superintendent of Public Instruction determines that a school district or county

August 26, 1987
Page 4

superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the Superintendent of Public Instruction may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year." (Section 62005.5; emphasis supplied.) The Department also continues to have legal obligations to supervise and enforce local school districts' compliance with the Equal Education Opportunities Act. (See 20 U.S.C. Sections 1703, 1720.)

Coordinated compliance reviews scheduled for 1987-88 are currently planned to be held; however, due to budget cuts it is likely that the validation review process will be modified. In addition, the Department plans to revise the Consolidated Programs Section of the Coordinated Compliance Review Manual related to compliance monitoring functions as mandated by Sections 62003, 62005, 62005.5 and 64001. Information regarding these changes will be communicated as soon as possible.

The Department currently is reviewing the status of findings of districts which were not in compliance with applicable statutes and regulations prior to June 30, 1987. Determinations will be made whether those findings will continue in view of Sections 62000-62007. Findings based upon the following criteria will be maintained: (1) the general purposes of the program, (2) the distribution of funds, or (3) Section 62002.5 relating to parent advisory committees and school site councils. Findings based upon specific statutes and regulations other than the three criteria listed in the previous sentence will be dropped.

5. Program Quality Reviews and School Plans Continue

Education Code Section 64001 establishes the requirement for program quality reviews and continues the requirement for school plans for schools receiving Consolidated Programs funds. Since this section of the Education Code is not affected by Sections 62000-62007, districts and schools must continue to schedule and conduct program quality reviews and develop and implement school plans as in the past. The Department of Education procedures and documents used to comply with Section 64001 will continue to be operative.

6. Use of Staff Development Days and the School-Based Coordinated Program Option

The authorization for schools with School Improvement (SI) Programs to use up to eight school days each year for staff

August 26, 1987
Page 5

development and/or to advise students, yet receive full average daily attendance (ADA) reimbursement, is contained in former Section 52022. Since this section of the Education Code has expired, these days are no longer available to SI schools.

A major consequence of the expiration of the five categorical programs is to provide schools and districts with greater flexibility in operating the programs. Consistent with this purpose is the School-Based Program Coordination Act (Sections 52800-52888) which is available to coordinate the funding of any or all of the following six programs: 1) School Improvement Program, 2) Economic Impact Aid, 3) Miller-Unruh, 4) Gifted and Talented Education, 5) Staff Development, and 6) Special Education. One of the benefits of a school opting to participate in this program is that Section 52854 allows the school to use a maximum of eight school days per year for staff development and/or advising students and still receive full ADA reimbursement. The three basic steps a school must follow to participate in the School-Based Coordination Program are set forth below at pages 9-10.

7. Waivers of the Education Code

The State Board of Education has authority to consider waivers of the Education Code under two conditions: (1) under the general authority provided in Section 33050, and (2) under specific waiver provisions which are contained within some programs. Although the specific waiver provisions in the sunset programs have expired, the general waiver authority is still available to waive nonrestricted sections of the Education Code, including Sections 62000-62007.

8. Future Legislation May Affect Programs Which Have Sunset

In deciding the extent to which changes in the five programs which have sunset will be made, districts should remember that there may be efforts made in the Legislature to reinstate the same or similar statutory requirements for each of the programs. Whether those efforts will prove successful is very uncertain at this point.

August 26, 1987

Page 6

SPECIFIC QUESTIONS AND ANSWERS CONCERNING THE FIVE PROGRAMS
General Introduction

The expiration of the five categorical aid programs on June 30, 1987, leaves many issues unresolved. In this portion of the Advisory, we attempt to answer some of the most frequently asked questions about the impact of Sections 62000-62007 on the use of funds for those programs. We shall provide more information as we resolve ambiguities in the interpretation of these sections.

With regard to each of the programs, the specific statutory and regulatory requirements have been discontinued. Some type of objective evidence of the appropriate use of funds for the "general purposes" of the particular program would, however, appear to be necessary.

I. MILLER - UNRUH BASIC READING ACT OF 1965:

Question 1: What is the general purpose of the program?

Answer: Former Section 54101 emphasized that Miller-Unruh funds are provided to employ and pay the salary of reading specialists for the purpose of preventing and correcting "reading difficulties at the earliest possible time in the educational career of the pupil." The Legislature intended "that the reading program in the public schools be of high quality." (Former Section 54101.) In order to achieve its intent, the Legislature enacted the Miller-Unruh reading program "to provide means to employ specialists trained in the teaching of reading." (Former Section 54101.)

Question 2: What is required now that the legislation has expired?

Answer: School districts participating in the program must employ reading specialists for programs designed to prevent and correct reading difficulties as early as possible. It is the opinion of the Department, with the concurrence of the Commission on Teacher Credentialing, that former Section 54101's purpose (i.e., that any district using Miller-Unruh funds "employ specialists trained in the teaching of reading") and intent (i.e., "to provide salary payments for reading specialists") currently require that a Miller-Unruh funded teacher hold a reading specialist credential issued pursuant to Section 44265 (i.e., a Ryan Act Specialist Credential). This opinion is based upon Sections 44001, 44831, 44253.5, 54101, and 62002. The statutes which established the Miller-Unruh Reading Specialist

August 26, 1987
Page 7

Certificate (former Sections 54120 and 54121) have expired. The Commission on Teacher Credentialing plans to issue "coded correspondence" related to the credential requirement for "reading specialists" as now mandated by Section 62002 and former Section 54101. The Department has recommended to the Commission that it adopt regulations for the acceptance of the former Miller-Unruh Reading Specialist Certificate as fulfilling the minimum requirements for a reading specialist credential under Section 62002 and former Section 54101.

In addition, districts receiving Miller-Unruh funds are required to "cofund," with general funds, each reading position for which partial Miller-Unruh monies are received. For example, partial Miller-Unruh funding of ten reading positions must be used to employ ten reading teachers. Districts cannot aggregate Miller-Unruh funds and fill less than the specified number of Miller-Unruh positions because the cofunding requirement is a part of the allocation funding process preserved by Section 62002. (Section 62002; former Sections 54141, 54145.)

Question 3: What is not required now that the legislation has expired?

Answer: Four major program components are no longer statutorily required:

- a) Participating districts are not required to address the specific priorities in former Section 54123 (e.g., first priority is supplementing instruction in kindergarten and grade 1). However, districts are required to describe how Miller-Unruh Program funds are being used to address the "earliest" prevention and correction of reading difficulties. (Former Section 54101.)
- b) Districts are not required to monitor the caseload of the reading specialist. (Former Section 54123.)
- c) Districts are not required to allot time to the specialist for diagnostic and prescriptive planning, staff development, and self-improvement. (Former Section 54123.)
- d) Districts are not required to pay reading specialists a \$250 stipend. (Former Section 54124.)

August 26, 1987
Page 8

II. SCHOOL IMPROVEMENT (SI) PROGRAM:

Question 1: What are the general purposes of the program?

Answer: As former Section 52000 stated, the SI program is intended "to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school." These efforts are thus directed to the goal of improving the school's entire curriculum and instructional program for all students. The standards of quality contained in the Program Quality Review Criteria are the guides for the school's improvement efforts. They encompass curricular areas (i.e., English Language Arts, Mathematics, Science, History/Social Science, etc.) and non-curricular areas (i.e., learning environment, staff development, school-wide effectiveness, instructional practices, special needs, etc.). The school site council is required to develop an SI plan and a budget; the plan guides the implementation and evaluation of the school's improvement activities.

Question 2: What is not required now that the original legislation has expired?

Answer: The following four major components of the School Improvement Program are no longer in effect:

- a) The requirement for a district master plan to guide the implementation of School Improvement. (Former Sections 52034 (b) through (i); former Sections 52011(a) and (b).)
- b) The specific requirements of what a school plan must include. (Former Sections 52015, 52015.5, 52016, 52019.) There continues, however, to be a requirement for a school plan which is designed to meet the students' educational, personal and career needs through the implementation of a high quality instructional program. Improvement efforts in the plan include, but are not limited to, instruction, auxiliary services, school organization and environment. (Former Section 52000.)
- c) The authorization to use up to eight school days each year for staff development and/or to advise

August 26, 1987
Page 9

students and still receive ADA reimbursement.
(Former Section 52022.)

- d) The authorization to waive various sections of the Education Code that refer to School Improvement. (Former Section 52033.) Districts which desire to waive sections of the Education Code that remain in effect and involve School Improvement now must use the general waiver program and form.

Question 3: Are school site councils still required?

Answer: Yes, under Section 62002.5 (quoted on page 3 above) and Section 64001.

Question 4: Are the requirements for composition, functions, and responsibilities of the school site councils contained in former Section 52012 still in force?

Answer: Yes. Section 62002.5 requires that all parent advisory committees and school site councils which were in existence prior to June 30, 1987, continue. That is, Section 62002.5 requires that all current and future operating school site councils continue to operate with the same composition, functions, and responsibilities required prior to June 30, 1987.

Question 5: Are eight days of staff development available under Section 52022?

Answer: Because former Section 52022 was terminated by the sunset provisions, the specific authorization for SI schools to receive full average daily attendance reimbursement for a maximum of eight staff development days no longer exists. However, schools may exercise the option of placing the SI program under the authority of the School-Based Program Coordination Act (Sections 52800-52903). This portion of the Education Code was not affected by the sunset legislation and grants schools the authority to use up to eight school days a year for staff development and still receive ADA reimbursement for each day. (See Section 52854.)

Question 6: How can schools become School-Based Coordinated Program schools?

August 26, 1987
Page 10

Answer: Districts and schools which choose to exercise this option must complete the following steps:

- a) The local governing board must decide to grant permission to schools to participate and must adopt policies and procedures to guide both the distribution of information about and the formation of school site councils. The school site council must agree (vote) to come under the provisions of the School-Based Program Coordination Act and identify a funding source or sources to be a part of this option. The local governing board must then grant approval before any school may operate a School-Based Coordinated Program.
- b) The school site council must develop or revise an existing school plan accordingly. The local governing board must then approve the new or revised plan.
- c) The district must then notify the Consolidated Programs Management Unit in the State Department of Education of this change in status by submitting Addendum C contained in the Manual of Instruction for the Consolidated Program (Form SDE 100).

Note: There is no authority in the School-Based Coordinated Program provisions, as there was in the former School Improvement legislation, to use the eight staff development days to develop the school plan. The School-Based Program provisions authorize staff development days only for the implementation of a developed and approved plan. Within this context, all staff development activities and/or the advising of students must directly relate to the purposes of the program and must be specified in the school plan.

Question 7: Must a district continue to meet the minimum funding requirements for schools participating in the School Improvement program?

Answer: Yes. Section 62002 states that the allocation formulas in effect on the date that a program ceases to be operative shall continue to apply to the disbursement of funds. Since the minimum funding levels are a part of the allocation formulas,

August 26, 1987
Page 11

districts must continue to meet the established funding levels for schools.

III. INDIAN EARLY CHILDHOOD EDUCATION:

Question 1: What is the general purpose of the program?

Answer: As stated in former Section 52060, the purpose of this program is to "improve the educational accomplishments of American Indian students in rural school districts in California." The intent is "to establish projects which are designed to develop and test educational models which increase competence in reading and mathematics." The American Indian parent community must be involved in planning, implementing and evaluating the educational program. (Former Section 52060.)

Question 2: Is an advisory committee required?

Answer: Yes. Each school district receiving funds for this program must establish a district-wide American Indian Advisory Committee for Native American Indian Education. Also, at each participating school, an American Indian parent advisory group must be established to increase communication and understanding between members of the community and the school officials. If there is only one school participating in the district, only one committee is required.

IV. ECONOMIC IMPACT AID--STATE COMPENSATORY EDUCATION:

Question 1: What is the general purpose of Economic Impact Aid, the State Compensatory Education (EIA/SCE) Program?

Answer: The general purposes of EIA/SCE are found in former Sections 54000, 54001, and 54004.³

Former Section 54000 stated:

It is the intent of the Legislature to provide quality educational opportunities for all children in the public schools. The Legislature recognizes that a wide variety of factors such as low family income, pupil

³The program "Economic Impact Aid" as specified in Section 52000.2(d) means the Educationally Disadvantaged Youth Programs governed by former sections 54000-54059.

August 26, 1987
Page 12

transiency rates, and large numbers of homes where a primary language other than English is spoken have a direct impact on a child's success in school and personal development, and require that different levels of financial assistance be provided districts in order to assure a quality level of education for all pupils.

Former Section 54001 stated:

From the funds appropriated by the Legislature for the purposes of this chapter, the Superintendent of Public Instruction, with the approval of the State Board of Education, shall administer this chapter and make apportionments to school districts to meet the total approved expense of the school districts incurred in establishing education programs for pupils who qualify economically and educationally in preschool, kindergarten, or any of grades 1 through 12, inclusive. Nothing in this chapter shall in any way preclude the use of federal funds for educationally disadvantaged youth. Districts which receive funds pursuant to this chapter shall not reduce existing district resources which have been utilized for programs to meet the needs of educationally disadvantaged students.

And former Section 54004.3 stated:

It is the intent of the Legislature to provide all districts receiving impact aid with sufficient flexibility to design and administer an intra-district allocation system for impact aid which reflects the distribution and the needs of the needy population and assure the provision of services to students traditionally served by the educationally disadvantaged youth programs and bilingual education programs.

Question 2: What is not required now that the legislation has expired?

August 26, 1987
Page 13

Answer: Unlike the other four categorical funding programs which expired on June 30, 1987, the statutory EIA/SCE program remains almost entirely intact. Nearly all of former Sections 54000-54059 are linked to the Economic Impact Aid funding formulas (the "EIA formula" and the "bounce file") contained in former Sections 54020-54028, which are preserved by Section 62002. In addition, the program options for EIA funds are permissive--other than the requirement inherent in former Section 54004.7 and Section 62002 that funds for LEP students must be expended first. Those permissive program options remain after the Economic Impact Aid Program terminated on June 30. Because EIA/SCE funds under Section 62002 must continue "to be disbursed according to the identification criteria and allocation formulas" in effect on June 30, most major components of the EIA/SCE program which were mandatory prior to June 30 are still mandatory.

Question 3: What is the relationship after June 30 between EIA/SCE and federal ECIA, Chapter 1 funds?

Answer: There are three major considerations in this area:

- a) ECIA, Chapter 1, requires that programs in target schools be comparable to those in other schools. When EIA funds are used to meet the educational needs of educationally deprived students and are consistent with the purposes of Chapter 1, districts are allowed to exclude these funds when calculating comparability.
- b) ECIA, Chapter 1, must supplement and not supplant state funded programs. When EIA/SCE programs are consistent with the purposes of Chapter 1, districts may exclude these funds from the requirement that Chapter 1 funds supplement, not supplant.
- c) The allocation alternatives (Title 5, sections 4420 and 4421) developed as a result of ESEA, Title I, have been superseded by ECIA, Chapter 1. They are no longer mandated by any statute. However, they may serve as useful guidelines for district seeking models for the allocation of EIA/SCE funds.

Question 4: What flexibility does a school receiving EIA funds have now that it did not have before June 30, 1987?

August 26, 1987
Page 14

Answer: All services which were allowable prior to June 30 are still permitted. For example, low achievement schoolwide programs, school security costs, and University/College Opportunity (UCO) programs remain viable options for the expenditure of EIA/SCE funds. In addition, school districts have the flexibility to design other programs for the use of EIA/SCE funds for eligible pupils which are consistent with former Sections 54000, 54001, and 54004.3.

V. BILINGUAL EDUCATION:

Question 1: What are the general or intended purposes of the bilingual education program?

Answer: Former Section 52161 specified eight general purposes of bilingual education programs. Section 62002 now makes each of these purposes a requirement for serving limited-English-proficient (LEP) students. They are:

- 1) "[T]he primary goal of all [bilingual] programs is, as effectively and efficiently as possible, to develop in each child fluency in English."
- 2) The program must "provide equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language."
- 3) The program must "provide positive reinforcement of the self-image of participating pupils."
- 4) The program must "promote crosscultural understanding."
- 5) California school districts are required "to offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools."
- 6) California school districts are required "to provide adequate supplemental financial support" in order to offer such bilingual learning opportunities.
- 7) "Insofar as the individual pupil is concerned participation in bilingual programs is voluntary on the part of the parent or guardian."

August 26, 1987
Page 15

- 8) School districts must "provide for in-service programs to qualify existing and future personnel in the bilingual and crosscultural skills necessary to serve the pupils of limited English proficiency of this state."

Question 2: What responsibilities do districts have to meet federal legal requirements to provide appropriate services to LEP students?

Answer: The United States Supreme Court held in 1974 that LEP children were deprived of equal educational opportunities when instruction in a language they could understand had not been provided. (Lau v. Nichols (1974) 414 U.S. 563.) The Lau ruling has been codified in Section 1703(f) of the Equal Education Opportunities Act. That statute provides:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. (20 U.S.C. Section 1703(f); emphasis supplied.)

The federal cases which have interpreted 20 U.S.C. Section 1703(f) establish a three-part analysis of whether "appropriate action" is being taken to eliminate language barriers impeding the participation of LEP students in a district's regular instructional program. It is that:

- 1) The educational theory or principles upon which the instruction is based must be sound.
- 2) The school system must provide the procedures, resources, and personnel necessary to apply the theory in the classroom. That is, the programs actually used by the school system must be reasonably calculated to implement effectively the educational theory adopted.
- 3) After a reasonable period of time, the application of the theory must actually overcome the English language barriers confronting the students and

August 26, 1987
Page 16

must not leave them with a substantive academic deficit.

(See generally Gomez v. Illinois State Bd. of Education (7th Cir. 1987) 811 F.2d 1030, 1041-1042; Castaneda v. Pickard (5th Cir. 1981) 648 F. 2d 989, 1009-1010; Keyes v. School District No. 1 (D. Colo. 1983) 576 F. Supp. 1503, 1516-1522.)

The above requirements apply to all school districts which enroll one or more LEP pupils. In addition, districts receiving ESEA Title VII funding must adhere to ESEA Title VII regulations. Districts operating Lau plans approved by the federal Office of Civil Rights should continue to comply with their plan; any changes should be submitted to OCR for review under Title VI prior to implementation.

Question 3: What are the minimum services which must be provided to LEP students after June 30, 1987?

Answer: Based upon (a) federal statutes and regulations; (b) applicable federal court decisions; (c) ETA/LEP identification criteria and allocation funding formulas; (d) former Section 52161; and (e) Sections 62000-62007, the following ten items appear to be the minimum services which the law requires districts to provide to LEP students:

- o Identification of LEP students according to statutes and regulations in effect prior to June 30, 1987. (Section 62002; former Sections 52164; 52164.1; 52164.2; 52164.3; 52164.4; 52164.5; and 20 U.S.C. Section 1703(f).)⁴
- o Assessment of the English and primary language proficiency of all language minority students. (Section 62002; former Section 52161; and 20 U.S.C. Section 1703(f).)
- o Academic assessment of LEP students in order to determine when "academic instruction through the

⁴Section 62002's reference to "identification criteria" preserves those criteria by which funds are allocated. Thus, the identification of LEP pupils continues to be governed by the current combination of statutes and regulations. They remain in effect until altered either by the Legislature or by the State Board of Education.

August 26, 1987

Page 17

primary language" is necessary. (Section 62002; former Section 52161; and 20 U.S.C. Section 1703(f).)

- o Offering an instructional strategy which must include: 1) an English language development program "to develop in each child fluency in English" as "effectively and efficiently as possible" and 2) the provision of "equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language." (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); Castaneda v. Pickard (5th Cir. 1981) 698 F.2d 989, 1011; and Keyes v. School Dist. No. 1 (D. Colo. 1983) 576 F.Supp. 1503, 1518.)
- o Provision of a procedure which ensures that the "participation of each student in bilingual programs is voluntary on the part of the parent or guardian." (Former Section 52161; Section 62002.)
- o Provision of adequate practices, procedures, resources, qualified personnel, and staff development necessary to implement the general purposes of former Section 52161. (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1010, 1012-1013; and Keyes v. School Dist. No. 1 (D. Colo. 1983) 576 F.Supp. 1503, 1516-1518.)
- o "[I]n-service programs to qualify existing and future personnel in the bilingual and crosscultural skills necessary to serve the pupils of limited English proficiency of this state." (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1012-1013.)
- o Monitoring of the progress of each student toward developing both "fluency in English" and "academic achievement" by means of adequate testing and evaluation. (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 698 F.2d 989, 1014.)
- o Long term accountability for results: The district's instructional program should, over time, enable the LEP students to learn English and

August 26, 1987
Page 18

achieve in the regular instructional program. (Sections 62002, 62005, 62005.5; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1010; and Keyes v. School Dist. No.1 (D. Colo. 1983) 576 F.Supp. 1503, 1518-1519.) The District must specify the measures by which it is assessing the adequacy of its programs in serving the needs of its LEP students. (Sections 62002, 62005, 62005.5; former Section 52161; and 20 U.S.C. Section 1702(f).)

- c) An established parent advisory committee (district and school level) functioning in the same manner as required prior to June 30, 1987. (Section 62002.5.)

Question 4: What is not required now that the specific statutes and regulations have expired?

Answer: Seven major statutory requirements are no longer required:

- a) The definitions and specific requirements of program options (a)-(f). (Former Section 52163.)
- b) The specific reclassification criteria. (Former Section 52164.6.)
- c) The "triggering" mechanism for a bilingual teacher when ten LEP students with the same primary language are enrolled in the same grade level in K-6. (Former Section 52165.)
- d) Bilingual classroom and Individual Learning Program (ILP) staffing requirements. (Former Section 52165.)
- e) Classroom proportions of LEP students to non-LEP students. (Former Section 52167.)
- f) The specific bilingual program-related credential or certificate and waiver requirements for staff assigned to previously required bilingual

August 26, 1987
Page 19

programs. (Former Sections 52163, 52165, 52166, 52172, 52178, 52178.1, 52178.3, 52178.4.)⁵

- g) The specific requirements for parent notification of a student's enrollment in and withdrawal from bilingual education programs. (Former Section 52173.)

Even though these specific requirements are no longer mandated, the eight general purposes of former Section 52161 must be integrated into whatever instructional program is implemented to serve LEP pupils.

Question 5: What effect do Sections 62000-62007 have on EIA/LEP funding?

⁵When the district provides English language development and "academic instruction through the primary language," in order to implement the instructional strategy selected, the staff providing the instruction clearly must have the requisite language and academic skills to provide such instruction competently. The Department does not believe that this requires that every staff person have a specific bilingual credential or authorization. This opinion is based upon Sections 62000 and 62000.2 and their impact upon former Sections 52163, 52165, 52166, 52172, and 52178.

Whenever personnel holding bilingual certificates or authorizations are available, the Department strongly urges districts to assign them to classes in which "academic instruction through the primary language" is necessary. Similarly, bilingually-authorized teachers and language development specialists should be assigned to classes in which special English language development instruction is provided. (See Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1012-1013.)

Since the general and bilingual statutory provisions involving credentialing have not expired (e.g., Sections 44001, 44831, and 44253.5), the Commission on Teacher Credentialing has informed the Department that it believes the current requirements for bilingual credentialing may still be in effect in certain situations. The Commission has stated that it plans to issue "coded correspondence" related to bilingual certificates and authorizations soon.

August 26, 1987
Page 20

Answer: None. State funding of EIA programs, including programs for LEP students, continues. In addition, the "standard dollar" provision which sets a local funding floor for LEP services remains in effect. EIA funds will continue to be disbursed according to the identification criteria and allocation formulas for the program in effect on June 30, 1987. However, the obligation to provide services to LEP pupils is not contingent upon receipt of state categorical funds, since each LEP student generates a given level of average daily attendance (ADA) dollars for instruction in the core curriculum and auxiliary services.

Question 6: Is it still necessary to fill out the R-30 annual language census?

Answer: Yes. Under Section 62002, the funding formula for EIA funds has not changed. That formula is based upon multiple criteria, including the identification criteria contained in the R-30 census data. Therefore, in order to receive EIA funds to fulfill the general purposes of former Section 52161, schools and districts must continue to fill out the R-30 census forms in accord with identification requirements in effect before June 30, 1987.

Question 7: What general advice does the Department have regarding changes in current bilingual programs?

Answer: The Department believes that districts should assess their current practices and consider modifying existing programs in ways which will result in improving LEP students' academic achievement in the regular instructional program. Districts should be guided in improving programs by reviewing the descriptions of minimum state and federal legal requirements provided in this Advisory. Consistent with the trend throughout education, recent legislation would have provided local districts with more options for policies and programs than those allowed by the previous statute. The Department supports this trend toward ~~more program flexibility and effectiveness as described in the~~ recent legislation. In the absence of specific programmatic requirements, districts may now consider changes in the following areas:

- a) Instructional Methods. Districts are encouraged to consider a variety of approaches for serving LEP students, but any approach must be based upon sound educational theory and principles.

August 26, 1987

Page 21

- b) Staffing. Districts may change staffing patterns in an effort to deliver services in a more effective manner. Policies should be directed toward ensuring LEP students access to adequate and appropriately qualified staff who are provided with sufficient resources to accomplish their assignments.⁶
- c) Classroom Composition. Alternatives to the strict classroom composition ratios of LEP and non-LEP students are now available. Districts are cautioned, however, to avoid approaches which promote prohibited segregation of LEP students.⁷
- d) Parent Involvement. Districts may consider a variety of strategies for involving parents in the education of their children. In particular, each parent of an LEP student should 1) know what the alternative program choices are which the district is offering, 2) understand the nature of the alternatives, and 3) actively participate in an informal way in the selection of the program into which the child is placed. Schools are

⁶See footnote 5 on page 19.

⁷It should be noted that there are existing federal prohibitions against segregating children within the school site. In Chapter 453, Statutes of 1986, the California Legislature addressed this issue last year and provided:

The classroom proportion specified in subdivision (a) may be modified for the purpose of providing effective instruction for all pupils in core academic subjects. Pupils of limited English proficiency participating in programs established pursuant to subdivision (a), (b), or (c) of Section 52165 shall receive instruction for at least 20 percent of the school day in classes in which the proportions specified in subdivision (a) are met, and shall receive instruction in classes with pupils of fluent English proficiency for an increased portion of the school day, as their English language skills increase. (Former Section 52167(b).)

Although this section has expired, the Department believes that it provides a reasonable alternative for additional flexibility in classroom composition. Chapter 453 was signed by the Governor and passed by a bi-partisan vote of the Legislature.

August 26, 1987.

Page 22

encouraged, whenever possible, to obtain the written consent of each student's parents when placing the student in a bilingual education program. Students identified as LEP should receive appropriate services (as defined on pages 14-17) pending parental response.

It must be remembered that each of the eight general purposes of former Section 52161 must be integrated into the entire bilingual education program. (See pages 14-15 above.)

August 26, 1987

Page 23

CONCLUSION

The Department is working to define more clearly the effects of Sections 52000-62007 on program operation and will provide additional information as it becomes available. Districts needing assistance interpreting this Advisory may contact any of the following Department staff:

- 1) Miller-Unruh Basic Reading--Janet Cole/Donovan Merck:
(916) 322-5960 or 322-4981
- 2) School Improvement--Dennis Parker/Jim McIlwrath:
(916) 322-5954
- 3) Indian Early Childhood Education--Andy Andreoli/Peter Dibble: (916) 322-9745
- 4) Economic Impact Aid/State Compensatory Education--Hanna Walker: (916) 445-2590
- 5) Bilingual Education--Leo Lopez: (916) 445-2872
- 6) Legal Issues--Allan Keown: (916) 445-4694
- 7) Waivers--Vicki Lee/Leroy Hamm: (916) 322-3428 or 323-0975
- 8) School-Based Pupil Motivation and Maintenance Programs (SB 65)--Maria Chairez: (916) 323-2212
- 9) Consolidated Programs--Bill Waroff: (916) 322-5205
- 10) School-Based Coordinated Programs--please contact the person(s) listed above regarding the applicable funding source(s)

Teacher credentialing questions should be directed to:

- 1) Reading--Sanford L. Huddy, Commission on Teacher Credentialing: (916) 445-0233;
- 2) Bilingual--Sarah Gomez, Commission on Teacher Credentialing: (916) 445-0176.

August 26, 1987

Page 24

Questions which fall outside the scope of this Advisory should be addressed in writing to:

Bill Honig
 Superintendent of Public Instruction
 Attention: Sunset Advisory Group
 721 Capitol Mall
 P.O. Box 944272
 Sacramento, CA 94244-2720

In addition, the Department plans to hold workshops to answer questions related to this Program Advisory according to the following schedule:

<u>Date</u>	<u>Location</u>	<u>Time</u>	<u>Contact Number for Directions</u>
Sept. 10	<u>Santa Rosa</u> Sonoma County Office of Education 410 Fiscal Drive Santa Rosa, CA Board Room	10 AM-Noon	(707) 527-2443
Sept. 11	<u>Sacramento</u> Employment Development Dept. 800 Capitol Mall Sacramento, CA 1098 Auditorium (First Floor)	9-11 AM	(916) 322-5205
Sept. 11	<u>Alameda</u> Alameda County Office of Education 313 W. Winton Hayward, CA Board Room	3-5 PM	(415) 887-0152
Sept. 14	<u>Fresno</u> Fresno County Administrators Bldg. 2314 Mariposa St. Fresno, CA Auditorium	10 AM-Noon	(209) 225-6612 Ext. 215

August 26, 1987
Page 25

Sept. 15 Los Angeles 9-11 AM (213) 533-4269
Levy School
3420 W. 229th Place
Torrence, CA
(Near Del Amo Shopping
Center--South of LAX)
Multipurpose Room

Sept. 15 Riverside 3-5 PM (714) 788-6530
Riverside County
Office of Education
3939 13th Street
Riverside, CA
Board Room

Sept. 15 San Diego 9-11 AM (619) 235-6191
San Diego USD
Bandini Center
3550 Logan Avenue
San Diego, CA
Auditorium

- NOTE: - PLEASE BRING A COPY OF THIS PROGRAM ADVISORY TO THE WORKSHOP.
- PLEASE LIMIT THE NUMBER OF PERSONS ATTENDING EACH WORKSHOP TO TWO PER DISTRICT BECAUSE SPACE IS LIMITED

Westlaw

94 S.Ct. 786
 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
 (Cite as: 414 U.S. 563, 94 S.Ct. 786)

Page 1

Supreme Court of the United States

Kinney Kinmon LAU, a minor by and through Mrs.
 Kam Wai Lau, his guardian ad
 litem, et al., Petitioners,
 v.
 Alan H. NICHOLS et al.

No. 72-6520.

Argued Dec. 10, 1973.
 Decided Jan. 21, 1974.

Action by students of Chinese ancestry who do not speak English for relief against alleged unequal educational opportunities in that they do not receive courses in the English language. The United States District Court for the Northern District of California denied relief and plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, 483 F.2d 791, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that school system's failure to provide English language instruction denied meaningful opportunity to participate in public educational program in violation of Civil Rights Act of 1964.

Reversed.

Mr. Justice White concurred in the result; Mr. Justice Stewart filed an opinion concurring in the result, in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined; Mr. Justice Blackmun filed an opinion concurring in the result, in which Mr. Chief Justice Burger joined.

West Headnotes

[1] Federal Courts ◊452
 170Bk452 Most Cited Cases

Certiorari was granted to review determination that school district's failure to provide English language

instruction to students of Chinese ancestry who do not speak English did not deny equal protection or violate Civil Rights Act of 1964, because of public importance of question presented. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A. Const. Amend. 14.

[2] Civil Rights ◊1070
 78k1070 Most Cited Cases
 (Formerly 78k127.1, 78k127, 78k9)

School system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied them meaningful opportunity to participate in public educational program in violation of Civil Rights Act of 1964; equality is not provided by providing the same facilities, textbooks, teachers, and curriculum. Civil Rights Act of 1964, §§ 201 et seq., 601 et seq., 602, 42 U.S.C.A. §§ 2000a et seq., 2000d et seq., 2000d-1.

*563 **786 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program and thus violates § 601 of the Civil Rights Act of 1964, which bans discrimination **787 based 'on the ground of race, color, or national origin,' in 'any program or activity receiving Federal financial assistance,' and the implementing regulations of the Department of Health, Education, and Welfare. Pp. 787--789.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

94 S.Ct. 786
414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
(Cite as: 414 U.S. 563, 94 S.Ct. 786)

483 F.2d 791, reversed and remanded.

Edward H. Steinman, Santa Clara, Cal., for petitioners; Kenneth Hecht and David C. Moon, San Francisco, Cal., on the briefs.

Thomas M. O'Connor, San Francisco, Cal., for respondents; George E. Frueger and Burk E. Delventhal, San Francisco, Cal., on the brief.

J. Stanley Pottinger, Asst. Atty. Gen., San Francisco, Cal., for the United States, as amicus curiae, by special leave of Court; Solicitor Gen., Robert Bork, Deputy Solicitor Gen., Lawrence G. Wallace, Mark L. Evans and Brian K. Landsberg, Washington, D.C., on the brief.

Stephen J. Pollak, Ralph J. Moore, Jr., David Rubin, Washington, D.C., and Peter T. Galiano, Burlingame, Cal., for Nat. Ed. Assn. and others; W. Reece Bader and James R. Madison, San Francisco, Cal., for San Francisco Lawyers' Committee for Urban Affairs; J. Harold Flannery, Washington, D.C., for Center for Law and Ed., Harvard University; Herbert Teitelbaum, New York City, for Puerto Rican Legal Defense and Ed. Fund, Inc; Mario G. Obledo, San Francisco, Cal., Sanford J. Rosen, Berkeley, Cal., Michael Mendelson, and Alan Exelrod, San Francisco, Cal., for Mexican American Legal Defense and Educational Fund and others; Samuel Rabinove, Joseph B. Robison, Arnold Forster, and Elliot C. Rothenberg, New York City, for American Jewish Committee and others; F. Raymond Marks, Berkeley, Cal., for the Childhood and Government Project; Martin Glick, San Francisco, Cal., for Efrain Tostado and others; and the Chinese Consolidated Benevolent Assn. and others, as amicus curiae.

*564 Mr. Justice DOUGLAS delivered the opinion of the Court.

The San Francisco, California, school system was integrated in 1971, as a result of a federal court decree, 339 F.Supp. 1315. See *Lee v. Johnson*, 404 U.S. 1215, 92 S.Ct. 14, 30 L.Ed.2d 19. The District Court found that there are 2,856 students of Chinese ancestry in the school system who do not speak English. Of those who have that language

deficiency, about 1,000 are given supplemental courses in the English language. [FN1] About 1,800, however, do not receive that instruction.

FN1. A report adopted by the Human Rights Commission of San Francisco and submitted to the Court by respondents after oral argument shows that, as of April 1973, there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.

This class suit brought by non-English-speaking Chinese students against officials responsible for the operation of the San Francisco Unified School District seeks relief against the unequal educational opportunities, which are alleged to violate, inter alia, the Fourteenth Amendment. No specific remedy is urged upon us. *565 Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

[1] The District Court denied relief. The Court of Appeals affirmed, holding that there was no violation of the Equal Protection Clause of the Fourteenth Amendment or of s 601 of the Civil Rights Act of 1964, 78 Stat. 252, **78842 U.S.C. s 2000d, which excludes from participation in federal financial assistance, recipients of aid which discriminate against racial groups, 483 F.2d 791. One judge dissented. A hearing en banc was denied, two judges dissenting. *Id.*, at 805.

We granted the petition for certiorari because of the public importance of the question presented, 412 U.S. 938, 93 S.Ct. 2786, 37 L.Ed.2d 397.

The Court of Appeals reasoned that (e)very student

94 S.Ct. 786
 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
 (Cite as: 414 U.S. 563, 94 S.Ct. 786)

Page 3

brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system,' 483 F.2d, at 797. Yet in our view the case may not be so easily decided. This is a public school system of California and s 71 of the California Education Code states that 'English shall be the basic language of instruction in all schools.' That section permits a school district to determine 'when and under what circumstances instruction may be given bilingually.' That section also states as 'the policy of the state' to insure 'the mastery of English by all pupils in the schools.' And bilingual instruction is authorized 'to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.'

*566 Moreover, s 8573 of the Education Code provides that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in English, as well as other prescribed subjects. Moreover, by s 12101 of the Education Code (Supp. 1973) children between the ages of six and 16 years are (with exceptions not material here) 'subject to compulsory full-time education.'

Under these state-imposed standards there is no 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.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

[2] We do not reach the Equal Protection Clause argument which has been advanced but rely solely on s 601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, to reverse the Court of Appeals.

That section bans discrimination based 'on the ground of race, color, or national origin,' in 'any program or activity receiving Federal financial assistance.' The school district involved in this litigation receives large amounts of federal financial assistance. The Department of Health, Education, and Welfare (HEW), which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 U.S.C. s 2000d-1, in 1968 issued one guideline that '(s)chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the *567 opportunity to obtain the education generally obtained by other students in the system.' 33 Fed.Reg. 4955. In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded to rectify the language deficiency in order to open the instruction to students who had 'linguistic deficiencies,' 35 Fed.Reg. 11595.

By s 602 of the Act HEW is authorized to issue rules, regulations, and orders [FN2] to make sure that recipients of **789 federal aid under its jurisdiction conduct any federally financed projects consistently with s 601. HEW's regulations, 45 CFR 80.3(b)(1), specify that the recipients may not

FN2. Section 602 provides:

'Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . . 42 U.S.C. s 2000d-1.

'(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

'(iv) Restrict an individual in any way in the

94 S.Ct. 786
 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
 (Cite as: 414 U.S. 563, 94 S.Ct. 786)

Page 4

enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.'

Discrimination among students on account of race or national origin that is prohibited includes 'discrimination . . . in the availability or use of any academic . . . or *568 other facilities of the grantee or other recipient.' Id., s 80.5(b).

Discrimination is barred which has that effect even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.' Id., s 80.3(b)(2).

It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program--all earmarks of the discrimination banned by the regulations. [FN3] In 1970 HEW issued clarifying guidelines, 35 Fed.Reg. 11595, which include the following:

FN3. And see Report of the Human Rights Commission of San Francisco, Bilingual Education in the San Francisco Public Schools, Aug. 9, 1973.

'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.'

'Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent

track.'

Respondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the *569 Regulation' of HEW (45 CFR pt. 80) which are 'issued pursuant to that title . . . and also immediately to 'take any measures necessary to effectuate this agreement.' The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 142--143, 67 S.Ct. 544, 552--554, 91 L.Ed. 794. Whatever may be the limits of that power, *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279 et seq., they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said: [FN4]

FN4. 110 Cong.Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'

We accordingly reverse the judgment of the Court of Appeals and remand the **790 case for the fashioning of appropriate relief.

Reversed and remanded.

Mr. Justice WHITE concurs in the result.

Mr. Justice STEWART, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, concurring in the result.

It is uncontested that more than 2,800 schoolchildren of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or

94 S.Ct. 786
 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
 (Cite as: 414 U.S. 563, 94 S.Ct. 786)

write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency. The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only *570 that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that s 601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. For that section provides that '(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.'

On the other hand, the interpretive guidelines published by the Office for Civil Rights of the Department of Health, Education, and Welfare in 1970, 35 Fed.Reg. 11595, clearly indicate that affirmative efforts to give special training for non-English-speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools:

'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.' [FN1]

FN1. These guidelines were issued in further clarification of the Department's position as stated in its regulations issued to implement Tit. VI, 45 CFR pt. 80. The regulations provide in part that no recipient of federal financial assistance administered by HEW may

'Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (or)

'Restrict an individual in any way in the

enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.' 45 CFR s 80.3(b)(1)(ii), (iv).

*571 The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of s 601. [FN2] Last Term, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318, we held that the validity of a regulation promulgated under a general authorization provision such as s 602 of Tit. VI [FN3] 'will be sustained so long as it is 'reasonably related to the **791 purposes of the enabling legislation.' *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280--281, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1969).' I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and 'consistent administrative construction' are 'entitled to great weight.' *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415; *Griggs v. Duke Power Co.*, 401 U.S. 424, 433--434, 91 S.Ct. 849, 854--855, 28 L.Ed.2d 158; *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616. The Department has reasonably and consistently interpreted s 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

FN2. The respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.

FN3. Section 602, 42 U.S.C. s 2000d--1, provides in pertinent part:

'Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d

94 S.Ct. 786
 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1
 (Cite as: 414 U.S. 563, 94 S.Ct. 786)

Page 6

of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . .

The United States as amicus curiae asserts in its brief, and the respondents appear to concede, that the guidelines were issued pursuant to § 602.

For these reasons I concur in the result reached by the Court.

Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

I join Mr. Justice STEWART'S opinion and thus I, too, concur in the result. Against the possibility that the Court's judgment may be interpreted too broadly, I *572 stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. We may only guess as to why they have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Westlaw.

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 1

▷

United States Court of Appeals,
Fifth Circuit.
Unit A

Elizabeth and Katherine CASTANEDA, by their
father and next friend, Roy C.
Castaneda, et al., Plaintiffs-Appellants,
v.
Mrs. A. M. "Billy" PICKARD, President,
Raymondville Independent School
District, Board of Trustees, et al.,
Defendants-Appellees.

No. 79-2253.

June 23, 1981.

Plaintiffs, Mexican-American children and their parents who represented a class of others similarly situated, brought action against school district alleging that district engaged in policies and practices of racial discrimination which deprived plaintiffs and their class of rights secured by them by the Constitution and various federal statutes. The United States District Court for the Southern District of Texas, Robert O'Connor, Jr., J., entered judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) remand for purpose of determining whether school district had past history of discrimination and whether it currently operated unitary school system was necessary in order to determine claims that district's ability grouping system of student assignment for grades K-8 was unlawful; (2) bilingual education and language remediation programs offered by school district did not violate the Title VI; and (3) school district's bilingual education and language remediation programs were inadequate with respect to in-service training of teachers for bilingual classrooms and in measuring progress of students in the programs.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Schools ◊164
345k164 Most Cited Cases

Ability grouping is not per se unconstitutional; however, in a system having a history of unlawful segregation, if testing or other ability grouping practices have a markedly disparate impact on students of different races in a significant racially segregative effect, such process cannot be employed until the school system has achieved unitary status and maintained a unitary school system for sufficient period of time that handicaps which past segregative nexus have inflicted on minority students and which may adversely affect their performance have been erased.

[2] Civil Rights ◊1536
78k1536 Most Cited Cases
(Formerly 78k378, 78k44(1))

In cases involving claim of pattern or practice of discrimination in employment of faculty and staff brought against a school district with a history of discrimination, defendant must rebut plaintiff's prima facie case by clear and convincing evidence that challenged employment decisions were motivated by legitimate and nondiscriminatory reasons.

[3] Civil Rights ◊1424
78k1424 Most Cited Cases
(Formerly 78k243.1, 78k243, 78k13.14)

In action in which Mexican-American children and their parents alleged that school district unlawfully discriminated against them by using an ability grouping system for classroom assignments and in hiring and promotion of faculty and administrators, trial court erred in failing to make findings regarding history of school district and whether vestiges of past discrimination currently existed.

[4] Schools ◊13(6)
345k13(6) Most Cited Cases

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 2

If statistical results of ability grouping practices do not indicate "abnormal or unusual" segregation of students along racial lines, the practice is acceptable even in a system still pursuing desegregation efforts.

[5] Schools ⇄13(21)
345k13(21) Most Cited Cases

Remand for purpose of determining whether school district had past history of discrimination and whether it currently operated unitary school system was necessary in order to determine claims that district's ability grouping system of student assignment for grades K-8 was unlawful.

[6] Civil Rights ⇄1070
78k1070 Most Cited Cases
(Formerly 78k127.1, 78k127, 78k13.4(1))

[6] Civil Rights ⇄1331(5)
78k1331(5) Most Cited Cases
(Formerly 78k201, 78k13.11)

Class of Mexican-American students had standing to complain of, and a private cause of action for relief from, alleged discrimination by school district in hiring and promotion of teachers and staff under Equal Educational Opportunities Act and under Civil Rights Act of 1871. Equal Educational Opportunities Act of 1974, § 204(d), 20 U.S.C.A. § 1703(d); 42 U.S.C.A. § 1983.

[7] Civil Rights ⇄1395(8)
78k1395(8) Most Cited Cases
(Formerly 78k235(3), 78k13.12(3))

[7] Civil Rights ⇄1405
78k1405 Most Cited Cases
(Formerly 78k240(2), 78k13.13(1))

In order to assert a claim based upon unconstitutional racial discrimination a party must not only allege and prove that the challenged conduct had a differential or disparate impact on persons of different races but also assert and prove that the governmental actor, in adopting or employing challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on basis of race; thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employer under Title VI or

applicable civil rights statutes. 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[8] Civil Rights ⇄1535
78k1535 Most Cited Cases
(Formerly 78k377.1, 78k377, 78k43)

In an employment discrimination act premised upon Title VII, a party may rely solely upon disparate impact theory of discrimination and need not establish an intent to discriminate in order to make out a cause of action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] Civil Rights ⇄1060
78k1060 Most Cited Cases
(Formerly 78k127.1, 78k127, 78k13.4(1))

Conduct proscribed by Equal Educational Opportunities Act is coextensive with that prohibited by Fourteenth Amendment and Title VI and does not encompass conduct which might violate Title VII because, although not motivated by racial factors, it has a disparate impact upon persons of different races. Civil Rights Act of 1964, §§ 601 et seq., 701 et seq., 42 U.S.C.A. §§ 2000d et seq., 2000e et seq.; Equal Educational Opportunities Act of 1974, § 204(d), 20 U.S.C.A. § 1703(d).

[10] Federal Courts ⇄858
170Bk858 Most Cited Cases

In civil rights cases, district court's finding of discrimination or no discrimination is a determination of ultimate fact; thus, reviewing court must make an independent determination of the question but is bound by subsidiary factual determinations unless they are clearly erroneous. Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C.A.

[11] Civil Rights ⇄1139
78k1139 Most Cited Cases
(Formerly 78k142, 78k9.10)

[11] Civil Rights ⇄1544
78k1544 Most Cited Cases
(Formerly 78k382.1, 78k382, 78k44(1))

In class action or pattern and practice employment discrimination suits, question whether employer discriminates against a particular group in making

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 3

hiring decisions requires, as a first and fundamental step, a statistical comparison between racial composition of employer's work force and that of relevant labor markets; where nature of employer involved suggests that pool of people qualified to fill positions is not likely to be substantially congruent with general population, relevant labor market must be separately and distinctly defined.

[12] Civil Rights ⇨1544
78k1544 Most Cited Cases
(Formerly 78k382.1, 78k382, 78k44(1))

A statistically significant disparity between racial composition of applicant pool and that of relevant labor market may create a prima facie case of discrimination in recruiting.

[13] Federal Courts ⇨939
170Bk939 Most Cited Cases

Remand was necessary for comparison of employment statistics of school district with ethnic composition of relevant labor market for purpose of determining whether class of Mexican-American students and parents established prima facie case of unlawful discrimination as to school district's hiring of teachers and its hiring or promotion of persons to administrative positions and, if so, whether school district could adequately rebut prima facie case. Equal Educational Opportunities Act of 1974, § 204(d), 20 U.S.C.A. § 1703(d); Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; U.S.C.A. Const. Amend. 14.

[14] Schools ⇨148(1)
345k148(1) Most Cited Cases
(Formerly 345k148)

Equal Educational Opportunities Act imposes on educational agency a duty to take appropriate action to remedy language barriers of transfer students as well as obstacles confining students who begin their education under that agency. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[15] Schools ⇨164
345k164 Most Cited Cases

Lau guidelines were inapplicable to any evaluation of legal sufficiency of school district's language

program. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[16] Schools ⇨164
345k164 Most Cited Cases

Bilingual education and language remediation programs offered by school district did not violate Title VI. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[17] Schools ⇨164
345k164 Most Cited Cases

Where appropriateness of a particular school system's language remediation program is challenged under Equal Educational Opportunities Act, responsibility of federal court is threefold: first, court must examine carefully evidence the record contains concerning soundness of educational theory or principles upon which challenged program is based in order to ascertain whether school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy and secondly, to determine whether programs and practices actually used by school system are reasonably calculated to implement effectively the educational theory adopted by the school and finally, if school's program fails to produce results indicating that language barriers confronting students are actually being overcome, that program may no longer constitute appropriate action as far as that school is concerned. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[18] Schools ⇨164
345k164 Most Cited Cases

Under Equal Educational Opportunities Act, a school is not free to persist in a language remediation policy which, although it may have been "appropriate" when adopted, in sense that there were sound expectations for success and bona fide effort to make the program work, is, in practice, proved a failure. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[19] Schools ⇨164

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 4

345k164 Most Cited Cases

Equal Educational Opportunities Act imposes on educational agencies not only an obligation to overcome the direct obstacle to learning which language barrier itself imposes but also a duty to provide limited English-speaking abilities to students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[20] Schools ⇐164

345k164 Most Cited Cases

Equal Educational Opportunities Act leaves schools free to determine whether they wish to discharge their obligations to limited English-speaking students to overcome obstacles to learning which language barrier imposed simultaneously, by implementing a program designed to keep limited English-speaking students at grade level in other areas of the curriculum by providing instruction in their native language at same time that English language development effort is pursued, or to address problems in sequence, by focusing first on development of English language skills and then providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during that period so long as schools design programs which are reasonably calculated to enable those students to obtain parity of participation in standard instructional program within reasonable length of time after they enter school system. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[21] Schools ⇐164

345k164 Most Cited Cases

School district's bilingual education and language remediation programs were inadequate with respect to in-service training of teachers for bilingual classrooms and in measuring progress of students in the programs. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

*992 James A. Herrmann, Texas Rural Legal Aid, Inc., Harlingen, Tex., for plaintiffs-appellants.

Michael K. Swan, Jeffrey A. Davis, Houston, Tex., for Pickard, et al.

Barbara C. Marquardt, Asst. Atty. Gen. of Texas, Austin, Tex., for Brockette, et al.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiffs, Mexican-American children and their parents who represent a class of others similarly situated, instituted this action against the Raymondville, Texas Independent School District (RISD) alleging that the district engaged in policies and practices of racial discrimination against Mexican-Americans which deprived the plaintiffs and their class of rights secured to them by the fourteenth amendment and 42 U.S.C. s 1983 (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d et seq. (1976), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. s 1701 et seq. (1976). Specifically, plaintiffs charged that the school district unlawfully discriminated against them by using an ability grouping system for classroom assignments which was based on racially and ethnically discriminatory criteria and resulted in impermissible classroom segregation, by discriminating against Mexican-Americans in the hiring and promotion of faculty and administrators, and by failing to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district.[FN1] The original complaint also named the Secretary of the Department of Health, Education and Welfare (HEW) as a defendant and alleged that the department, although charged with responsibility to assure that federal funds are spent in a nondiscriminatory manner and cognizant of the school district's noncompliance with federal law, had failed to take appropriate action to remedy the unlawful practices of the school district or to terminate its receipt of federal funds. By an amended complaint, the plaintiffs also named the

648 F.2d 989
(Cite as: 648 F.2d 989)

Texas Education Agency (TEA) as a defendant and charged that the TEA had failed to fulfill its duty to assure that the class represented by the plaintiffs was not subjected to discriminatory practices through the use of state or federal funds.

FNI. The pleadings in this case also contained an allegation that the school district had administered the extracurricular programs of its schools with the purpose and effect of denying Mexican-American students an equal opportunity to participate in such activities. The record reveals no evidence on this issue and plaintiffs have not reasserted this claim on appeal.

The case was tried in June 1978; on August 17, 1978 the district court entered judgment in favor of the defendants based upon its determination that the policies and practices of the RISD, in the areas of hiring and promotion of faculty and administrators, ability grouping of students, and bilingual education did not violate any constitutional or statutory rights of the plaintiff class. From that judgment, the plaintiffs have brought this appeal in which they claim the district court erred in numerous matters of fact and law.

Although upon motion of the plaintiffs, HEW was dismissed as a defendant in this suit before trial, the agency remains an important actor in our current inquiry because this private litigation involves many of the same issues considered in an HEW administrative investigation and fund termination proceeding involving RISD. In April 1973, following a visit from representatives of HEW's Office for Civil Rights (OCR), HEW notified RISD that it failed to comply with the provisions of Title VI and administrative regulations issued by the Department to implement Title VI. HEW requested that RISD submit an affirmative plan for remedying these deficiencies. Apparently, *993 RISD and the OCR were unable to negotiate a mutually acceptable plan for compliance and in June 1976, formal administrative enforcement proceedings were instituted in which the OCR sought to terminate federal funding to RISD. RISD requested a hearing on the allegations of noncompliance and in January 1977, a five day hearing was held before

an administrative law judge. Thereafter, the judge entered a decision which concluded that RISD was not in violation of Title VI or the administrative regulations and policies issued thereunder. The judge ordered that the suspension of federal funds to the district be lifted. This decision was affirmed in April 1980, by a final decision of the Reviewing Authority of the OCR.

The extensive record of these administrative proceedings, including the transcript of the hearing before the administrative law judge and the judge's decision, was received into the record as evidence in the trial of this case and included in the record on appeal. The defendants have moved to supplement the appellate record by including the decision of the Reviewing Authority. This motion was carried with the appeal. Since the record in this case already includes extensive material from this administrative proceeding, which involved many of the same questions of fact and law as this case, we see no reason why the final administrative determination of those questions should not also be included. The defendants' motion to supplement the appellate record in this cause to include the final decision of the Reviewing Authority of OCR is, therefore, granted.

Before we turn to consider the specific factual and legal issues raised by the plaintiffs in their appeal of the district court's judgment, we think it helpful to outline some of the basic demographic characteristics of the Raymondville school district. Raymondville is located in Willacy County, Texas. Willacy County is in the Rio Grande Valley; by conservative estimate based on census data, 77% of the population of the county is Mexican-American and almost all of the remaining 23% is "Anglo." The student population of RISD is about 85% Mexican-American.

Willacy County ranks 248th out of the 254 Texas counties in average family income. Approximately one-third of the population of Raymondville is composed of migrant farm workers. Three-quarters of the students in the Raymondville schools qualify for the federally funded free school lunch program. The district's assessed property valuation places it among the lowest ten percent of all Texas counties in its per capita student expenditures.

The district operates five schools. Two campuses,

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 6

L.C. Smith and Pittman, house students in kindergarten through fifth grade. The student body at L.C. Smith is virtually 100% Mexican-American; Pittman, which has almost twice as many students, has approximately 83% Mexican-American students. There is one junior high school, which has 87% Mexican-American students, and one high school, in which the enrollment is 80% Mexican-American.

I. A THRESHOLD OBSTACLE TO APPELLATE REVIEW

In their brief on appeal, the plaintiffs contend first, that the analysis of the memorandum opinion in which the district court concluded that the challenged policies and practices of the RISD did not violate the fourteenth amendment, Title VI or the Equal Educational Opportunities Act is pervasively flawed by the court's failure to make findings concerning the history of discrimination in the RISD in assessing the plaintiffs' challenges to certain current policies and practices. Plaintiffs contend that these issues were properly raised by the pleadings and that there was ample evidence in the record to support findings that RISD had, in the past, segregated and discriminated against Mexican-American students and that, as yet, RISD has failed to establish a unitary system in which all vestiges of this earlier unlawful segregation have been eliminated because the virtually 100% Mexican-American school, L.C. Smith, is a product of this earlier unlawful policy of segregation. Although the plaintiffs in this case did not challenge the current student *994 assignment practices of the RISD (which are no longer based on attendance zones but rather on a freedom of choice plan) or request relief designed to alter the ethnic composition of the student body at L.C. Smith, the evidence of past segregative practices of RISD was relevant to the legal analysis of two of the claims the plaintiffs did make.

[1] The plaintiffs here challenge the RISD's ability grouping system which is used to place students in particular sections or classes within their grade. We have consistently stated that ability grouping is not per se unconstitutional. In considering the propriety of ability grouping in a system having a history of unlawful segregation, however, we have cautioned that if testing or other ability grouping practices have a markedly disparate impact on students of

different races and a significant racially segregative effect, such practices cannot be employed until a school system has achieved unitary status and maintained a unitary school system for a sufficient period of time that the handicaps which past segregative practices may have inflicted on minority students and which may adversely affect their performance have been erased. *United States v. Gadsden County School District*, 572 F.2d 1049 (5th Cir. 1978); *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975); *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir. 1975); *Moses v. Washington Parish School Board*, 456 F.2d 1285 (5th Cir. 1972); *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1219 (5th Cir. 1969).

[2] The question whether RISD has a history of unlawful discrimination is also relevant to the analysis of plaintiffs' claim regarding the district's employment practices. In cases involving claims similar to those made here regarding a pattern or practice of discrimination in the employment of faculty and staff, we have held that when such a claim is asserted against a school district having a relatively recent history of discrimination, the burden placed on the defendant school board to rebut a plaintiff's prima facie case is heavier than the burden of rebuttal in the usual employment discrimination case. In a case involving a school district with a history of discrimination, the defendant must rebut the plaintiff's prima facie case by clear and convincing evidence that the challenged employment decisions were motivated by legitimate nondiscriminatory reasons. *Lee v. Conecuh County Board of Education*, 634 F.2d 959 (5th Cir. 1981); *Lee v. Washington County Board of Education*, 625 F.2d 1235, 1237 (5th Cir. 1980); *Davis v. Board of School Commissioners*, 600 F.2d 470, 473 (5th Cir. 1979); *Hereford v. Huntsville Board of Education*, 574 F.2d 268, 270 (5th Cir. 1978); *Barnes v. Jones County School District*, 544 F.2d 804, 807 (5th Cir. 1977). This, of course, is a much heavier burden of rebuttal than that imposed on an employer in the usual employment discrimination case under *Texas Department of Community Affairs v. Burdine*, -- U.S. --, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). [FN2]

FN2. In *Burdine*, the Supreme Court

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
 (Cite as: 648 F.2d 989)

Page 7

elaborated upon the basic allocation of the burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment which it had enumerated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Court clarified the defendant's burden of rebuttal by describing it as follows: The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

-- U.S. at --, 101 S.Ct. at 1094 (footnotes omitted).

Although the Court's opinion in *Burdine* clearly disapproves of this circuit's previous practice of requiring the defendant in a Title VII case to prove the existence of legitimate non-discriminatory reasons for a challenged employment decision by a preponderance of the evidence, we do not believe that *Burdine* affects the burden shifting device we have long employed in the distinctive context of claims alleging discrimination, whether in employment or other areas, by a school district with a history of unlawful segregation. The analysis we have employed in this latter type of case is not derived from *McDonnell Douglas*; even as we employed the now disapproved "preponderance of the evidence" requirement in most Title VII contexts, we distinguished the situation where a claim of employment discrimination was lodged against a school district which formerly operated a dual school system and imposed the even stiffer "clear and convincing" standard. *Lee v. Conecuh County Board of Education*, 634 F.2d 959 (5th Cir. 1981)

The application of this standard under these circumstances, is consistent with the type of presumptions approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (in school district which formerly operated segregated dual system, burden placed on district to establish that continued existence of some one-race schools is not the result of present or past discriminatory action by the district) and *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973) ("finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.") We do not believe the Court in *Burdine* intended to affect the manner in which this court has applied a presumption similar to that recognized in *Swann* and *Keyes*, to place on school districts having a history of unlawful discrimination a more onerous burden of rebuttal in an employment discrimination case than is usually imposed on defendant in a Title VII case.

[3] Plaintiffs raised the issue of RISD's past discrimination in their pleadings and introduced substantial evidence in support *995 of this claim in the proceedings before the district court; [FN3] thus, the district court's failure to make findings regarding the history of the district and whether vestiges of past discrimination currently exist in the district cannot be excused on the grounds that these issues were not properly before the court. The absence of findings on these issues seriously handicaps our review of the merits of the ability grouping and employment discrimination claims made by the plaintiffs in this case. With regard to plaintiffs' first two arguments on appeal, our opinion will, therefore, be limited to identifying the factual and legal determinations which, although

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 8

necessary to a proper analysis of the plaintiffs' claims, were not made by the district court and must be *996 made upon remand and to reviewing those aspects of the merits of these claims which are not affected by this failure to make certain essential findings.

FN3. The record contains evidence that although Raymondville has always operated only one secondary school facility, attended by both Anglo and Mexican-American students, there was historically, segregation of Mexican-American students at the elementary school level. From school board minutes it appears that in the early decades of this century RISD operated schools on only one campus. There were separate buildings or wings of buildings on this one site for the "Mexican School" and the "American School," both of which provided instruction in the elementary grades, and the secondary school which housed junior high and high school students.

In 1947, overcrowding at the central campus prompted a proposal that RISD operate another elementary school at a different site in northwest Raymondville and to establish attendance zones for elementary students. This proposal met with organized and vocal opposition from the Mexican-American community. The League of United Latin-American Citizens petitioned the board to consider another location for the new school and complained that the proposed site coupled with the new attendance zone policy would result in the establishment of a school attended almost exclusively by Mexican-Americans. The school board nevertheless proceeded to open a school on the northwest Raymondville site. This school, known first as the San Jacinto school and later as the North Ward school, was housed in old military barracks. This school was closed and the L.C. Smith school was built on the same site in 1962. We note that although the northwest campus has apparently been a virtually all-Mexican-American school, it is not

clear from the record that the main campus elementary school was ever exclusively, or even primarily, Anglo and it is certainly not so today. It is clear, however, that as a result of the manner in which attendance zones were defined, the Anglo students were concentrated at the main campus elementary school facilities. At that campus, Mexican-American students were apparently instructed in separate classes during the first three elementary grades in an effort to provide English language instruction; classrooms at the main elementary school were integrated beginning with the fourth grade. The record in this case does not contain evidence from which we can determine whether, despite this history, RISD has now fully remedied the effects of these practices and operates a unitary system.

II. ABILITY GROUPING

RISD employs an ability grouping system of student assignment. In the elementary grades and the junior high school, students are placed in a particular ability group (labeled "high," "average" or "low") based on achievement test scores, school grades, teacher evaluations and the recommendation of school counselors. In grades 1-6, once students have been placed in a particular ability group, they are assigned to a specific class for that group by a random manual sorting system designed to assure that each classroom has a roughly equal number of girls and boys. After the junior high school students are grouped by ability, they are assigned to particular sections of their ability group by computer. Although Raymondville High School offers courses of varying pace and difficulty, students are not assigned to particular ability groups. High school students, with the assistance of their parents and school counselors, choose the subjects they wish to study (subject, of course, to the usual sort of prerequisites and curriculum required for graduation) and are free to select an accelerated, average or slower class. Plaintiffs claim that these ability grouping practices unlawfully segregate the Mexican-American students of the district.

As we noted above, this circuit has consistently

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 9

taken the position that ability grouping of students is not, per se, unconstitutional. The merits of a program which places students in classrooms with others perceived to have similar abilities are hotly debated by educators; nevertheless, it is educators, rather than courts, who are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved. Thus, as a general rule, school systems are free to employ ability grouping, even when such a policy has a segregative effect, so long, of course, as such a practice is genuinely motivated by educational concerns and not discriminatory motives. However, in school districts which have a past history of unlawful discrimination and are in the process of converting to a unitary school system, or have only recently completed such a conversion, ability grouping is subject to much closer judicial scrutiny. Under these circumstances we have prohibited districts from employing ability grouping as a device for assigning students to schools or classrooms, *United States v. Gadsden County School District*, supra; *McNeal v. Tate County School District*, supra. The rationale supporting judicial proscription of ability grouping under these circumstances is two-fold. First, ability grouping, when employed in such transitional circumstances may perpetuate the effects of past discrimination by resegregating, on the basis of ability, students who were previously segregated in inferior schools on the basis of race or national origin. Second, a relatively recent history of discrimination may be probative evidence of a discriminatory motive which, when coupled with evidence of the segregative effect of ability grouping practices, may support a finding of unconstitutional discrimination.

[4] Thus, in a case where the ability grouping practices of a school system are challenged, the court must always consider the history of the school system involved. If the system has no history of discrimination, or, if despite such a history, the system has achieved unitary status and maintained such status for a sufficient period of time that it seems reasonable to assume that any racially disparate impact of the ability grouping does not reflect either the lingering effects of past segregation or a contemporary segregative intent, then no impermissible racial classification is involved and ability grouping may be employed despite segregative effects. However, if the

district's history reveals a story of unremedied discrimination, or remedies of a very recent vintage which may not yet be fully effective to erase the effects of past discrimination, then the courts must scrutinize the effects of ability grouping with "punctilious care." *997 *McNeal v. Tate County School District*, id. at 1020. Even under these circumstances, however ability grouping is not always impermissible. If the statistical results of the ability grouping practices do not indicate "abnormal or unusual" segregation of students along racial lines, the practice is acceptable even in a system still pursuing desegregation efforts. *Morales v. Shannon*, supra at 414.

[5] Despite the absence of district court findings on the questions whether RISD has a history of discrimination against Mexican-Americans and whether any past discrimination has been fully remedied, we are able to consider the merits of plaintiffs' ability grouping claim insofar as it challenges the practices employed in grades 9-12. We note, first, that although different high school courses in Raymondville may be designed to accommodate students of different abilities or interests, self-selection, by students and parents, plays a very large part in the process by which students end up in a particular course. In light of this fact, we cannot conclude that "ability grouping," insofar as that term refers to the practice of a school in assigning a student to a particular educational program designed for individuals of particular ability or achievement, is, in fact, employed at the high school level.

The district court's failure to make findings concerning the RISD's history does, however, severely handicap our review of the ability grouping practices employed in the central campus elementary school and the junior high school. RISD contends that we should deem these practices unobjectionable because even if the district court were to find that RISD has a history of unlawful discrimination, the effects of which have not yet been fully and finally remedied, the statistical results of RISD's ability grouping practices, are, like the results of the ability grouping employed in *Morales v. Shannon*, supra, "not so abnormal or unusual as to justify an inference of discrimination." Id. at 414. We cannot agree. In *Morales*, the overall student population in the grades where ability grouping was practiced was approximately

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 10

60% Mexican-American and 40% Anglo; however, approximately 61% of the students assigned to "high" groups were Anglo. Thus, 1.5 times as many Anglos were assigned to high groups as were enrolled in these grades as a whole. In Raymondville, the statistical results of the ability grouping are definitely more marked. For example, in grades kindergarten through three, during the academic year 1977-78, Anglo students formed approximately 17% of the student population at the central elementary campus; however 41% of the students in "high" ability classes for those grades were Anglo. Thus, there were approximately 2.4 times as many Anglos in high ability classes as there were in these grades as a whole. The figures in the upper grades for this year are comparable. In grades 4 and 5, there were approximately 2.3 times as many Anglos in high ability classes as in these grades as a whole; and in the junior high school grades 6-8, there were approximately 2.6 times as many Anglos in high groups as in the junior high school as a whole.

Statistical results such as these would not be permissible in a school system which has not yet attained, or only very recently attained, unitary status. Thus it is essential to examine the history of the RISD in order to determine the merits of the plaintiffs' claims. On remand, therefore, the district court should reconsider the plaintiffs' allegation that the ability grouping practices of the RISD are unlawful, insofar as grades K-8 are concerned, in light of the conclusions it reaches concerning the history of the district and the question whether it currently operates a unitary school system. If the district court finds that RISD has a past history of discrimination and has not yet maintained a unitary school system for a sufficient period of time that the effects of this history may reasonably be deemed to have been fully erased, the district's current practices of ability grouping are barred because of their markedly segregative effect.

The historical inquiry is not, however, the only one that the district court must make on remand in order to determine the merits of the plaintiffs' claims that RISD's ability *998 grouping practices are unlawful. The record suggests that in Raymondville "ability grouping" is intertwined with the district's language remediation efforts and this intersection raises questions not present in our earlier cases involving ability grouping. The record indicates

that the primary "ability" assessed by the district's ability grouping practices in the early grades is the English language proficiency of the students. Students entering RISD kindergarten classes are given a test to determine whether their dominant language is English or Spanish. Predominantly Spanish speaking children are then placed in groups designated "low" and receive intensive bilingual instruction. "High" groups are those composed of students whose dominant language is English. "Ability groups" for first, second and third grade are determined by three basic factors: school grades, teacher recommendations and scores on standardized achievement tests. These tests are administered in English and cannot, of course, be expected to accurately assess the "ability" of a student who has limited English language skills and has been receiving a substantial part of his or her education in another language as part of a bilingual education program.

Nothing in our earlier cases involving ability grouping circumscribes the discretion of a school district, even one having a prior history of segregation, in choosing to group children on the basis of language for purposes of a language remediation or bilingual education program. Even though such a practice would predictably result in some segregation, the benefits which would accrue to Spanish speaking students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation.[FN4] See *McNeal v. Tate County School District*, supra at 1020 (ability grouping may be permitted in a school district with a history of segregation "if the district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.")

FN4. We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible and thus that these programs would not result in segregation

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 11

that would permeate all areas of the curriculum or all grade levels.

Language grouping is, therefore, an unobjectionable practice, even in a district with a past history of discrimination. However, a practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is, we think, highly suspect. In a district with a past history of discrimination, such a practice clearly has the effect of perpetuating the stigma of inferiority originally imposed on Spanish speaking children by past practices of discrimination. Even in the absence of such a history, we think that if the district court finds that the RISD's ability grouping practices operate to confuse measures of two different characteristics, i. e., language and intelligence, with the result that predominantly Spanish speaking children are inaccurately labeled as "low ability," the court should consider the extent to which such an irrational procedure may in and of itself be evidence of a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.

III. TEACHERS

Testimony given in both the administrative proceeding and the trial of this civil suit indicates that the relatively small number of Mexican-American teachers and administrators employed by the Raymondville school district is a matter of great concern to Mexican-American students and their parents. Many persons in the community apparently believe that the disparity between the percentage of teachers in the district who are Mexican-American, 27%, and the percentage of students who are *999 Mexican-American, 88%, is one of the major reasons for the underachievement and high dropout rate of Mexican-American students in Raymondville. Plaintiffs urge that this statistical disparity is both the result of, and evidence of, unlawful discrimination by RISD. The school district insists that it shares this desire to see more Mexican-American teachers employed in Raymondville schools, and argues that the current situation is not the result of unlawful discrimination on its part, but rather a reflection of the fact that

certain characteristics of Raymondville, notably the lack of cultural activities and housing, make it difficult to recruit Mexican-American teachers, who are actively sought by many other school districts in Texas. The district court agreed with the RISD's contentions and concluded that the school district did not discriminate against Mexican-Americans in either the hiring or promotion of teachers or administrators. In order to review the merits of that conclusion, we think it appropriate to examine first the precise legal basis for the teacher discrimination claim advanced by the plaintiffs in order to discern the correct legal framework for our review.

[6] At the outset we note that the question whether RISD discriminates in the employment or promotion of teachers or administrators reaches us in a somewhat unusual posture. The class of plaintiffs in this case includes only Mexican-American students and their parents; no RISD employee, former employee or applicant for employment by the district is a party to this suit. Although students and parents are not typically the persons who bring suit to remedy alleged discrimination in the hiring and promotion of teachers and administrators in a school district, we do not believe they lack standing to do so. Plaintiffs premise their claim on the fourteenth amendment, and 42 U.S.C. s 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d and the Equal Educational Opportunity Act, 20 U.S.C. s 1701 et seq. The Equal Educational Opportunities Act (EEOA) explicitly provides in s 1703(d) that "discrimination by an educational agency on the basis of race, color or national origin in the employment of faculty or staff" constitutes a denial of equal educational opportunity. The statute also expressly provides a private right of action for persons denied such an "equal educational opportunity" in s 1706. Thus the class of students here clearly have standing to complain of, and a private cause of action for relief from, alleged discrimination by RISD in the hiring and promotion of teachers and staff under this statute.

With regard to the plaintiffs' rights to assert a claim based upon this type of discrimination under the constitution and Title VI, we note that historically, dual school systems were maintained not only by segregation of students on the basis of race but also through discrimination in hiring and assignment of teachers. Consequently, as part of the remedy

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 12

ordered in school desegregation cases, we have often included a provision intended to assure that a school district did not perpetuate unlawful school segregation through discriminatory employment practices.[FN5] Such remedial orders implicitly acknowledge that the Equal Protection Clause, which outlaws discrimination on the basis of race or national origin in public education, requires not only that students shall not themselves be discriminated against on the basis of race by assignment to a particular school or classroom, but that they shall not be deprived of an equal educational opportunity by being forced to receive instruction from a faculty and administration composed of persons selected on the basis of unlawful racial or ethnic criteria. *1000 Thus, we think that the class of plaintiffs here may also assert a cause of action based upon unconstitutional racial discrimination in employment of teachers and administrators under 42 U.S.C. s 1983. In making this claim, the students are not attempting to vindicate the constitutional rights of the teachers involved but only seeking to remedy a denial of equal protection they claim to have suffered as a result of faculty discrimination. They have thus suffered an "injury in fact" and have shown a "sufficient personal stake in the outcome of the controversy" to establish their standing to assert a claim that RISD discriminates in its employment practices. *Tasby v. Estes*, 634 F.2d 1103 (5th Cir. 1981); *Otero v. Mesa Valley School District No. 51*, 568 F.2d 1312, 1314 (10th Cir. 1977) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1976)).

FN5. *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970) which set forth the standard form desegregation order in this circuit, required, inter alia, that:

Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race, color or national origin.
Id. at 1218.

With regard to Title VI, although the Supreme Court has never explicitly so held, there is authority

in this circuit acknowledging a private right of action under this statute. *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 852-51 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). In any event, since a majority of the Court has now taken the position that Title VI proscribes the same scope of classifications based on race as does the Equal Protection Clause, *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the question whether plaintiffs have an independent cause of action under that statute is not a significant one in this case.

[7][8] Having concluded that the plaintiffs in this case have standing and a cause of action to complain of discrimination by RISD in the employment of faculty and staff, we turn to examine more carefully the elements of this cause of action and the proof adduced by the plaintiffs in support of their claim. With regard to the plaintiffs' claims based upon Title VI and the Equal Protection Clause, we note that it is now well-established that in order to assert a claim based upon unconstitutional racial discrimination a party must not only allege and prove that the challenged conduct had a differential or disparate impact upon persons of different races, but also assert and prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under Title VI, 42 U.S.C. s 1981 or s 1983. *Lee v. Conecuh County Board of Education*, 634 F.2d 959 (5th Cir. 1981); *Lee v. Washington County Board of Education*, 625 F.2d 1235 (5th Cir. 1980); *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978). By contrast, in an employment discrimination action premised upon Title VII, a party may rely solely upon the disparate impact theory of discrimination recognized in *Griggs v. Duke Power Co.*, 401 U.S.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 13

424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To establish a cause of action based upon this theory, no intent to discriminate need be shown.

[9] The question of what constitutes "discrimination" in the employment practices of a school district within the meaning of s 1703(d) of the EEOA, specifically the question whether intent is required in order to establish a cause of action for discrimination under that statute, cannot be so easily answered by reference to established judicial interpretations of the statute. There is little judicial precedent construing this provision. After examining carefully the language and legislative history of the statute, we have, however, reached the conclusion that the discriminatory conduct proscribed by s 1703(d) is coextensive with that prohibited by the fourteenth amendment and Title VI and does not encompass conduct *1001 which might violate Title VII because, although not motivated by racial factors, it has a disparate impact upon persons of different races. Certain of the subsections of s 1703 which define the practices which constitute a denial of equal educational opportunity, explicitly include only intentional or deliberate acts. For example, s 1703(a) prohibits "deliberate segregation on the basis of race, color or national origin." and s 1703(e) bans transfers of students which have "the purpose and effect" of increasing segregation. The language of 1703(d) refers only to "discrimination" and does not contain such an explicit intent requirement. In considering the EEOA under different circumstances, we have found that some of its provisions "go beyond the acts and practices proscribed prior to the EEOA's passage" and that by its terms, the statute explicitly makes unlawful practices, such as segregation of students on the basis of sex, which may not violate the fourteenth amendment because of the lesser scrutiny given sex-based classifications under the Equal Protection Clause, *United States v. Hinds County School Board*, 560 F.2d 619 (5th Cir. 1977). Although by language in the act explicitly prohibiting segregation on the basis of sex in pupil assignments Congress clearly evidenced an intent that the statute prohibit certain types of conduct not unlawful under the Constitution, we have found no evidence to suggest that the particular subsection which concerns us here, s 1703(d), was designed to encompass a broader variety of employment practices than the provisions of the fourteenth amendment or Title VI. As other courts confronted

with the task of interpreting the EEOA have noted, the legislative history of this statute is very sparse, indeed almost non-existent. *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978). The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338-41, 346-48, 352 (codified in scattered sections of 20 U.S.C.). We agree with the Guadalupe court's suggestion that "(t)he interpretation of floor amendments unaccompanied by illuminating debate should adhere closely to the ordinary meaning of the amendment's language." 587 F.2d at 1030. Unlike Title VII there is nothing in the language of s 1703(d) to suggest that practices having only disparate impact, as well as those motivated by a discriminatory animus, were to be prohibited. Title VII, unlike s 1703(d), makes it an unlawful practice for an employer not only to "discriminate" against individuals on the basis of certain criteria but also makes it unlawful "to limit, segregate or classify (persons) in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of race, color, religion, sex or national origin." It is this latter provision, which was interpreted in *Griggs* to prohibit facially neutral practices having a disparate impact on persons of different races. No similar provision or description of employment practices having a disparate impact was included in the Equal Educational Opportunities Act. Thus, we conclude that the elements of plaintiff's cause of action for discrimination in the hiring and promotion of teachers and administrators under the Equal Educational Opportunities Act are the same as the elements of their claims premised on the fourteenth amendment and s 1983 and Title VI.

[10] Although the question whether RISD unlawfully discriminates against Mexican-Americans in the hiring or promotion of faculty and administrators reaches us in the somewhat unusual posture of a case brought by students, we think the legal analysis of their claim is properly drawn from the approach used to assess the merits of more traditional class action and pattern and practice employment discrimination suits. In civil rights cases generally we have noted that a district court's finding of discrimination or no discrimination is a determination of an ultimate fact;

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 14

thus, we must make an independent determination of this question. *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1024-25 (5th Cir. 1981); *1002 *Danner v. U.S. Civil Service Commission*, 635 F.2d 427 (5th Cir. 1981); *Thompson v. Leland Police Dep't.*, 633 F.2d 1111 (5th Cir. 1980); *Shepard v. Beard-Poulan, Inc.*, 617 F.2d 87 (5th Cir. 1980); *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980). In undertaking such an independent review, however, we are bound by the subsidiary factual determinations that the district court made in the course of considering the ultimate issue of discrimination, unless these subsidiary findings are clearly erroneous within the meaning of Fed.R.Civ.P. 52(a). In this case, the district court apparently based its conclusion that RISD did not discriminate against Mexican-Americans in the hiring or promotion of teachers or administrators on subsidiary findings that: (1) RISD currently hires a higher percentage of Mexican-American applicants for teaching positions than Anglo applicants; (2) the school district hires many teachers from nearby universities which have substantial numbers of Mexican-American students; and (3) the school district has a difficult time recruiting Mexican-American teachers because, although its salaries are commensurate with those paid by other schools in the area, Raymondville has very limited housing and cultural activities. Although we do not characterize any of these subsidiary findings as clearly erroneous, we do not believe they are sufficient to support an ultimate finding that RISD does not discriminate against Mexican-Americans in the employment of teachers or administrators.

[11] In class action or pattern and practice employment discrimination suits, the question whether the employer discriminates against a particular group in making hiring decisions requires, as a first and fundamental step, a statistical comparison between the racial composition of the employer's work force and that of the relevant labor market. In many of these cases the nature of the jobs involved suggests that the relevant labor market is coextensive with the general population in the geographical areas from which the employer might reasonably be expected to draw his work force. *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Markey v. Tenneco Oil Co.*, 635 F.2d 497 (5th Cir. 1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980). In this case, plaintiffs have

relied heavily on the disparity between the percentage of the Raymondville school population consisting of Mexican-Americans (approximately 85%) and the percentage of the faculty in the Raymondville schools who are Mexican-American (27%), in support of their contention that RISD discriminates in its employment decisions. Plaintiffs urge that this statistical disparity coupled with the evidence of a past history of segregation in the Raymondville schools sufficed to make out a prima facie case of discrimination which shifted to the defendants a heavy burden of rebuttal which they failed to meet.

We think the plaintiffs' suggested comparison is not the relevant one. Where, as here, the nature of the employment involved suggests that the pool of people qualified to fill the positions is not likely to be substantially congruent with the general population, the relevant labor market must be separately and distinctly defined. In *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Supreme Court considered the question of how to define the relevant labor pool in a case involving a claim that a school district engaged in a pattern and practice of employment discrimination in the hiring of teachers. The Court disapproved of the comparison, which had been made by the district court, between the racial composition of the district's teacher work force and the student population. Such an approach, the Court admonished, "fundamentally misconceived the role of statistics in employment discrimination cases." *Id.* at 308, 97 S.Ct. at 2741-42. The proper comparison in a case involving school teachers was

between the racial composition of (the district's) teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.

Id.

The district court's memorandum opinion in this case does not indicate that any such *1003 comparison was made here. The district court did apparently compare the data concerning the ethnic composition of the pool of persons who applied for teaching positions at Raymondville, with the ethnic composition of the persons hired. The court found that a larger percentage of Mexican-American applicants than Anglos was hired. The record also indicates that Mexican-Americans comprise a larger

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 15.

percentage of the teachers hired in RISD than they do of the applicant pool. In the usual hiring discrimination case, this type of applicant flow data provides a very good picture of the relevant labor market because it allows one to compare the ethnic composition of an employer's workforce with that of the pool of persons actually available for hire by the employer. Markey, *supra*, at 499. However, in cases such as this one where there is an allegation that the employer's discriminatory practices infect recruiting, the process by which applications are solicited, such applicant flow data cannot be taken at face value and assumed to constitute an accurate picture of the relevant labor market. Discriminatory recruiting practices may skew the ethnic composition of the applicant pool. B. L. Schlei and P. Grossman, *Employment Discrimination Law*, 445 (1976).

[12][13]. In a case such as this one, the relevant labor market must first be defined separately from the applicant pool in order to determine the merits of the claim of discrimination in recruiting. A statistically significant disparity between the racial composition of the applicant pool and that of the relevant labor market may create a prima facie case of discrimination in recruiting. Because determination of the relevant labor market, the geographical area from which we might reasonably expect RISD to draw applicants and teachers, and of the ethnic composition of the group of persons qualified for teaching positions in this area, is an essentially factual matter within the special competence of the district court, Hazelwood, *supra* at 312, 97 S.Ct. at 2744, Markey, *supra* at 498, we remand the issue of discrimination in teacher hiring to the district court for further findings in accordance with the analysis the Supreme Court delineated in Hazelwood and which we have employed in class action and pattern and practice employment discrimination suits. See, e. g., Phillips v. Joint Legislative Committee, *supra* at 1024-25; Markey, *supra*; E.E.O.C. v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978).

With regard to the question whether RISD discriminates in the hiring or promotion of persons to administrative positions in the district, the district court concluded that there was no discrimination in this area. In recent years, the percentage of Mexican-Americans serving in administrative positions in the Raymondville School District has

been roughly comparable to the percentage of Mexican-Americans on the faculty. For example in 1976, Mexican-Americans occupied 5 of the 16 administrative positions in the district (24%); in the same year 26% of the district's teachers were Mexican-American. Given the small numbers involved we are not prepared to term this a significant disparity. The record indicates that, as a general rule, the RISD prefers to hire administrative personnel from within the ranks of its current employees; thus the statistical evidence in this case would not seem to support an inference of discrimination in promotion, unless, of course, discrimination in hiring is established. In that case, the district court should, on remand, reconsider the issue of discrimination in promotion as well.

The comparison of the employment statistics of RISD with the ethnic composition of the relevant labor market goes to the determination whether the plaintiff made out a prima facie case of unlawful discrimination. If, on remand, the district court concludes that plaintiffs succeeded in making out a prima facie case, the court should determine the nature and weight of the burden of rebuttal this prima facie case placed on the RISD. As we noted above, that burden may differ depending on the conclusions the district court reaches concerning the district's history. See text *supra*, at 994-996.

*1004 The district court must, of course, then consider whether RISD adduced evidence sufficient to rebut the plaintiffs' prima facie case, i. e., evidence tending to suggest that the statistical underrepresentation of Mexican-Americans established by the plaintiffs' prima facie case was not the result of intentional discrimination by the school district. We note that RISD has urged that since Mexican-Americans form a majority of the voting population in the school district, are present on the district's board and have, along with the Anglo majority of the board, voted for and approved most of the hiring and promotion decisions which the plaintiffs have challenged here, the district has adequately rebutted any inference of discriminatory intent which might be raised by plaintiffs' prima facie case.

Although there have been Mexican-American members on the RISD board, there is no evidence in the record that Mexican-Americans have ever formed a majority of the board. Further, the school

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 16

board's role in the teacher employment process appears to be a largely ministerial one. From the minutes of the school board meetings contained in the record, it appears that the school board does not itself receive and review the files of all applicants or involve itself in the recruiting process. The minutes suggest that the superintendent presents a slate of teachers to the board for its formal approval en masse. Thus, the record suggests that the school board has delegated primary responsibility for the recruitment and hiring of teachers and administrators to the superintendent, a position which has always been occupied by an Anglo. This suggests the possibility that the Mexican-Americans on the board may not, in fact, be in a position to exercise much power over the district's employment decisions.

In any event, the Supreme Court has rejected the argument that this type of "governing majority" theory can, standing alone, rebut a prima facie case of intentional discrimination. In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court considered a similar argument. *Castaneda* involved a challenge by a Mexican-American to the grand jury selection procedures employed in Hidalgo County, Texas. The state argued that the plaintiffs' prima facie case of intentional discrimination, which consisted of statistical evidence of a significant underrepresentation of Mexican-Americans on grand juries, was effectively rebutted merely by evidence that Mexican-Americans were an effective political majority in the county and occupied many county offices, including three of the five grand jury commissioners' posts. The state reasoned that these facts made it highly unlikely that Mexican-Americans were being intentionally excluded from the county's grand juries. The Supreme Court, however, held that such a governing majority theory could not, standing alone, discharge the burden placed on the defendants by plaintiffs' prima facie case. This is not, of course, to say that such evidence is not relevant as part of the district's rebuttal, but only that it may not be deemed conclusive.

We express no opinion as to the outcome of the inquiry which we have directed the district court to make. The question of whether the plaintiffs have made out a prima facie case of unlawful discrimination in the employment practices of the

district and the question of whether that case, if made out, has been adequately rebutted are reserved to the district court in the first instance.

IV. THE BILINGUAL EDUCATION AND LANGUAGE REMEDIATION PROGRAMS OF THE RAYMONDVILLE SCHOOLS [FN6]

FN6. The district court's failure to make findings regarding the history of RISD does not impair our review of the merits of plaintiff's claims that inadequacies of the district's language remediation programs render it unlawful because this claim is premised only on Title VI and the EEOA. The plaintiffs in this case do not argue that the current English language disabilities affecting some of the Mexican-American students in Raymondville are the product of past discrimination or that the district is obligated to provide bilingual education or other forms of language remediation as part of a remedy for past discrimination. Cf. *United States v. State of Texas*, 506 F.Supp. 405 (E.D.Tex.1981).

RISD currently operates a bilingual education program for all students in kindergarten *1005 through third grade.[FN7] The language ability of each student entering the Raymondville program is assessed when he or she enters school. The language dominance test currently employed by the district is approved for this purpose by the TEA. The program of bilingual instruction offered students in the Raymondville schools has been developed with the assistance of expert consultants retained by the TEA and employs a group of materials developed by a regional educational center operated by the TEA. The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade.

FN7. RISD's program was apparently adopted in compliance with Tex.Ed.Code Ann. s 21.451 (Vernon 1980 Supp.) which required local school districts to provide bilingual programs for students in kindergarten through third grade. The

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 17

Texas legislature, although requiring and funding bilingual education programs has, nevertheless, provided that English shall be the basic language of instruction in Texas' public schools and that bilingual education may be employed "in those situations when such instruction is necessary to insure that (students acquire) reasonable efficiency in the English language so as not to be educationally disadvantaged." Tex.Ed.Code Ann. s 21.109 (Vernon 1980 Supp.).

Although the program's emphasis is on the development of language skills in the two languages, other cognitive and substantive areas are addressed, e. g., mathematics skills are taught and tested in Spanish as well as English during these years. All of the teachers employed in the bilingual education program of the district have met the minimum state requirements to teach bilingual classes. However, only about half of these teachers are Mexican-American and native Spanish speakers; the other teachers in the program have been certified to teach bilingual classes following a 100 hour course designed by TEA to give them a limited Spanish vocabulary (700 words) and an understanding of the theory and methods employed in bilingual programs. Teachers in the bilingual program are assisted by classroom aides, most of whom are fluent in Spanish.

[14] RISD does not offer a formal program of bilingual education after the third grade. In grades 4 and 5, although classroom instruction is only in English, Spanish speaking teacher aides are used to assist students having language difficulties which may impair their ability to participate in classroom activities. For students in grades 4-12 having limited English proficiency or academic deficiencies in other areas, the RISD provides assistance in the form of a learning center operated at each school. This center provides a diagnostic/prescriptive program in which students' particular academic deficiencies, whether in language or other areas, are identified and addressed by special remedial programs. Approximately 1,000 of the district's students, almost one-third of the total enrollment, receive special assistance through small classes provided by these learning centers. The district also makes

English as a Second Language classes and special tutoring in English available to all students in all grades; this program is especially designed to meet the needs of limited English speaking students who move into the district in grades above 3.[FN8]

FN8. We think s 1703(f) clearly imposes on an educational agency a duty to take appropriate action to remedy the language barriers of transfer students as well as the obstacles confronting students who begin their education under the auspices of that agency. However, the challenge presented by these transfer students clearly poses a distinctive and difficult problem. Transfer students may bring to their new school varying amounts of previous education in English or another language; a school district may enroll only a few transfer students or may have a rather large revolving population of transient or migrant students who transfer in and out of the system. Factors such as these may be relevant to a determination of whether a school's language remediation program for such students is appropriate under s 1703(f). In this case, neither the pleadings nor the record in this case indicates that the distinctive problems presented and confronted by these students were addressed with the care necessary to determine whether RISD was currently taking "appropriate action" to meet their needs. Therefore we shall express no opinion on this issue in this decision.

*1006 Plaintiffs claim that the bilingual education and language remediation programs offered by the Raymondville schools are educationally deficient and unsound and that RISD's failure to alter and improve these programs places the district in violation of Title VI and the Equal Educational Opportunities Act. The plaintiffs claim that the RISD programs fail to comport with the requirements of the "Lau Guidelines" promulgated in 1975 by the Department of Health, Education and Welfare. Specifically, plaintiffs contend that the articulated goal of the Raymondville program to teach limited English speaking children to read and write in both English and Spanish at grade level is

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development. Under the Lau Guidelines, plaintiffs argue, "pressing English on the child is not the first goal of language remediation." Plaintiffs criticize not only the premise and purpose of the RISD language programs but also particular aspects of the implementation of the program. Specifically, plaintiffs take issue with the tests the district employs to identify and assess limited English speaking children and the qualifications of the teachers and staff involved in the district's language remediation program. Plaintiffs contend that in both of these areas RISD falls short of standards established by the Lau Guidelines and thus has fallen out of compliance with Title VI and the EEOA.

[15][16] We agree with the district court that RISD's program does not violate Title VI. Much of the plaintiffs' argument with regard to Title VI is based upon the premise that the Lau Guidelines are administrative regulations applicable to the RISD and thus should be given great weight by us in assessing the legal sufficiency of the district's programs. This premise is, however, flawed. The Department of HEW, in assessing the district's compliance with Title VI, acknowledged that the Lau Guidelines were inapplicable to an evaluation of the legal sufficiency of the district's language program. The Lau Guidelines were formulated by the Department following the Supreme Court's decision in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). In *Lau*, the Supreme Court determined that a school district's failure to provide any English language assistance to substantial numbers of non-English speaking Chinese students enrolled in the district's schools violated Title VI because this failure denied these students "a meaningful opportunity to participate in the educational program" offered by the school district, 414 U.S. at 568, 94 S.Ct. at 789. *Lau* involved a school district which offered many non-English speaking students no assistance in developing English language skills; in declaring such an omission unlawful, the Court did not dictate the form such assistance must take. Indeed the Court specifically noted that the school district might undertake any one of several permissible courses of language remediation:

Teaching English to the students of Chinese

ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others.

Id. at 565, 94 S.Ct. at 787. The petitioners in *Lau* did not specifically request, nor did the Court require, court ordered relief in the form of bilingual education; the plaintiffs in that case sought only "that the Board of Education be directed to apply its expertise to the problem." *Id.*

Following the Supreme Court's decision in *Lau*, HEW developed the "Lau Guidelines" as a suggested compliance plan for school districts which, as a result of *Lau*, were in violation of Title VI because they failed to provide any English language assistance to students having limited English proficiency. Clearly, Raymondville is not culpable of such a failure. Under these *1007 circumstances, the fact that Raymondville provides (and long has provided) a program of language remediation which differs in some respects from these guidelines is, as the opinion of the Reviewing Authority for the OCR noted, "not in itself sufficient to rule that program unlawful in the first instance."

The Lau Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The Lau Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's departure from the Lau Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

We must confess to serious doubts not only about the relevance of the Lau Guidelines to this case but also about the continuing vitality of the rationale of the Supreme Court's opinion in *Lau v. Nichols* which gave rise to those guidelines. *Lau* was written prior to *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), in which the Court held that a discriminatory purpose, and not simply a disparate impact, must be shown to establish a violation of the Equal Protection Clause, and *University of California Regents v. Bakke*, 438

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 19

U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), in which, as we have already noted, a majority of the court interpreted Title VI to be coextensive with the Equal Protection Clause. Justice Brennan's opinion (in which Justices White, Marshall and Blackmun joined) in *Bakke* explicitly acknowledged that these developments raised serious questions about the vitality of *Lau*.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (96 S.Ct. 2040, 48 L.Ed.2d 597) (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352, 98 S.Ct. at 2779. Although the Supreme Court in *Bakke* did not expressly overrule *Lau*, as we noted above, we understand the clear import of *Bakke* to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races. Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

Plaintiffs, however, do not base their legal challenge to the district's language program solely on Title VI. They also claim that the district's current program is unlawful under s 1703(f) of the EEOA which makes it unlawful for an educational agency to fail to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." As we noted above in dissecting the meaning of s 1703(d) of the EEOA, we have very

little legislative history from which to glean the Congressional intent behind the EEOA's provisions. Thus, as we did in examining s 1703(d), we shall adhere closely to the plain language of s 1703(f) in defining the meaning of this provision. Unlike subsections (a) and (e) of s 1703, s 1703(f) does *1008 not contain language that explicitly incorporates an intent requirement nor, like s 1703(d) which we construed above, does this subsection employ words such as "discrimination" whose legal definition has been understood to incorporate an intent requirement. Although we have not previously explicitly considered this question, in *Morales v. Shannon*, supra, we assumed that the failure of an educational agency to undertake appropriate efforts to remedy the language deficiencies of its students, regardless of whether such a failure is motivated by an intent to discriminate against those students, would violate s 1703(f) and we think that such a construction of that subsection is most consistent with the plain meaning of the language employed in s 1703(f). Thus, although serious doubts exist about the continuing vitality of *Lau v. Nichols* as a judicial interpretation of the requirements of Title VI or the fourteenth amendment, the essential holding of *Lau*, i. e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in s 1703(f).^[FN9] The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting s 1703(f) intended to go beyond the essential requirement of *Lau*, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

FN9. In *Pennhurst State School v. Halderman*, -- U.S. --, 101 S.Ct. 1531, 68 L.Ed.2d -- (1981), the Supreme Court was called upon to determine the meaning of s 6010(1) and (2) of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. ss 6001-6080, which stated in relevant part that:

Congress makes the following findings respecting the rights of persons with

developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution that (A) does not provide treatment, services, and habilitation which are not appropriate to the needs of such person; or (B) does not meet the following minimum standards

Id. at --, 101 S.Ct. at 1537. Plaintiffs in Pennhurst urged, and the Court of Appeals had agreed, that this section imposed upon states an affirmative obligation to provide "appropriate treatment" for the disabled and created certain substantive rights in their favor and a private right of action to sue for protection of these rights. The Supreme Court disagreed. The Court, at the outset, analyzed the statute to determine whether Congress in enacting it had acted pursuant to s 5 of the fourteenth amendment or pursuant to the Spending Power and cautioned against implying a Congressional intent to act pursuant to s 5 of the fourteenth amendment, especially where such a construction would result in the imposition of affirmative obligations on the states. Id. at --, 101 S.Ct. 1538.

Although we are sensitive to the need for restraint recognized by the Court in Pennhurst, it is undisputed in this case, and indeed indisputable, that in enacting the EEOA Congress acted pursuant to the powers given it in s 5 of the fourteenth amendment. The general declaration of policy contained in s 1701 and s 1702 of the EEOA expresses Congress' intent that the Act specify certain guarantees of equal opportunity and identify remedies for violations of these guarantees pursuant to its own powers under the fourteenth

amendment without modifying or diminishing the authority of the courts to enforce the provisions of that amendment.

We do not believe that Congress, at the time it adopted the EEOA, intended to require local educational authorities to adopt any particular type of language remediation program. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, 20 U.S.C. s 880b et seq. (1976). The Bilingual Educational Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly embodied a recognition that bilingual education programs were still in experimental stages *1009 and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although 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. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), reprinted in (1974) U.S.Code Cong. & Ad.News 4093, 4206.

We note that although Congress enacted both the Biligual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "biligual 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 under the EEOA. 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 in s 1706, 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

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 21

students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i. e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

[17][18] In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under s 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. This, of course, is not to be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system. The state of the art in the area of language remediation may well be such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students and we do not believe that Congress in enacting s 1703(f) intended to make the resolution of these differences the province of federal courts. The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the

field or, at least, deemed a legitimate experimental strategy.

*1010 The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under s 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

With this framework to guide our analysis we now turn to review the district court's determination that the RISD's current language remediation programs were "appropriate action" within the meaning of s 1703(f). Implicit in this conclusion was a determination that the district had adequately implemented a sound program. In conducting this review, we shall consider this conclusion as a determination of a mixed question of fact and law. Therefore we shall be concerned with determining whether this conclusion was adequately supported by subsidiary findings of fact which do not appear clearly erroneous.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 22

In this case, the plaintiffs' challenge to the appropriateness of the RISD's efforts to overcome the language barriers of its students does not rest on an argument over the soundness of the educational policy being pursued by the district, but rather on the alleged inadequacy of the program actually implemented by the district.[FN10] Plaintiffs contend that in three areas essential to the adequacy of a bilingual program curriculum, staff and testing Raymondville falls short. Plaintiffs contend that although RISD purports to offer a bilingual education program in grades K-3, the district's curriculum actually overemphasizes the development of reading and writing skills in English to the detriment of education in other areas such as mathematics and science, and that, as a result, children whose first language was Spanish emerge from the bilingual education program behind their classmates in these other areas. The record in this case does not support plaintiffs' allegation that the educational program for predominantly Spanish speaking students in grades K-3 provides significantly less attention to these other areas than does the curriculum used in the English language dominant classrooms. The bilingual education manual developed by the district outlines the basic classroom schedules *1011 for both Spanish dominant classrooms and English dominant classrooms. These schedules indicate that students in the Spanish language dominant classrooms spend almost exactly the same amount of classroom time on math, science and social studies as do their counterparts in the predominantly English speaking classrooms. The extra time that Spanish language dominant children spend on language development is drawn almost entirely from what might fairly be deemed the "extras" rather than the basic skills components of the elementary school curriculum, e. g., naps, music, creative writing and physical education.

FN10. The district court in its memorandum opinion observes that there was "almost total disagreement amongst the witnesses, experts and lay persons, as to the benefits of bilingual education and as to the proper method of implementing a bilingual education program if determined to be in the best interests of the students." Insofar as this statement was intended to suggest that there was uncertainty and

disagreement manifested in the record about the effectiveness of the bilingual education program currently conducted in Raymondville, it is certainly correct. However, this statement should not be understood as suggesting that the record in this case presents a dispute about the value of bilingual education programs in general.

The issue in this case was not the soundness or efficacy of bilingual education as an approach to language remediation, but rather the adequacy of the actual program implemented by RISD.

Even if we accept this allegation as true, however, we do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligations under s 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period. The language of s 1703(f) speaks in terms of taking action "to overcome language barriers" which impede the "equal participation" of limited English speaking children in the regular instructional program. We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action."

[19][20] Limited English speaking students entering school face a task not encountered by students who are already proficient in English. Since the number of hours in any school day is limited, some of the time which limited English speaking children will spend learning English may be devoted to other subjects by students who entered school already proficient in English. In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand s 1703(f) to impose on educational

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 23

agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program. We also believe, however, that s 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or to address these problems in sequence, by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period. In short, s 1703(f) leaves schools free to determine the sequence and manner in which limited English speaking students tackle this dual challenge so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system. Therefore, we disagree with plaintiffs' assertion that a school system which chooses to focus first on English language development and later provides students with an intensive remedial program *1012 to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under s 1703(f).

[21] Although we therefore find no merit in the plaintiffs' claim that RISD's language remediation programs are inappropriate under s 1703 because of the emphasis the curriculum allegedly places on English language development in the primary grades, we are more troubled by the plaintiffs' allegations that the district's implementation of the program has been severely deficient in the area of

preparing its teachers for bilingual education. Although the plaintiffs raised this issue below and introduced evidence addressed to it, the district court made no findings on the adequacy of the teacher training program employed by RISD.[FN11] We begin by noting that any school district that chooses to fulfill its obligations under s 1703 by means of a bilingual education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program. The record in this case indicates that some of the teachers employed in the RISD bilingual program have a very limited command of Spanish, despite completion of the TEA course. Plaintiffs' expert witness, Dr. Jose Cardenas, was one of the bilingual educators who participated in the original design of the 100 hour continuing education course given to teachers already employed in RISD in order to prepare them to teach bilingual classes. He testified that a subsequent evaluation of the program showed that although it was effective in introducing teachers to the methodology of bilingual education and preparing them to teach the cultural history and awareness components of the bilingual education program, the course, was "a dismal failure in the development of sufficient proficiency in a language other than English to qualify the people for teaching bilingual programs." Although the witnesses familiar with the bilingual teachers in the Raymondville schools did not testify quite as vividly to the program's inadequacy, testimony of those involved in the RISD's program suggested that despite completion of the 100 hour course, some of the district's English speaking teachers were inadequately prepared to teach in a bilingual classroom. Mr. Inez Ibarra, who was employed by the district as bilingual supervisor prior to his appointment to the principalship of L. C. Smith School in 1977, testified in the administrative hearing that he had observed the teachers in the bilingual program at Raymondville and that some of the teachers had difficulty communicating in Spanish in the classroom and that there were teachers in the program who taught almost exclusively in English, using Spanish, at most, one day per week. He also described the evaluation program used to determine the Spanish proficiency of the teachers at the end of the 100 hour course. Teachers were required to write a paragraph in Spanish. Since in completing this task, they were permitted to use a Spanish-English dictionary, Ibarra acknowledged that this was not a valid

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989

(Cite as: 648 F.2d 989)

Page 24

measure of their Spanish vocabulary. Teachers also read orally from a Spanish language text and answered oral questions addressed to them by the RISD certification committee. There was no formal grading of the examination; the certification committee had no guide to measure the Spanish language vocabulary of the teachers based on their performance on the exam. Thus, it may well have been impossible for the committee to determine whether the teachers had mastered even the 700 word vocabulary the TEA had deemed the minimum to enable a teacher to work effectively in a bilingual elementary classroom. Following the examination, the committee would have an informal discussion among themselves and decide whether or not the teacher was qualified. Mr. Ibarra testified that the certification *1013 committee had approved some teachers who were, in his opinion, in need of more training "much more than what they were given."

FN11. The only reference to the district's in-service teacher training program in the district court's memorandum opinion was an observation that RISD "is training non-Spanish speaking teachers in accordance with a State-administered program." This observation does not constitute a finding that this program was an adequate one, nor a finding that RISD teachers who complete the program are adequately prepared to be effective teachers in a bilingual classroom.

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own

unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers. The record in this case strongly suggests that the efforts RISD has made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program are inadequate. On this record, we think a finding to the contrary would be clearly erroneous. Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students. Although we certainly hope and expect that RISD will attempt to hire teachers who are already qualified to teach in a bilingual classroom as positions become available, we are by no means suggesting that teachers already employed by the district should be replaced or that the district is limited to hiring only teachers who are already qualified to teach in a bilingual program. We are requiring only that RISD undertake further measures to improve the ability of any teacher, whether now or hereafter employed, to teach effectively in a bilingual classroom.

On the current record, it is impossible for us to determine the extent to which the language deficiencies of some members of RISD's staff are the result of the inadequacies inherent in TEA's 100 hour program (including the 700 word requirement which may be an insufficient vocabulary) or the extent to which these deficiencies reflect a failure to master the material in that course. Therefore, on remand, the district court should attempt to identify more precisely the cause or causes of the Spanish language deficiencies experienced by some of the RISD's teachers and should require both TEA and RISD to devise an improved in-service training program and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program. [FN12]

FN12. On remand, the district court should, of course, consider any improvements which may have been

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 25

effected in RISD's in-service training program during the pendency of this litigation.

The third specific area in which plaintiffs claim that RISD programs are seriously deficient is in the testing and evaluation of students having limited English proficiency. Plaintiffs claim first that the language dominance placement test used to evaluate students entering Raymondville schools is inadequate. Although it appears that at the time of the administrative hearing in this case, RISD was not employing one of the language tests approved by the TEA, by the time of the trial in this civil suit RISD had adopted a test approved for this purpose by TEA. None of plaintiffs' expert witnesses testified that this test was an inappropriate one. [FN13] Thus, we do not think *1014 there is any reason to believe that the district is deficient in the area of initial evaluation of students entering the bilingual program.

FN13. Dr. Jose Cardenas, plaintiffs' principal expert witness on the subject of bilingual education, testified that he had no objection to the tests recommended by TEA for use in assessing students entering a bilingual education program. R. at 291. Mr. Inez Ibarra, employed as principal of the L. C. Smith School at the time of trial in this case and who had previously served as bilingual education supervisor for RISD, testified that RISD had adopted, for use beginning in the academic year 1978-79, the Powell Test for language placement which was "on top of the list" approved by TEA. R. at 366.

A more difficult question is whether the testing RISD employs to measure the progress of students in the bilingual education program is adequate. Plaintiffs, contend, RISD apparently does not deny, and we agree that proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself. In their brief, plaintiffs contend that RISD's testing program is inadequate because the limited English speaking students in the bilingual program are not tested in

their own language to determine their progress in areas of the curriculum other than English language literacy skills. Although during the bilingual program Spanish speaking students receive much of their instruction in these other areas in the Spanish language, the achievement level of these students is tested, in part, by the use of standardized English language achievement tests. No standardized Spanish language tests are used. Plaintiffs contend that testing the achievement levels of children, who are admittedly not yet literate in English and are receiving instruction in another language, through the use of an English language achievement test, does not meaningfully assess their achievement, any more than it does their ability, a contention with which we can scarcely disagree.

Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-a-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred. The district court on remand should require both TEA and RISD to implement an adequate achievement test program for RISD in accordance with this opinion. If, following the district court's inquiry into the ability grouping practices of the district, such practices are allowed to continue, we assume that Spanish language ability tests would be employed to place students who have not yet mastered the English language satisfactorily in ability groups.

Finally plaintiffs contend that test results indicate that the limited English speaking students who participate in the district's bilingual education program do not reach a parity of achievement with students who entered school already proficient in English at any time throughout the elementary

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

648 F.2d 989
(Cite as: 648 F.2d 989)

Page 26

grades and that since the district's language program has failed to establish such parity, it cannot be deemed "appropriate action" under s 1703(f). Although this question was raised at the district court level, no findings were made on this claim. While under some circumstances it may be proper for a court to examine the achievement scores of students involved in a language remediation program in order to determine whether this group appears on the whole to attain parity of participation with other students, we do not think that such an inquiry is, as yet, appropriate with regard to RISD. Such an inquiry may become proper after the inadequacies in the implementation of the RISD's program, which we have identified, have been corrected and the program has operated with *1015 the benefit of these improvements for a period of time sufficient to expect meaningful results.[FN14]

FN14. We note also, that even in a case where inquiry into the results of a program is timely, achievement test scores of students should not be considered the only definitive measure of a program's effectiveness in remedying language barriers. Low test scores may well reflect many obstacles to learning other than language. We have no doubt that the process of delineating the causes of differences in performance among students may well be a complicated one.

To summarize, we affirm the district court's conclusion that RISD's bilingual education program is not violative of Title VI; however, we reverse the district court's judgment with respect to the other issues presented on appeal and we remand these issues for further proceedings not inconsistent with this opinion. Specifically, on remand, the district court is to inquire into the history of the RISD in order to determine whether, in the past, the district discriminated against Mexican-Americans, and then to consider whether the effects of any such past discrimination have been fully erased. The answers to these questions should, as we have noted in this opinion, illuminate the proper framework for assessment of the merits of the plaintiffs' claims that the ability grouping and employment practices of RISD are tainted by unlawful discrimination. If the court finds that the current record is lacking in

evidence necessary to its determination of these questions, it may reopen the record and invite the parties to produce additional evidence.

The question of the legality of the district's language remediation program under 20 U.S.C. s 1703(f) is distinct from the ability grouping and teacher discrimination issues. Because an effective language remediation program is essential to the education of many students in Raymondville, we think it imperative that the district court, as soon as possible following the issuance of our mandate, conduct a hearing to identify the precise causes of the language deficiencies affecting some of the RISD teachers and to establish a time table for the parties to follow in devising and implementing a program to alleviate these deficiencies. The district court should also assure that RISD takes whatever steps are necessary to acquire validated Spanish language achievement tests for administration to students in the bilingual program at an appropriate time during the 1981-82 academic year.

AFFIRMED in part, REVERSED in part and REMANDED.

648 F.2d 989

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Westlaw

724 F.Supp. 698
 57 Ed. Law Rep. 90
 (Cite as: 724 F.Supp. 698)

Page 1

C

United States District Court,
 N.D. California.

TERESA P., Cesar P., Jorge A.P., Evangelina P.,
 Carmen P. and Carlos P., by
 their next friend T.P.; Marcelo J., Carolina J. and
 Guadalupe J., by their
 next friend M.J.; Freddie P. by his next friend T.P.;
 Giovanni T. and Viviana
 T. by their next friend C.T.; Juan A. and Maria A.
 by their next friend V.A.;
 P.K.V.; Jose A., on behalf of themselves and all
 similarly situated,
 Plaintiffs,

v.

BERKELEY UNIFIED SCHOOL DISTRICT;
 Steve Lustig, Myron Moskovitz, Joe Gross,
 Ronald Kemper and Elizabeth Shaughnessy,
 members of the Board of Education of
 the Berkeley Unified School District; Louis R.
 Zlokovich, Superintendent of
 the Berkeley Unified School District, Defendants.

No. C-87-2396 DLJ.

Sept. 8, 1989.

A class of limited English proficiency students sued school district, claiming that school district's language remediation program violated the Equal Educational Opportunity Act (EEOA) and Title VI of the Civil Rights Act. The District Court, Jensen, J., held that: (1) students did not show that school district did not take appropriate action to overcome special educational barriers, and (2) students did not show that the program had a disparate impact on them.

So ordered.

West Headnotes

[1] Schools ⇐45

345k45 Most Cited Cases

Courts should not substitute their educational values and theories for educational and political decisions properly reserved to local school authorities and expert knowledge of educators, since they are ill-equipped to do so.

[2] Schools ⇐164

345k164 Most Cited Cases

California school district did not violate Equal Educational Opportunity Act in regard to its program for dealing with students who had limited proficiency in English language; program was informed by educational theory which some experts recognized as sound, school's actual programs and practices were reasonably calculated to effectively implement educational theories upon which overall program was premised, and standardized achievement tests and classroom grades of limited English proficiency students pointed to effectiveness of program. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[3] Schools ⇐164

345k164 Most Cited Cases

Under Equal Educational Opportunities Act, it is unnecessary for teachers or tutors to hold language-specific credentials in order to deliver remediation programs to limited English proficiency students. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[4] Civil Rights ⇐1070

78k1070 Most Cited Cases

(Formerly 78k127.1, 78k127)

Limited English proficiency students could not maintain claim that school district's language remediation program violated Title VI; students did not argue that district harbored any racially discriminatory intent in delivery of any of its

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

educational programs, and offered no evidence, statistical or otherwise, of racially discriminatory effect. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

*699 Peter D. Roos with the Multicultural Educ. Training & Advocacy Project, San Francisco, Cal., Deborah Escobedo and Susan Spelletich, San Francisco, Cal., with the Legal Aid Soc. of Alameda County, Cal., for plaintiffs.

Celia Ruiz and Thomas B. Donovan with the law firm of Dinkelspiel, Donovan & Reder, San Francisco, Cal., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JENSEN, District Judge.

I. INTRODUCTION

This case was tried to the Court on August 23, 1988. Defendants were represented by Celia Ruiz and Thomas B. Donovan of Dinkelspiel, Donovan & Reder. Plaintiffs were represented by Peter D. Roos of the Multicultural Education Training and Advocacy Project (META), and Deborah Escobedo and Susan Spelletich of the Legal Aid Society of Alameda County.

A thorough, comprehensive evidentiary showing was made by both parties. Forty-six witnesses testified. After nine days of testimony, plaintiffs rested their case on September 8, 1988. After 10 further days of testimony, defendants rested their case on September 23, 1988.

The Court examined the documentary evidence, heard the oral testimony, considered the arguments of counsel, and reviewed the written memoranda of the parties. Having done so, the Court makes the following findings of facts and conclusions of law.

II. FINDINGS OF FACT

A. Jurisdiction

1. The Court has jurisdiction over this case under 20 U.S.C. § 1708; 28 U.S.C. §§ 1343(a)(3) and (4); 28 U.S.C. § 1331; and 28 U.S.C. §§ 2201-2202.

B. Parties

2. Plaintiff class, as certified by this Court on May 4, 1988, pursuant to Rule 23(b)(2), consists of all students currently enrolled in the Berkeley Unified School District (the BUSD or District), who are of limited English proficiency by reason of having a first or home language other than English and who consequently have a barrier to equal participation in the BUSD programs.

3. The District is the governmental entity responsible, under California law, for providing public education to students residing within the City of Berkeley.

4. The District operates on the basis of federal and state funds, and executes state law compliance assurances in order to receive state funds.

*700 5. The District is an educational agency, within the meaning of section 221 of the Equal Educational Opportunities Act, 20 U.S.C. § 1720.

6. Defendants Steve Lustig, Myron Moskovitz, Joe Gross, Ronald Kemper, and Elizabeth Shaughnessy, at the time of trial, constituted the publicly elected Board of Education of the Berkeley Unified School District (the Board).

7. The Board is responsible for the governance and operation of the District and for policy decisions affecting the District's educational programs.

8. Defendant Louis R. Ziokovich is the former Superintendent of the District. He resigned effective June 30, 1988. Dr. Andrew J. Viscovich is the new District Superintendent and is responsible for the daily operation of the District, the administration of its educational programs, and the implementation of policy decisions made by the Board.

C. Nature of the Action

9. Plaintiffs seek relief against defendants under section 204 of the Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703, and under section 601 of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulations (Title VI regulations). Plaintiffs claim

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 3

that they have been denied equal educational opportunity because the District has failed to take appropriate action to overcome language barriers faced by plaintiffs. Plaintiffs allege that the District's testing and procedures for the identification and assessment of the District's limited English proficient (LEP) students is inadequate, and that the District employs inappropriate criteria and procedures to determine when the District's programs of special language services for individual LEP students are no longer necessary or appropriate. They also claim that the District has failed to allocate adequate resources to the District's special language services for LEP students, and has failed to assure that teachers and other instructional personnel have the requisite qualifications, credentials and skills to provide these services effectively. Finally, plaintiffs contend that the District has not provided them with adequate English language development instruction, and adequate native tongue instruction and support.

D. The BUSD's Limited English Proficient Students

10. As of June 15, 1988, 571 LEP students were enrolled in the District which has a total of about 8,000 students. The District's LEP students speak approximately 38 languages other than English. The language groups comprising the largest number of the District's LEP students are: Spanish (268), Vietnamese (60), Cantonese (40), Laotian (32), Mandarin (32) and Tagalog (20). The remaining 32 languages are represented by a maximum of 16 students in any single non-English language category. Some of these languages are spoken by only 1 to 3 of the District's LEP students.

11. The District's LEP students are spread throughout its several schools. As of June 15, 1988, most of these children (412) were elementary school students, which includes kindergarten through sixth grade. The District has 12 elementary schools, 7 serving grades kindergarten through 3, 3 serving grades 4 through 6, and 2 schools--the Arts Magnet School and the Model School--serving grades kindergarten through 6. 86 LEP students, who speak a total of 14 different languages, were enrolled in the District's 2 junior high schools, which covers grades 7 and 8. 73 LEP students, who speak 14 different languages, were enrolled at Berkeley High School.

E. Identification and Assessment of LEP Students

12. As part of the registration process, the parents and guardians of each student enrolled in the District are asked to fill out a Home Language Survey to determine whether a language other than English is spoken in the student's home. The survey form is written in English, Vietnamese, Spanish, Chinese, Portuguese, Arabic, Korean, *701 Farsi, Samoan, Hebrew, Japanese, Italian, and Armenian. On the basis of the survey returns received from parents, a list of all students from homes where a language other than English is spoken is prepared.

13. During the first week of school, BUSD officials, including testers who are proficient in a number of languages, visit each District school site to test all students who are from homes where a language other than English is spoken to determine the oral and written English proficiency of such students.

14. The BUSD staff conducts tests as needed for students enrolling later in the school year and students who were absent during the initial testing period or who were unable for any other reason to complete the testing during the first week of school.

15. The English oral proficiency tests, used by the District for identification and assessment of LEP students, are the IDEA Oral Language Proficiency Tests (IPT or IPT I and IPT II). The IPT I is given to students in grades kindergarten through 6, and the IPT II is given in grades 7 through 12.

16. The English reading and writing proficiency of potential LEP students in grades 2 through 8 is assessed by BUSD through use of the Comprehensive Test of Basic Skills (the CTBS), a standardized achievement test. The CTBS tests the students' achievement in reading, language arts, and mathematics.

17. Language minority students, in grades 9 through 12, are identified and assessed with respect to their individual English language proficiency through a battery of tests. These tests, which include those referred to as the TEPL, STEL, SLEP and ELSA, test English oral proficiency, reading, writing, grammar, and listening skills.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 4

18. The BUSD Secondary School ESL Coordinator consulted with a testing expert from San Francisco, who had reviewed the TEPL favorably. The Coordinator also reviewed the subsequent academic performance of all students who were tested as fluent in the TEPL in 1986-87 and 1987-88, and found that these students were in fact successful students in the regular English program.

19. The Coordinator also administered the TEPL to native English speakers to establish a comparison group. She found that native English speaking students scored at the E, F, or G levels. Since the District uses a score of G (or perfect) before a LEP student is reclassified as fluent in English, the fact that native English speaking students scored E or F on the test showed, if anything, that the TEPL is over-inclusive.

20. The grading system used for the writing portion of the TEPL requires 3 ESL teachers to independently evaluate and agree that the student's writing is of such quality as to identify the student as fluent.

21. Based on these various considerations, the BUSD Coordinator, concluded that the TEPL could and would be used as a valid test for English language proficiency.

22. The BUSD uses the TEPL in combination with other criteria, such as the IPT and the SLEP proficiency tests, in order to reduce the potential for error in use of the TEPL alone.

23. The District conducts oral interviews to assess students' proficiencies in some of the languages spoken by LEP students. A written questionnaire is used to guide the interview process.

24. If the District has an appropriate native language test available, the District also administers tests to LEP students to determine their proficiency in their native language. The District tests Spanish speaking students with a Spanish CTBS to assess Spanish reading skills, and a Spanish IPT to test Spanish oral skills. To test oral proficiency in Cantonese, the District utilizes the Oakland Oral Cantonese test developed by the Oakland Unified School District. The District also has a Chinese Reading and Writing test.

*702 25. In Berkeley, native tongue testing plays no role in the identification of LEP students or in reclassifying them as fluent English proficient (FEP).

26. The BUSD conducts its English as a Second Language (ESL) based program on the premise that there is no need to test a student's native tongue proficiency because most if not all instruction and tutorial support is delivered in English.

27. Students identified by the BUSD as LEP students are placed in the District's program of special language services. Parents are notified of such placement. The notification letters are translated where appropriate into Spanish, Vietnamese, and Chinese. The parents are given the option to withdraw their child from the program if the parents first meet with the District and are informed of the program's benefits. Parents have the option of transferring their child from one type of special language services program to another where choices are available based on the language needs of the individual child. Parents also may withdraw their child from all participation in special language services. If the parents do so, the District monitors the child's academic performance for 6 months, and, if the child experiences academic difficulty, asks the parents to reconsider enrolling their child in one of the District's programs of special language services.

F. The BUSDs Educational Philosophy, Parental Input, and Budget

28. The District has had a long-standing commitment to an integrated educational system. This commitment is evidenced by the District's voluntary desegregation plan, which was instituted in 1968, and which is implemented, *inter alia*, by racially mixed and heterogenous classrooms and a curriculum that emphasizes cross-cultural awareness and sensitivity.

29. District policy is directed at avoidance of segregation of any kind, whether by reason of race, national origin, language, educational achievement, or otherwise.

30. The District has instituted programs aimed at helping "at-risk," low income, and disadvantaged

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

minority students, including racial, ethnic, and language minority, i.e., LEP students.

31. The development of the District's programs of special language services was the result of extensive planning by District personnel. Educational theories, educational philosophies, fiscal resources, human resources, the available curriculum materials, and parental input and preferences, all were considered.

32. There is parental support for the District's program structure, which provides both ESL and bilingual programs.

33. As an important element in assuring an effective program of special language services for LEP students, the District seeks the support and approval of the parents of LEP students. The District invites parents of LEP students to participate in a District Advisory Committee, which was formed in compliance with state law to permit parental review of the overall educational plan for LEP students, and to participate in individual school, or site, advisory committees. These committees provide guidance to the District's administrators and principals in the process of designing the District's programs of special language services.

34. The District Advisory Committee considered the question of which type of special language program was preferable. Parental preferences were considered by the District in developing its programmatic designs for special language services. The BUSD Master Plan for its programs was approved in June 1987 by a majority of the LEP parents participating in the District Advisory Committee.

35. In April 1988, the District commissioned a survey of the parents of all its kindergarten through sixth grade LEP students. That survey, to which 81% of all families who had LEP students enrolled in the District responded, showed that Hispanic parents tended to prefer a bilingual, primary language program to preserve culture and language, while Asian parents and others tended to prefer the ESL program *703 because it represented the fastest way to learn English. The survey results indicated that most parents of LEP students,

including Hispanic, Asian, and others, were satisfied with the education their children were receiving from the District.

36. The existing structure and design of the District's special language programs was adopted by the BUSD after consideration of parental committee input, available resources, and alternative program approaches.

37. Measure H, a Berkeley school funding measure approved by the electorate, provides an additional \$30 per LEP child for educational materials that are used to supplement the regular educational materials provided to other students in the District.

38. The District experienced a severe financial crisis in 1986 that resulted in its near bankruptcy. Bankruptcy was avoided with the help of a loan from the State of California. The District is currently repaying that loan and is operating under the supervision of a trustee who has been appointed by the state to ensure repayment of the loan.

G. The BUSD's Special Language Services

39. The District has adopted two types of special language services: (1) a Spanish bilingual program; and (2) ESL programs in three separate forms. The primary purposes of all the District's special language services are to help LEP students develop fluency in English and to provide academic support to LEP students while the students learn English.

40. The District's special language programs are supervised by the District's Coordinator of Bilingual Education.

1. The Spanish Bilingual Program

41. The District's Spanish bilingual program is offered in grades kindergarten through 6. Students in the District's Spanish bilingual program are taught to read and write in Spanish before they are taught literacy skills in English. They are taught by teachers who are proficient and qualified to teach in Spanish.

42. The Spanish bilingual program in the District emphasizes English language development. Native language academic support is provided in all

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 6

subjects.

43. The District has conducted bilingual education programs, both with and without native language support, since the early 1970s.

44. In 1984, the District examined its experience with native tongue instruction programs and concluded that the program did not produce satisfactory English and academic results. The program was modified to stress English language development intended to help the student gain fluent English proficiency (FEP), as quickly as possible, in order to participate in academic classes taught in English.

2. The ESL Program

45. The District provides ESL special language services to all LEP students in grades kindergarten through 12 who are not in the Spanish bilingual program. These services feature instruction delivered in the English language by a teacher who may be proficient only in English. The ESL instructional curriculum focuses on rapid development of English language proficiency through the delivery of a structured English curriculum. These ESL-based programs, and the techniques used to implement them, are based upon generally accepted educational theories.

46. At both the elementary and secondary levels, the ESL instructional curriculum teaches English by incorporating academic themes being taught in the regular classroom. This approach is intended to provide both instruction in the English language and simultaneous academic instruction. Academic achievement in areas other than English language development is aided by specialized English instructional techniques, and by the help of the District's tutors and instructional aides who work with LEP students enrolled in the District's ESL-based programs.

47. The District's ESL programs are implemented by heterogeneous classroom *704 placement of students intended to avoid isolating or segregating LEP children.

a. The Elementary ESL-ILP Program

48. At the kindergarten through sixth grade level, all LEP students are assigned to "self-contained" heterogeneous classrooms. The LEP students receive academic instruction from the regular classroom teacher, who is expected to use instructional strategies beneficial to students needing extra help with learning. The LEP students receive English language instruction from ESL resource teachers on a "pull-out" basis, either individually or in small groups. In addition, academic assistance is provided by tutors who work with the LEP children within the classroom and, on occasion, on a pull-out basis.

49. In order to coordinate instruction between the regular classroom teacher, the ESL resource teacher, and the tutor, the ESL elementary program is implemented through Individual Learning Plans (ILPs), and is therefore referred to as the "ESL-ILP" program. An ILP was required by expired state law, and, although no longer required, is still used in Berkeley to record assessment data regarding each LEP student's oral, reading, and writing proficiency as well as other useful information. The program contemplates that the principal, regular classroom teacher, parent, and tutor will meet to discuss the ILP.

50. The District's elementary school ESL-ILP program includes participation of 5 full-time equivalent itinerant ESL teachers (ESL resource teachers). The District hired 3,10 full-time equivalent teachers to staff the program for the 1988-89 school year. These teachers are assigned on the basis of LEP student needs.

51. The regular classroom program for LEP students in the District's elementary ESL-ILP program includes the participation of ESL teachers, tutors, and aides, and includes the use of materials for LEP students such as the IDEA Plus Kit, which is a special English language assistance program), computer programs, and the Reading Management System.

52. Because of the District's decentralized committee and site-based administrative structure, specific program implementation may vary from school to school, but all school sites offer the same configuration: a classroom teacher who is trained and uses several educational techniques and

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

materials as well as supplemental educational resources directed to the educational needs of LEP students.

53. All LEP students in the elementary ESL-ILP program are to receive assistance from the District's extensive tutoring program. The tutors provide that assistance in the student's native language when necessary to assist the student's comprehension and when it is possible to do so. The District does not have tutors who speak the native language of each of its LEP students. The tutors usually work within the regular classroom, but sometimes tutor the children on a pull-out basis. Students are tutored either individually or in clusters, according to language proficiency and grade level.

54. Within the elementary school ESL-ILP program, the District looks at the relative English proficiency levels of students to determine how available tutorial support should be allocated.

55. The elementary ESL-ILP program is supervised by an experienced ESL resource teacher.

b. The Jefferson Chinese Cultural Enrichment Program

56. At the Jefferson School, which covers kindergarten through third grade, the District provides an ESL program with a Chinese cultural theme. The program is conducted in 3 self-contained classrooms by teachers, each of whom is proficient in either Cantonese or Mandarin, and all of whom hold bilingual/cross-cultural credentials. The program is open to all kindergarten through third grade students whose parents wish them to be enrolled in it. In the 1987-88 school year, there were 15 LEP students in the program.

57. ESL instruction is provided by the classroom teacher within self-contained classrooms. Academic instruction in the program is conducted in the English language. The teachers use their knowledge *705 of Mandarin or Cantonese as necessary to assist the comprehension of students whose native language is Mandarin or Cantonese. Chinese language is taught, as is Chinese culture, as an enrichment to the curriculum for one period daily.

c. The Secondary ESL Program

58. At the secondary level, which covers grades 7 through 12, the District's LEP students are placed in an ESL class after consideration of the student's relative English language proficiency and needs. The ESL classes range from a beginning level of English proficiency through an advanced level of English proficiency. These ESL classes focus on reading, writing, listening, and speaking English. Academic courses for beginning LEP students are offered by teachers knowledgeable in the use of Sheltered English techniques to teach both academic content and the English language. Additional English language instruction is given to LEP students by language development teachers who have been trained in ESL and Sheltered English methodology and techniques. LEP students receive additional assistance in academic subjects from tutors, 11 ESL, and specialized English content teachers, provide special language services at the secondary level.

59. The District's two junior high schools, which covers grades 7 and 8, are Willard Junior High School and Martin Luther King Junior High School.

(1) Willard Junior High School

60. At Willard, beginning LEP students receive one period of ESL a day in a self-contained classroom.

61. The beginning LEP students take an English class with the regular school population. This class is taught by the ESL resource teacher and provides special language help to LEP students. A tutor is assigned to this class.

62. Willard's LEP students also take a special back-up reading class designed for LEP students only. This class helps LEP students with the regular English class.

63. The beginning LEP student is assigned to either a science or a history class, and receives the assistance of a tutor.

64. The beginning LEP students also take math and are assisted in their math class by a tutor from the compensatory education program.

65. Intermediate LEP students at grades 7 and 8

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 8

also receive 1 period each day of both ESL and ESL Enrichment. In addition, these LEP students attend an English class where they receive the assistance of a compensatory education tutor and a back-up reading class where they receive the assistance of a compensatory education tutor. Intermediate LEP students also take a math course and a science/social living course.

66. Advanced level LEP students receive the same curriculum as intermediate level LEP students except that they do not take an ESL class. Instead, they take a history course which is taught by a teacher who is assisted by a compensatory education tutor.

(2) Martin Luther King Junior High School

67. At Martin Luther King, LEP students are taught in special classes for much of the school day. Every LEP student receives a daily ESL class at a level consistent with the student's English proficiency. LEP students are placed in special academic courses, such as history, math and science, which are taught by an ESL teacher. These classes are taught at a slower pace than regular classes and the teacher employs instructional strategies such as Sheltered English, cooperative learning, and cross-cultural awareness to make the class more understandable to LEP students.

68. The classes are generally smaller than a regular classroom, and utilize regular materials as modified and supplemented by the ESL teacher.

69. The LEP students receive additional academic support through the compensatory education resource specialist at Martin Luther King. This support is provided in small classes and through individual assistance.

*706 (3) Berkeley High School

70. At the high school level, beginning LEP students receive one period of ESL instruction a day. They also take an English language development class which is taught by an experienced language arts teacher who has satisfied the District's local designation criteria for ESL teachers and who gives the LEP students special

help. Tutors are assigned to work with the LEP students in both ESL and English language development classes.

71. Beginning LEP students take a special history class which is primarily concerned with English language development and utilizes Sheltered English techniques. This class is also taught by a teacher who has satisfied the District's local designation criteria for ESL teachers.

72. Beginning LEP students are placed in a math class on the basis of an ability test that is given in Spanish, Cantonese, Vietnamese, and Mandarin as well as English.

73. LEP students also take an elective, generally either computer science, music or art, as recommended by the ESL resource specialist and the student's counselor.

74. High school students who are at either intermediate or advanced levels of LEP also receive 1 period of ESL a day. These students also take an English language development class, which is consistent with their English language proficiency level. These English classes are taught by teachers who have met the District's local designation criteria for ESL teachers, and the students also are assisted with these classes by tutors.

75. Intermediate and advanced LEP students take either a special history class for ESL students, which is taught using Sheltered English techniques, or a regular history class in which they are clustered to receive assistance from tutors who assist the regular teacher.

76. There is also a special Sheltered English biology class, which is taught by a biology teacher who is trained in ESL.

77. Intermediate and advanced LEP students also choose an elective class on the basis of individual preference and the recommendations of their counselors and the ESL resource specialist.

78. Tutors are not available in every primary language spoken by Berkeley's High School LEP students. However, the District attempts to find tutors for as many of the native languages spoken as

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

is possible. High school students also are given language assistance at the Washington After School Program which provides language support for LEP students at every grade level.

79. The tutors who work with the high school LEP students are supervised by the ESL resource specialist at the high school.

80. The District's Secondary School ESL Coordinator developed the District's secondary level ESL curriculum and basic program design. She oversees all ESL teachers at the secondary level and is responsible for assuring a reasonable amount of consistency in the program and in the teaching methods employed from grade to grade and school to school. She also works to ensure consistency in basic procedures and materials.

H. The District's Other Special Services

81. The District carries out several programs designed to assist low achieving minority students, a category of students that includes LEP students as well as others. These programs include a Break the Cycle Program, an after-school program that focuses on self-awareness and behavior modification and is implemented with the help of tutors; and an Early Intervention Program that provides tutorial help in the classroom to assist kindergarten through third grade students overcome learning problems. Break the Cycle and Early Intervention are special programs aimed at identifying academic and language difficulties.

82. The District also conducts programs relevant to LEP students, through the Compensatory Education Program, which is funded by Economic Impact Aid funds from the State of California and Chapter 1 (or compensatory education) funds from *707 the federal government. At the kindergarten through sixth grade level, the District employs a compensatory education resource specialist who is a certificated teacher. This teacher works in the area of English language development, reading, and mathematics with all students who score below a designated level on standardized achievement tests.

83. The District also sponsors the ACCESS Program at Berkeley High School. This program provides tutors who directly assist LEP students and

other students who have been identified as potential high school dropouts. The tutors assist these students with their academic work, help them develop in basic skills, and help them with job training tasks.

84. In addition to the special language program tutors, remedial education is provided to LEP students through the compensatory education instructional aides. The compensatory education aides are employed to assist the District's students at both the primary and secondary level during the school day. In addition, LEP students take advantage of numerous other compensatory education programs, including tutorial programs for low-achieving students at each school site.

85. Some LEP students receive guidance counseling and tutorial assistance through the District's University and College Opportunity Program. This program is directed specifically toward minority students and is designed to help ensure that minority students are encouraged to attend college.

I. The District's Curriculum

86. The District's regular curriculum is set by committee. The committee includes LEP parents and ESL or bilingual teachers. At the elementary level, the curriculum focuses on English language arts and efforts are made to assure that the curriculum and textbooks meet the special needs of LEP students.

87. The District's curriculum and materials include multi-ethnic literature that is designed to instill respect and knowledge about divergent cultures and values.

88. The District's regular curriculum for LEP students is supplemented by educational programs designed to provide additional assistance with English language development academic content.

J. Monitoring and Reclassification of LEP Students

89. In order to assess the progress of LEP students, all LEP students are tested annually for oral and written proficiency in English with the IPT I or IPT II test. Academic progress from grade 2 through 8

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 10

is assessed through the CTBS test each year. In addition, LEP students enrolled in the Spanish bilingual program take a Spanish language standardized achievement test, the CTBS Espanol, each year. The academic progress of all students in Berkeley High School, including LEP students, is assessed through the High School Proficiency Tests, grades, attendance, and teacher evaluations.

90. In order to be eligible to exit the District's programs of special language services, a LEP student must score at least at the 38th percentile level on the English version of the CTBS and at the "fluent" level on the IPT. The student also must score at least a grade of 4 in comprehension, fluency, vocabulary, and grammar, and a grade of 3 on pronunciation in the Student Oral Language Observation Matrix (SOLOM), which is administered either by the regular classroom teacher or by the ESL teacher. The student's grades, a writing sample, and the teacher's evaluation, also are considered. However, when a LEP student has been receiving language services for more than 3 years, the achievement test score criterion may be relaxed if the student's teacher and principal so recommend, with District supervisor approval.

91. If the student's test scores meet the District's criteria and his or her grades, writing sample, and teacher's evaluation indicate that reclassification is warranted, a LEP student may be reclassified as fluent English proficient (FEP) by the Student Appraisal Team (SAT), which consists *708 of the principal or his or her designee, the teacher, the tutor, and a parent.

92. A reclassified student is monitored for 6 months after reclassification. If the student's progress has not been satisfactory during that time, the SAT meets again to reconsider the reclassification decision, and the student may be furnished additional special language services. If the student's progress has been satisfactory, a final reclassification decision is made by the student's teacher and principal at the end of the six-month period.

K. The District's Teachers

93. The District's teaching staff appears to be competent and experienced.

94. The District's classroom teachers have received inservice training and workshops on educational strategies designed for effective teaching of LEP students.

95. All regular classroom teachers who teach LEP students are scheduled to receive training in Sheltered English methods during the 1988-89 academic year. Sheltered English is an instructional strategy used to teach regular academic courses to LEP students. It uses techniques such as a slower pace, vocabulary definition, and visual aids and props to facilitate comprehension for students who need help with their English. In addition, the regular classroom teachers utilize cooperative learning, group activity assignments, and other hands-on instructional strategies that have proven to be beneficial for LEP students.

96. The District's regular classroom teachers teach LEP students English language development by using Sheltered English techniques and ESL materials. The regular classroom teachers also draw upon other resources by working collaboratively with the ESL and regular academic tutors and with the ESL and compensatory education resource teachers.

97. At Thousand Oaks School, which covers grades kindergarten through 3, all regular classroom teachers receive training in and use Sheltered English methods.

98. At Oxford School, which covers grades kindergarten through 3, the regular classroom teacher's instructional strategy for the LEP student provides hands-on activities, cooperative learning, partnering, sharing, and oral language help.

99. At Emerson School, which covers grades kindergarten through 3, teachers working with LEP students also provide English instruction and have received training in and use ESL instructional strategies such as language modeling, the use of visual aids to develop vocabulary, simultaneous teaching of language and concepts, pacing of instruction, monitoring individual work, and cooperative learning.

100. At LeConte School, which covers grades kindergarten through 3, regular classroom teachers

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 11

have been trained to use a number of instructional strategies and materials designed for teaching LEP students.

101. The District's ESL teachers all have participated in the District's 30-hour in-service training program in ESL methodology. This program was based upon the model used in the San Francisco Unified School District. The San Francisco model was approved by the State Department of Education (SDE). The District's secondary school ESL teachers also have passed objective examinations based on a test that was validated by the SDE. These ESL teachers also have had extensive in-service training in English language development.

102. Both the bilingual/bicultural credential and a language development specialist (LDS) certificate authorize a teacher to provide ESL instruction in the State of California. The SDE, however, has recognized a critical shortage of both these categories of teachers and has authorized school districts to develop and employ local criteria for designating teachers as qualified to teach ESL. The District has developed and employs such criteria.

103. The District's local designation criteria for an ESL resource teacher requires: (a) previous successful experience teaching ESL; (b) a minimum of 30 hours of District in-service training in ESL methodology with the understanding that outside training *709 can be credited toward 10 of these hours; (c) obtaining a passing grade on a test of ESL theory and methodology that was (i) developed by a consultant to the District who is an ESL expert, and (ii) reviewed for reliability and validity and approved by the SDE; and (d) a satisfactory score on an observation of the teacher's classroom performance. The observation of all such teachers was scheduled to be held in the Fall of 1988, and was to be conducted by expert evaluators from the San Francisco Unified School District. The District places great emphasis on prior successful ESL teaching experience.

104. At the secondary level, the curriculum is more complex. The secondary ESL teachers have had past ESL teaching experience and have received in-service training.

105. California law requires academic content high school courses to be taught by teachers who are credentialed in the subject matter.

106. In these high school classes, students whose English proficiency is more limited are assigned to small classrooms where academic subjects are taught by a teacher who has received 30 hours of in-service training on ESL and sheltered techniques, who has passed an objective examination, and who has experience in working with students with special needs.

107. At the high school, there are English language development specialists who teach English skills classes specifically designed to correspond to the ESL class level of individual LEP students.

108. The District has hired ESL teachers who lack special certification on alternative grounds when credentialed ESL teachers for particular openings were unavailable.

109. The District could not hire bilingual credentialed teachers in some instances because such teachers were unavailable for the jobs then open.

110. The District's policy has been to recruit and hire fully credentialed Spanish bilingual teachers.

111. When a non-credentialed teacher was hired for a Spanish bilingual opening by the District, he or she was required to demonstrate competence in Spanish language and bilingual methodologies and was required thereafter to make substantial progress toward completion of the bilingual credential as a condition of continued employment.

112. When the District hired an interim bilingual teacher, that is, one who does not have a bilingual teaching credential, the teacher was assigned to teach only the English language and ESL portions of the Spanish bilingual program.

113. The BUSD students who are LEP have been taught effectively in English by a teacher who speaks only English.

114. Measures of achievement of the District LEP students in the Spanish bilingual program do not

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 12

appear to be related to whether the teacher was or was not a certified teacher.

115. The skills that a qualified ESL teacher should have are a knowledge of English, the language that is being taught, and an appreciation or understanding of how languages are learned.

116. A good teacher should be endowed with sensitivity, the ability to work hard, a love of children, and a love of the subject matter. These also are some of the qualities, among others, that a good ESL teacher should possess.

117. The District's 30-hour in-service ESL training program can be effective in providing teachers ESL skills.

118. Teachers of LEP children depend upon a strong background in liberal arts, the ability to be a good speaker of English, and where possible, some knowledge of the student's native language.

119. Characteristics of teaching excellence are common to all effective teachers whether their students are LEP students or not.

L. The District's Tutors

120. The District uses tutors to assist in delivery of educational services and, at the time of trial, had tutors who speak 11 of the 38 non-English languages represented in the Berkeley schools.

121. The District tries to hire academic tutors who possess a bachelor of arts degree, or 2 years of college and 2 years of full-time work experience as a tutor or other remedial instructional assistant.

122. Tutors participate in the District's in-service training which includes training in ESL methodology.

123. At the elementary level, the tutors' work with LEP students is supervised by the regular classroom teacher and by the principal at the school site.

124. At the secondary level in Berkeley, the role of the tutor is to provide academic assistance by working in the classroom with teachers, monitoring students, working in ESL tutorials, and coaching

students in academic and language acquisition.

M. Testimony of Expert Witnesses

125. A comparison of grades assigned to BUSD LEP and non-LEP students shows that:

In eight of nine grade levels, the mathematics report card grades for LEP students in Berkeley were similar to the report card grades earned by regular students.

In five of nine grade levels in reading or English, the LEP students in Berkeley displayed report card grades that were equal to or above report card grades earned by regular students.

In all of 18 reading or English and math content areas for all grade levels, LEP students in Berkeley earned report card grades equal to or greater than those of regular students in 13 of the 18 different content area comparisons.

126. The BUSD LEP students increased their test scores from pre-reclassification for exit from the District's special language services to post-reclassification, with average increases in CTBS reading, language and math scores of 20 to 30 points.

127. From the Fall of 1986 to the Fall of 1987, all students in grades kindergarten through 12, who were enrolled in the District's special language programs, had an average increase of 1.41, on a scale of 1 through 7, in their oral English proficiency skills as measured by the IPT.

128. CTBS scores 2 years before reclassification compared to scores two years after reclassification of former LEP students in Berkeley showed that English language scores went from the middle 40s up to the low 70s, and English reading scores increased from the middle 30s up to the middle 60s. Math scores went from 60 to 70 up to 70 to 80.

129. A comparison of BUSD LEP student California Achievement Profile (CAP) scores with two other school districts, that are generally known to have effective programs for LEP students, shows that there is no significant difference between the reading achievement of LEP students in Berkeley in comparison to those districts (Fremont and San Jose), and Berkeley LEP students have significantly higher math achievement.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 13

130. A comparison of CAP scores for selected school districts with the District's CAP scores for LEP students in grades 3 and 6 shows that:

In grade 3 the reading and mathematics test scores for the LEP students at Washington School were higher than the LEP scores at all of the schools reviewed in this study.

In grade 6 the reading test score for the LEP students at Malcolm X School was higher than the LEP scores in seven of the 11 schools cited.

In grade 6 the mathematics test score for the LEP students at Malcolm X School was higher than LEP scores in eight of the 11 schools cited.

131. A comparison of the academic achievement of LEP students in the ESL-ILP and the Spanish bilingual programs, shows no significant difference in achievement between LEP students in those programs.

132. The District designs its regular instructional program so as to afford equal access and equal educational opportunity for racial minority children and students with special needs, including LEP students. *711 The District has implemented several institutional changes such as voluntary desegregation involving cross-town busing of children, elimination of tracking, elimination of ability grouping, and the adoption of a cross-cultural curriculum. The District's teachers have received in-service training on instructional methods and techniques thought to be effective in improving minority student academic achievement.

133. Although it can be helpful at times to have a teacher or tutor who speaks the native language of the student, academic achievement is attainable without that ability. The evidence supports a conclusion that the District's ESL program has been delivered effectively by English-speaking teachers and tutors.

134. The District commissioned a survey of parents of LEP students in grades 1 through 6 in which 81% of those parents responded to the survey.

135. The survey showed that parent satisfaction with their children's education in Berkeley was very high.

136. Fifty-four percent of the parents of Berkeley's

LEP children in grades 1 through 6 were "very satisfied" and another 33% were "satisfied." Only 11% were either "somewhat dissatisfied" or "very dissatisfied" and 2% were "not sure." While Hispanics favored the bilingual model of instruction by a margin of 2 to 1, Asians and others favored the ESL-ILP program by a margin of about 2 to 1.

137. Parents who had children in the bilingual programs quite frequently cited "the maintenance of the primary language" as an important reason for having their children in the program. The next most frequent reason given was "to foster a learning of the Hispanic culture."

138. Dr. Thomas Scovel, a linguist from California State University at San Francisco, observed the District's classroom teachers and compared them to other teachers in other schools that he had observed. He rated the program in Berkeley as "good," and its teaching staff as highly competent.

139. Witnesses qualified as educational experts testified for the District and in each case the witness had visited the Berkeley schools before testifying and had first-hand knowledge of the District's special language programs.

140. Expert opinion presented by District witnesses based upon their personal observations of schools, teachers, administrators, classes, and students, supports the conclusion that the District's special language services were based upon sound theories, were appropriately implemented, and produced positive results in teaching LEP students.

N. Results of the District's Special Language Services

141. The District's LEP students are making reasonable gains in obtaining proficiency in English and mastering academic subjects. For the most part, they are performing at grade level in math, and making expected progress in English language skills.

142. The math and English reading achievement test scores of the District's LEP students compare favorably to the achievement test scores of LEP students in other school districts with programs of special language services.

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 14

143. Based on standardized test scores and grades, the achievement records of Berkeley's LEP students establish that they are deriving significant, ongoing educational benefits from the District's programs and are competing favorably with native English speakers. These test scores and grades show that the District's LEP students are learning at rates equal to, and in some cases greater than, their counterparts, countywide and statewide.

144. The District's LEP students have better than average attendance records. This tends to show that the LEP students in Berkeley are participating fully in the Berkeley educational program.

145. The evidence of LEP student achievement indicates that Berkeley LEP students are learning English and participating successfully in the District's regular curriculum.

*712 146. The structure and design of the District's elementary ESL program is based upon factors that include: diversity of language backgrounds; adherence to parental preferences, where possible, either for placement in regular mainstream classrooms, the ESL program, or in bilingual classrooms; and school district educational policies that foster integration and heterogeneity.

147. The testimony of the District's principals and classroom teachers established their consensus judgment, from direct observation, that Berkeley's LEP students are in fact learning English and academic content matter.

148. At Berkeley High School, LEP students are passing high school proficiency examinations in English writing, reading, and math at a satisfactory rate. When they achieve fluent English proficiency and exit the BSL program, these former LEP students appear to have sufficient English skills to participate successfully in the regular program. In general, Berkeley LEP students score consistently higher than the Alameda County and the state-wide averages on academic achievement tests.

149. The District's ESL and Sheltered English programs are appropriately designed and based upon educationally acceptable theory.

150. The record amply demonstrates that the

District's special language programs for LEP students are implemented in a manner which provides sound, essentially effective, programs for teaching English and academic subjects.

III. CONCLUSIONS OF LAW

Plaintiffs challenge the Language Remediation Program of the Berkeley Unified School District (BUSD) on two grounds. First, plaintiffs argue that the BUSD violated section 1703(f) of the Equal Educational Opportunity Act (EEOA), 20 U.S.C. § 1701 *et seq.*, which requires appropriate action by school districts to overcome special educational barriers. Second, plaintiffs allege that the BUSD violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits racial discrimination in programs receiving federal aid. As relief, plaintiffs request that the Court issue an injunction ordering the BUSD to design and implement a comprehensive plan to ensure plaintiffs equal educational opportunity and effective participation in the learning process.

Based on the findings of fact and a review of the applicable law, this Court concludes that plaintiffs have failed to establish a violation of either section 1703(f) or Title VI.

A. Plaintiffs' EEOA Section 1703(f) Claim

1. Legal Framework

Plaintiffs first cause of action is based on section 1703(f) of the EEOA, which provides that:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--

(f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703(f) (emphasis added).

The EEOA does not define appropriate action nor does it provide criteria for a court to evaluate whether or not a school district has taken "appropriate action." There are no Ninth Circuit cases which establish a legal framework for assessing whether or not a particular language remediation program constitutes appropriate action.

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 15

Although the Ninth Circuit in *Guadalupe v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1030 (9th Cir.1978), held that appropriate action need not include bilingual-bicultural education, the court did not further articulate appropriate action criteria to be used.

The clearest statement of this requirement is set forth by the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir.1981). *Castaneda* held that in evaluating a school system's language remediation program, a court must conduct the following three-prong analysis.

*713 First, the court must determine whether the school district is pursuing a program "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Id.* at 1009. Second, the court must establish whether "the programs and practices actually used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school." *Id.* at 1010. Third, the court must determine whether the school's program, although premised on sound educational theory and effectively implemented, "produces results indicating that the language barriers confronting students are actually being overcome." *Id.*

Several other courts have adopted this approach, [FN1] and plaintiffs urge this Court to follow their lead.

FN1. See e.g., *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1041 (7th Cir.1987); *Keyes v. School District No. 1, Denver, Colorado*, 576 F.Supp. 1503, 1510 (D.Colo.1983).

Although this Court is not bound by the *Castaneda* three-prong approach, the decision does provide the Court with useful criteria to be used in the review of appropriate action issues. As the Seventh Circuit in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1041 (7th Cir.1987) noted, the *Castaneda* guidelines require fine tuning, but nonetheless provide a helpful analytic structure.

[1] This Court agrees with, and will heed, the warnings stated by the *Castaneda* Court itself that courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators, since they are ill-equipped to do so. *Id.* at 1009.

2. Discussion

[2] Plaintiffs contend that the BUSD has failed to take appropriate action to overcome the language barriers faced by its LEP students. Specifically, plaintiffs challenge the BUSDs alternative to bilingual education, which is an ESL-ILP program at the elementary level and ESL classes and a Sheltered English program at the secondary level. Plaintiffs do not challenge the BUSDs Spanish bilingual or Jefferson Asian bilingual programs.

Relying on *Castaneda*, plaintiffs maintain that the BUSD remedial language program violates section 1703(f) of the EEOA. They claim that even if the program rests on a pedagogically sound basis its implementation violates the appropriate action standard of the EEOA. Plaintiffs argue that by failing to provide qualified teachers, sufficient supporting resources, and necessary monitoring systems, the BUSD has violated the EEOA. Plaintiffs also argue that the procedures utilized by the BUSD to identify, place, and exit students from the special language services program, violate the EEOA.

a. Sound Educational Theory

The EEOA does not require school districts to adopt a specific educational theory or implement an ideal academic program. That Congress utilized the term "appropriate action," rather than "bilingual education," indicates that Congress intended to leave educational authorities substantial latitude in formulating programs to meet their EEOA obligations. *Castaneda*, 648 F.2d at 1009.

Given the diversity of opinion in the education field concerning which theoretical and programmatic approach is sound, it is fortunate that this Court is not charged with the difficult task of establishing the ideal program or choosing between competing theories. Instead, this Court is charged

724 F.Supp. 698
 57 Ed. Law Rep. 90
 (Cite as: 724 F.Supp. 698)

Page 16

solely with the responsibility of determining whether the BUSDs program is informed by an educational theory which some experts recognize as sound. After reviewing the evidence presented in this case, this Court concludes that the plaintiffs have not met their burden to show that the BUSD program is not pedagogically sound. In fact, the evidence shows that the educational theories, upon which the BUSDs programs are grounded, are manifestly as sound as any theory identified by plaintiffs.

*714 Although plaintiffs advocate a program that emphasizes native tongue instruction, they introduced no objective evidence demonstrating that the efficacy of this approach, whatever it may be, for teaching LEP students English, or helping them succeed in a mainstream environment, renders the alternative programs preferred by BUSD pedagogically unsound.

b. Implementation of the Educational Program

(1) Effective Teachers

Plaintiffs maintain that the training of the bilingual teacher and tutor is crucial to the proper implementation of a language remediation program. Plaintiffs argue that by failing to hire teachers and tutors qualified to provide the highly technical and specialized instruction required by the ESL approach, the BUSD has failed to implement a sound educational program.

Plaintiffs contend that in order to implement its language remediation program, BUSDs teachers must have skills based on academic course work in ESL methodology, the developmental needs of LEP students, language proficiency assessment procedures, applied linguistics, general language acquisition, and second language acquisition. Plaintiffs contend that the BUSD should assure this competence by hiring teachers with a language development specialist credential, a bilingual-crosscultural certificate of proficiency or a bilingual-crosscultural specialist credential.

Plaintiffs further argue that in order to effectively deliver ESL instruction, the tutors and paraprofessionals hired by the BUSD must also possess a certificate or credential indicating that they possess the necessary skills and educational background.

By including in the EEOA the obligation to remove language barriers through appropriate action, Congress intended to ensure that school districts make "genuine and good faith efforts, *consistent with local circumstances and resources*," to remedy the language deficiencies of their LEP students. *Castaneda*, 648 F.2d at 1009. To this end, a school district that chooses to fulfill its EEOA obligations by means of a bilingual program must make good faith efforts to provide teachers competent to teach such a program. *Id.* at 1012. However, as *Castaneda* makes clear, the question of whether a school district has in good faith attempted to implement such a program must be tested against reality.

Based on the record in this case, this Court concludes that plaintiffs have failed to meet their burden to show that the actual programs and practices are not reasonably calculated to effectively implement the educational theories upon which an overall program is premised. The BUSD has not violated the EEOA by a failed implementation effort.

The threshold question is, of course, whether or not the credentialed teachers contemplated by plaintiffs are in fact available to a school district who seeks them out. The evidence at trial did not fully resolve this issue but did suggest that it is highly unlikely that the BUSD could fill all necessary positions with fully credentialed teachers in the basic language groups and that it is impossible to cover all languages represented in the BUSD school population. The record in this case established that the mix of teachers newly hired or reassigned to language remediation responsibilities by the BUSD, included both credentialed and non-credentialed teachers. Those without credentials were assessed as to relevant bilingual skills, required to participate in district level training sessions, and to make substantial progress toward completion of requirements for credentials as a condition of employment. The situation with tutors was much the same. The BUSD looks to college graduates or students with two years college at a minimum, finds some with native language ability, and provides relevant district level training to all.

[3] The other major assumption of plaintiffs in this area is that it is necessary to hold language-specific

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 17

credentials in order to deliver remediation programs which do not violate the EEOA. The evidence in the record does not support this assumption. Rather, it tends to show an alternative assumption: that good teachers are *715 good teachers no matter what the educational challenge may be. There is in fact evidence in the record showing that there is no difference in achievement success of LEP students in the BUSD between students with credentialed teachers and students who do not have credentialed teachers.

Finally, any review of the actual complement of teachers and the support provided them must be done in light of the resources actually available to the BUSD. The fact that the BUSD was nearly bankrupt in 1986 simply underscores the reality that the BUSD does not have unlimited funds and that program delivery by the BUSD in all areas is conditioned upon that fact.

Even though funds are limited, the evidence in this case shows that the BUSD has committed significant funds to language remediation program delivery and further that the actual delivery of those programs as to qualified teachers, supporting resources, and program monitoring, does not violate the EEOA on grounds of ineffective implementation.

(2) Testing Procedures

Plaintiffs claim that the BUSD has not effectively implemented its language remediation programs also contains the argument that the procedures utilized by the BUSD to identify, place, and exit LEP students from such programs violates the EEOA. In particular, plaintiffs argue that the use of a so-called TEPL exam does not provide an appropriate basis to determine whether a student is limited English proficient because the test is normed upon the English language skills of LEP students rather than those of native English-speaking students. Plaintiffs argue that the TEPL test does not permit an accurate assessment of the chances for the academic survival of an LEP student in a mainstream English speaking environment.

The TEPL test is but one of the more formal devices used by the BUSD in initial identification and continuing delivery of services to LEP students,

a continuing process which also relies heavily, as it should, on classroom teacher assessment. As to the TEPL test itself, the evidence indicates that LEP students tested as fluent in the 1986-87 and 1987-88 TEPL tests and were in fact successful in the regular English program. Moreover, upon consideration of the evidence as a whole, while it is apparent that the identification process is imprecise, it is surely not so flawed that it defeats the effectiveness of language remediation program delivery.

c. Success of the Program

The third prong of the *Castaneda* test involves consideration of the program's results. Neither the EEOA nor the *Castaneda* court explains how it is that a federal court is to judge the results of a school district's language remediation program. *Castaneda* simply indicated that the program should "produce results indicating that the language barriers confronting students are actually being overcome." 648 F.2d at 1010.

Measuring the success or failure of educational programs is one of the great challenges that faces our educators and is a challenge that this Court approaches with, at least, great trepidation. Other courts have also expressed a similar reluctance. See e.g., *Keyes v. School District No. 1, Denver, Colorado*, 576 F.Supp. 1503 (D.Colo.1983). It is surely beyond the competence of this Court to fashion its own measure of academic achievement, and the Court will necessarily defer to the measuring devices already used by the school system.

In this case, the CAP and CTBS standardized achievement scores, used by California schools, relative to English and to academic subject matter, as well as the classroom grades of the BUSDs LEP students, all point to the effectiveness of the program in teaching English to LEP students and in contributing to their academic achievement. [FN2] These scores show that the BUSDs LEP students are learning at rates *716 equal to or higher than their counterparts in California. LEP students in the BUSD have a record of achievement which is the same or better than the record of LEP students in schools identified by plaintiffs' experts as having effective language remediation programs.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 18

Extremely strong attendance patterns provide further proof, through non-academic criteria, that LEP students are fully participating in the BUSDs educational program.

FN2. In considering comparative test scores, this Court is mindful that these scores are often affected by a host of variables such as socio-economic status and individual characteristics of the child.

Recognizing the difficulties inherent in measurement it is nevertheless true that the best evidence of a sound and effectively implemented program lies in the results that it achieves. The overwhelming weight of evidence in this case establishes that the special language programs of the BUSD assure equal educational opportunity for LEP students and are effective in removing the language barriers faced by the LEP students.

Plaintiffs' claim that the BUSD has failed to implement a sound educational program, has not been sustained. Accordingly, this Court concludes that plaintiffs have failed to establish a violation of section 1703(f) of the EEOA.

B. Plaintiffs' Title VI Claim

1. Legal Framework

[4] Plaintiffs' second claim for relief is based on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing administrative regulations. Section 601 of the Act provides that:

No 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.

42 U.S.C. § 2000d.

Regulations issued under this statutory mandate require that recipients of federal funding may not: utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or

substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 100.3(b)(2), originally adopted as 45 C.F.R. § 80.3(b)(2).

In *Guardians Ass'n v. Civil Service Comm. of New York*, 463 U.S. 582, 103 S.Ct. 3221, 3237, 77 L.Ed.2d 866 (1983), a majority of the Supreme Court held that a violation of Title VI requires proof of discriminatory intent. A different majority held, however, that under the regulations to Title VI, proof of discriminatory effect may suffice to establish liability. *Id.* 103 S.Ct. at 3235 n. 1. The Court in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974), previously held that discrimination which had the effect of depriving students equal educational opportunity was barred by section 601, even if no purposeful design is present. The Ninth Circuit has expressly followed *Lau*. *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir.1984); *Guadelupe Organization v. Tempe Elementary School*, 587 F.2d 1022, 1029 (9th Cir.1978); *De La Cruz v. Tormey*, 582 F.2d 45, 61 n. 16 (9th Cir.1978), *cert. denied*, 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979).

2. Discussion

The case law makes clear that in order to establish a prima facie case of discrimination, plaintiffs must show a discriminatory intent on the part of the BUSD or show that the BUSDs language remediation program, although neutral on its face, has a discriminatory effect on the BUSDs LEP students. Plaintiffs have not offered evidence and in fact do not argue that the BUSD harbors any racially discriminatory intent whatsoever in the delivery of any of its educational programs. Proof that the BUSDs program has a disparate impact on LEP students is, therefore, the only avenue that remains open to them to establish that the BUSD violates Title VI.

Plaintiffs, however, disagree. Plaintiffs argue that a disparate impact analysis is not required in this case and claim that a *717 Title VI violation can be established simply by identifying the programs of the BUSD and the delivery in fact of those programs and establishing racial discrimination by a process of logical inference. This Court disagrees.

724 F.Supp. 698
57 Ed. Law Rep. 90
(Cite as: 724 F.Supp. 698)

Page 19

Although there are relatively few Title VI disparate impact cases, the cases that do exist all hold that plaintiff can only establish a prima facie case by offering proof of discriminatory intent or proof that the challenged action has a discriminatory impact.

For example, in *Larry P.*, the Ninth Circuit considered whether tests used to place students in educationally mentally retarded (EMR) classes operated with discriminatory effect. Although the court found that the placement tests violated Title VI, the court reached this conclusion only after plaintiffs established a prima facie case of detrimental impact with statistical evidence that a disproportionate number of Black students were being placed in EMR classes. 793 F.2d at 982.

Since plaintiffs in this case have not offered any evidence, statistical or otherwise, of racially discriminatory effect, this Court concludes that plaintiffs have utterly failed to sustain their burden of proof under Title VI.

IV. CONCLUSION

Based on these findings of fact and conclusions of law, this Court holds that plaintiffs have failed to establish a violation of section 1703(f) of the EEOA or section 601 of Title VI. Accordingly, this Court enters judgment in favor of defendants.

IT IS SO ORDERED.

724 F.Supp. 698, 57 Ed. Law Rep. 90

END OF DOCUMENT

Westlaw

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 1

H

United States District Court,
 D. Colorado.

Wilfred KEYES, et al., Plaintiffs,
 Congress of Hispanic Educators, et al.,
 Plaintiff-Intervenors,

v.

SCHOOL DISTRICT NO. 1, DENVER,
 COLORADO, et al., Defendants.

Civ. A. No. C-1499.

Dec. 30, 1983.

Parents of public school students brought suit for relief from alleged segregation in school system, and Hispanic groups and individuals intervened as plaintiffs, alleging that children with limited English language proficiency were discriminated against by school system. After the District Court, 380 F.Supp. 673, William E. Doyle, Circuit Judge, adopted desegregation plan, the Court of Appeals, 521 F.2d 465, Lewis, Chief Judge, affirmed in part and reversed in part. On remand, plaintiff intervenor filed supplemental complaint in intervention, adding claim under Equal Educational Opportunities Act. The District Court, Matsch, J., held that: (1) evidence supported certification of class identified as all children with limited English language proficiency who attended or would in future attend schools operated by defendant district, and (2) evidence of deficiencies in school system's transitional bilingual program warranted determination that school system was in violation of section of EEOA requiring educational agency to take appropriate action "to overcome language barriers that impede equal participation by its students," and thus, school system was properly required to take appropriate action to achieve equal educational opportunity for limited English proficiency student population.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure ⇐187.5
 170Ak187.5 Most Cited Cases

In school desegregation case, evidence on factors of numerosity, typicality, common questions of law or fact, and adequacy of representation supported certification of class of plaintiffs identified as all children with limited English language proficiency who attended or would in future attend schools operated by defendant district. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[2] Schools ⇐148(1)
 345k148(1) Most Cited Cases
 (Formerly 345k148)

In action alleging that children with limited English language proficiency were discriminated against by school system, evidence of deficiencies in resources, personnel, and practices of school system's transitional bilingual program warranted determination that school system was in violation of section of Equal Educational Opportunities Act which required educational agency to take appropriate action "to overcome language barriers that impede equal participation by its students," and thus, school system was properly required to take appropriate action to achieve equal educational opportunity for limited English proficiency student population, either internally through normal processes of local government or externally through procedures of litigation. Equal Educational Opportunities Act of 1974, §§ 204, 204(f), 20 U.S.C.A. §§ 1703, 1703(f).

*1504 Peter D. Roos, Irma Herrera, Mexican American Legal Defense and Educational Fund, San Francisco, Cal., Roger L. Rice, Camilo Perez-Bustillo, Cambridge, Mass., for plaintiff-intervenors.

Michael H. Jackson, Denver, Colo., John S. Pfeiffer, Denver, Colo., for defendants.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 2

MEMORANDUM OPINION AND ORDER ON
 LANGUAGE ISSUES

MATSCH, District Judge.

The delay in dealing with the particular issues discussed in this memorandum opinion is a result of the difficulties involved in using the adversary process to assess the efforts made by a public school district to obey a mandate to replace a segregated dual school system with a unitary system in which race and ethnicity are not limitations on access to the educational benefits provided. Among those difficulties are: (1) the polarization of positions through pleadings and proof, (2) the necessity to make a retrospective inquiry into a very fluid problem focusing on a static set of operative facts, (3) the limitations in the Rules of Evidence, (4) the tension between minority objectives and majoritarian values in the political process, (5) the time constraints imposed by the volume of other litigation, and (6) the inertia inherent in the bureaucratic structure of public education. While the following discourse is directed toward the problems of children with language barriers, it must be recognized that the analysis is made in the context of a desegregation case which has been in this court for more than a decade.

Stated in the most comprehensive form, the plaintiff-intervenors' contention is that within the pupil population of the Denver Public Schools, those children who have limited-English language proficiency ("LEP") are being denied equal access to educational opportunity because the school system has failed to take appropriate action to address their special needs. Accordingly, it is claimed that such children are denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution; that the school district has violated Title VI of the Civil Rights Act of 1964, as amended; and that the school district has violated the *1505 mandate of Section 1703(f) of the Equal Educational Opportunities Act.

PROCEDURAL HISTORY

These are ancillary issues in this litigation which began in 1969. In *Keyes v. School District No. 1*, 413 U.S. 189, 213, 93 S.Ct. 2686, 2699, 37 L.Ed.2d

548 (1973), the Supreme Court ordered trial of the factual question of whether the Denver School Board's policy of deliberate segregation in the Park Hill Schools constituted the entire school system a dual system. Judge William E. Doyle's findings that a dual system did exist required further proceedings to ensure that the school board discharged its "affirmative duty to desegregate the entire system 'root and branch'." *Id.* That process is still continuing under this court's supervision.

The Congress of Hispanic Educators ("CHE") and thirteen individually named Mexican-American parents of minor children attending the Denver Public Schools filed a motion to intervene as plaintiffs to participate in the remedy phase hearings. Those plaintiff-intervenors were represented by attorneys from the Mexican American Legal Defense and Educational Fund (MALDEF). Plaintiff-intervenors' motion to intervene was granted by Judge Doyle at a hearing on January 11, 1974. The only record of that order is in the handwritten minutes of the deputy clerk, which note, "Motion of Mexican American Legal Defense Fund to Intervene, Ordered-Motion to Intervene is Granted." The defendants never filed an answer or any other pleading in response to the complaint in intervention.

In that original complaint, the intervenors asserted claims under the Fourteenth Amendment, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000d). Paragraph 9 of the complaint alleged that the action was brought as a Rule 23(b)(1) and (3) class action, with the class defined as follows:

- (a) All Chicano school children, who by virtue of the actions of the Board complained of in the First Cause of Action, Section III of the plaintiff's complaint, are attending segregated schools and who are forced to receive unequal educational opportunity including *inter alia*, the absence of Chicano teachers and bilingual-bicultural programs;
- (b) All those Chicano school children, who by virtue of the actions or omissions of the Board complained of in the Second Cause of Action, Section IV of the plaintiff's complaint, are attending segregated schools, and who will be and have been receiving an unequal educational opportunity;

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 3

(c) All those Chicano teachers, staff, and administrators who have been the victims of defendant's discriminatory hiring, promotion, recruitment, assignment, and selection practices and whose victimization has additionally caused educational injury to Chicano students in that Chicano teachers, staff, and administrators are either nonexistent or underemployed. Additionally, the class is composed of present and future teachers, staff, and administrators who may be affected by this court's impending relief in such a manner as to detrimentally affect Chicano children within said district.

There is no record of any order by Judge Doyle certifying such a class. MALDEF lawyers actively participated in the hearings on the desegregation plans submitted by the plaintiff class and the defendant. There was no challenge to the standing of the parties they were representing.

On April 17, 1974, Judge Doyle ordered implementation of a desegregation plan based on the work of Dr. Finger, a court-appointed expert witness. Parts of that plan addressed the special interests and needs of Chicano children as urged by another expert witness, Dr. Jose Cardenas. On appeal, the Tenth Circuit Court of Appeals held that those special requirements went beyond Judge Doyle's findings. *Keyes v. School District No. 1*, 521 F.2d 465 (10th Cir.1975). The Court of Appeals ruled, in relevant part:

The [district] court made no finding, on remand, that either the School District's curricular offerings or its methods of educating minority students constituted *1506 illegal segregative conduct or resulted from such conduct. Rather, the court determined that ... a meaningful desegregation plan must provide for the transition of Spanish-speaking children to the English language. But the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far. Other considerations lead us to the same conclusion. Direct local control over decisions

vitaly affecting the education of children 'has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.' ... We believe that the district court's adoption of the Cardenas Plan would unjustifiably interfere with such state and local attempts to deal with the myriad economic, social and philosophical problems connected with the education of minority students.

We remand for a determination of the relief, if any, *necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language.* (emphasis added)

Id. at 482-83 (citations omitted).

After that remand, the parties agreed upon a plan to start the process of desegregation. That stipulated plan, approved by Judge Doyle in an order entered on March 26, 1976, did not contain any provisions dealing with the issues relating to limited-English language proficiency of any students. This civil action was reassigned to me immediately after the entry of that order.

On November 3, 1980, the plaintiff-intervenors filed a supplemental complaint in intervention, adding a claim under a provision of the Equal Educational Opportunities Act of 1974 (the EEOA), 20 U.S.C. §§ 1701 *et seq.* Although the supplemental complaint indicated that the parties were the same as in the original complaint, the statement of the claims expanded the group of intervenors to "those students who are limited-English proficient," without regard to native language. The supplemental complaint did not contain class action allegations. The defendant did not respond to either the original complaint or the supplemental complaint.

The filing of the supplemental complaint in intervention followed several years of unsuccessful efforts to negotiate and compromise the English language proficiency issues. The failure of those efforts is indicative of the intractable character of this controversy. Throughout several years of discovery and up to the time for trial, the defendant

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 4

school district never raised any question of plaintiff-intervenors' standing and never challenged the contention that these claims should be maintained as a class action. The first challenge was made on April 26, 1982, when the district suggested that the trial date be vacated. On the last day of trial, the plaintiff-intervenors tendered an amended supplemental complaint and filed motions to add parties, and for class certification. The motion to file the amended complaint to add the additional parties was granted and those additional parties are Hispanic parents whose children now attend the Denver Public Schools. The proposed class certification was simplified to consist of all limited English proficient Hispano children in the Denver Public Schools.

CLASS CERTIFICATION

[1] The question of class certification must be considered before determining the factual and legal questions presented. It arises in an unusual, although not unique, procedural setting since the trial on the merits has already been held. *See Amos v. Board of Directors of City of Milwaukee*, 408 F.Supp. 765, 772 (E.D.Wis.1976). Anyone who has any familiarity with the history of this case knows that there has been a *1507 *de facto* recognition of the standing of CHE in representing the Hispanic population group as a class since Judge Doyle first recognized participation by MALDEF attorneys in January, 1974. For example, in the March 26, 1976 order for implementation of the agreed pupil assignment plan, Judge Doyle said:

The order to modify the bi-lingual program has not been fulfilled and an extension of time (to April 1, 1976) to present a proposal has been granted to the Intervenors.

In determining the awards on applications for attorneys fees, Judge Finesilver commented on the role of the plaintiff-intervenors as follows:

Without the participation of the Congress of Hispanic Educators, the School District's largest minority group would have gone unrepresented. Their involvement assured a fair and balanced presentation of the various views, was important to the success of desegregation, and contributed to the acceptance of the plan by the Hispano community. The Congress of Hispanic

Educators are a prevailing party in this litigation. *Keyes v. School District No. 1*, 439 F.Supp. 393, 400 (D.Colo.1977).

The optimistic expectation that an agreement on bilingual education could be achieved was not fulfilled and the disagreements came on for trial in 1982. At that trial, the complete program for addressing the special needs of all limited-English proficiency students was explored. Indeed, through the testimony of the witnesses and the arguments of counsel, the school district emphasized that because of the many languages spoken by the pupil population and the changes which have occurred in that population since this case was commenced, including the transient nature of attendance patterns, the scope of the problem is considerably wider than that which was defined in the pleadings prior to trial. It is clear from the evidence presented at the trial that the Denver Public Schools now serve a population which is neither bi-racial, nor tri-ethnic. It is pluralistic.

The evidence fully supports the certification of a class identified as all children with limited-English language proficiency who now attend, and who will in the future attend schools operated by the defendant district. That conclusion must, of course, be supported by the separate analysis of the record with respect to each of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

Numerosity.

This prerequisite is not disputed by the defendant even if the class is limited to Spanish-speaking children with limited-English proficiency. Considering all classifications of LEP, there were more than 3,300 such children enrolled in the Denver Public Schools at the time of trial.

Common Questions Of Law Or Fact.

Here, there is a dispute. The defendant asserts that there is a conflict of interest between Hispanic and Indochinese students. While the arguments are focused more on the typicality and adequacy of representation prerequisites, the possibility of such a conflict must also be considered here. I do not find that conflict at this stage of the proceeding. We are now concerned with the question of whether

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 5

the school district has failed to follow the requirements of two federal statutes and whether there has been a denial of equal protection of the laws. From the evidence presented at trial, I find that the limitations arising from the influence of a language other than English are the same without regard for the particular language affecting the student. Accordingly, there is a common question of what obligation is owing to all LEP children in the district.

Additionally, to limit the class to Spanish speakers would be inconsistent with the remand from the Tenth Circuit Court of Appeals quoted on page 4 of this opinion. There, the appellate court directed "a determination of the relief necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." *Keyes v. School District No. 1*, 521 F.2d at 483. In the context of the opinion as a whole, it is clear that the reference to "other minority children" refers to all children with limited-English language proficiency.

The issues common to all children of limited-English language proficiency now or hereafter enrolled in the Denver Public Schools to be considered in this litigation are whether the school district has denied them equal protection of the laws, whether the defendant has failed to follow the requirements of Title VI of the Civil Rights Act of 1964, as amended, and whether the school district has failed to follow the mandate of Section 1703(f) of the Equal Educational Opportunities Act.

Typicality.

Before trial of the language issues, CHE and the original intervenors were particularly identified with the Hispanic community. The additional intervenors who participated in the trial are also from that community. The typicality prerequisite is met if the claims of students with limited-English proficiency who are affected by the Spanish language are representative of the claims of children who are affected by other languages. I find that they are representative and therefore typical because there are Spanish-speaking children who do not have the opportunity to participate in the special bilingual programs provided for some Spanish speakers and who are, therefore, no different from

speakers of other languages for whom there are no comparable programs in Denver. Whatever conflict may exist for those Spanish-speaking children who are receiving bilingual instruction, and who are thus provided better opportunities than those given to Indochinese or other children who are classified as LEP, there are other Spanish speakers who are attending schools under the same programs for those who speak Asian languages and the other identified language groups shown in the trial record in this case.

Adequacy of Representation.

The determination of this prerequisite has been made easy by the delay in class certification. The principal question in deciding whether the representative parties will fairly and adequately protect the interests of the class is the adequacy of the attorneys who are in appearance. One need only read the record of the trial and the briefs filed for the plaintiff-intervenors to conclude that their counsel are highly competent lawyers who have vigorously asserted the interests of all present and future LEP pupils involved with the Denver Public Schools.

Having determined that all of the prerequisites required under Rule 23(a) are met, the court must then consider whether a class action is maintainable under one of the subsections of Rule 23(b). Again, the answer is self-evident from a review of the record in this case. The school district has designed its program in a manner which can be considered as action or refusal to act on grounds generally applicable to all LEP children and, therefore, the class action should be maintained under Rule 23(b)(2).

This court has not disregarded the defendant's concerns about the possibility that non-Hispanic LEP children may be denied their constitutional protection of due process of law by being made a part of the class certified by this court. It is apparent that their rights and interests have been fully considered by the manner in which the evidence and legal arguments have been presented by plaintiff-intervenors' counsel in this case and by the procedural and evidentiary rulings made by this court to this time. It is appropriate, as plaintiff-intervenors' counsel have suggested, to

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
15 Ed. Law Rep. 796
(Cite as: 576 F.Supp. 1503)

Page 6

distinguish between the liability and remedy phases of a class action lawsuit and, in the event of any remedy hearings which may involve a conflict, this court has the authority to change both the class certification and to order the separate representation of sub-classes.

SECTION 1703(f) OF THE EEOA

[2] In enacting the Equal Educational Opportunities Act in 1974, the United States Congress was reacting to the many court cases in which the transportation of students from their residential neighborhoods was used as a means for removing *1509 some of the effects of segregation from the operation of a dual school system. The statement of policy in Section 1701 includes a specific statement of support for neighborhood schools. That section, in its entirety, is as follows:

(a) The Congress declares it to be the policy of the United States that--

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this sub-chapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

20 U.S.C. § 1701.

The legislative findings in Section 1702 of the EEOA include explicit criticism of extensive use of student transportation and, in the following language from Section 1702(a)(6), express a sense of frustration with the guidelines provided by the courts:

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

From the legislative findings, the Congress reached

the following conclusion set forth in Section 1702(b):

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

In this litigation, the transportation of students has been used as a part of the effort to remedy the effects of the past segregative policies in the Denver school system. Busing has been the primary means for the removal of racially isolated schools. That aspect of the case is not now directly under consideration, but, as will appear, it is unrealistic to parse out particular components of a school system when considering the fundamental issue of an equal educational opportunity for all students within the school population. The Congress showed the same perception in defining unlawful practices in Section 1703 of the EEOA, which reads as follows:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 7

employment, employment conditions, or assignment to *1510 schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

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

20 U.S.C. § 1703.

The present focus of attention is on subsection (f) of Section 1703. That subsection was analyzed carefully by the United States Court of Appeals for the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir.1981), a case which is very instructive in the present controversy. There, the Court made the following pertinent observations:

We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think 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 under the EEOA. 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 in § 1706, 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.

Congress has provided us with almost no

guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking--prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i.e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir.1981).

The suggested analysis is to ask three questions. First, is the school system pursuing a program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Second, is the program reasonably calculated to implement that theory? Third, after being used for enough time to be a legitimate trial, has the program produced satisfactory results? *United States v. State of Texas*, 680 F.2d 356, 371 (5th Cir.1982).

THE EVIDENCE

Limited-English proficiency children in the district.

School District No. 1 has a duty to identify, assess and record those students who come within the provisions of the English *1511 Language Proficiency Act, enacted by the Colorado General Assembly in 1981, codified at C.R.S. §§ 22-24-101 to 106 (1982 Cum.Supp.). The district uses classifications called Lau categories. These Lau categories were defined originally by the Department of Health, Education and Welfare ("HEW"), now the Department of Education, as part of its Lau Guidelines, which HEW drafted as

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 8

administrative recommendations following the Supreme Court's decision in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

Section 22-24-103(4) of the Colorado statute does not use the words "Lau A, B and C," but the definitions provided therein track the Lau categories. That section provides for the classification of children as follows:

"Student whose dominant language is not English" means a public school student whose academic achievement and English language proficiency are determined by his local school district, using instruments and tests approved by the department, to be impaired because of his inability to comprehend or speak English adequately due to the influence of a language other than English and who is one or more of the following:

- (a) A student who speaks a language other than English and does not comprehend or speak English; or
- (b) A student who comprehends or speaks some English, but whose predominant comprehension or speech is in a language other than English; or
- (c) A student who comprehends and speaks English and one or more other languages and whose dominant language is difficult to determine, if the student's English language development and comprehension is:
 - (I) At or below the district mean or below the mean or equivalent on a nationally standardized test; or
 - (II) Below the acceptable proficiency level on an English language proficiency test developed by the department.

C.R.S. § 22-24-103(4).

For the 1981-82 school year, the defendant school district used a survey which identified 3,322 children as limited-English speaking. Of that total count, 2,429 were Lau categories A and B, and 893 were Lau category C, as those terms are defined under the Colorado English Language Proficiency Act. There were 42 separate language groups identified among these students in the Denver Public Schools.

At the elementary level (Grades K-6) 1,639 students were identified as Lau A and B and 637 as

Lau C. In the secondary grades (7-12) there were 790 Lau A and B students and 256 Lau C. During the 1981-1982 school year, the school district operated 117 schools--88 elementary, 19 junior high, and 10 senior high schools--with a total enrollment in grades 1-12 of 54,644 students. Lau Category A and B students in the 42 language groups attended 83 of the school district's 88 elementary schools and there were Lau A and B students in all 19 of the junior high schools and all 10 of the senior high schools.

Although 42 languages were represented among the district's limited-English proficiency children in 1981-82, the majority fell into two language groups. There were 1,851 children, or 55.72% of the total number of LEP students at all grade levels, whose other language was Spanish. The second largest group, comprising 36.48% of all LEP children in the district, consisted of 1,212 children who are influenced by one of four Indochinese languages: Cambodian (116); Hmong (417); Lao (174); and Vietnamese (505).

At the elementary level, 919 Spanish language students were identified as Lau A and B, which represents 2.8% of the K-6 population. At the time of the trial, 80% of the Spanish language Lau A and B children were in grades K-3. At the junior high level, 146 Spanish language A and B students were identified, representing 1.07% of the junior high school population. At the senior high school level, the survey identified 86 Spanish language A and B students or two-thirds of one percent (.67%) of the senior high population. District-wide the Spanish language A and B population K-12 totaled 1,151 or 1.9% of the total *1512 district enrollment. An additional 700 Spanish language students were identified as Lau category C.

The school district's curriculum.

At the elementary level, a transitional bilingual program exists at twelve elementary schools: Boulevard, Bryant-Webster, Crofton, Del Pueblo, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Mitchell, Swansea and Valdez. At all those schools except Valdez, the program is for grades K-3; at Valdez it is provided for grades K-6. Not all classrooms in these schools are designated bilingual classrooms; most have one designated

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 9

bilingual classroom for each grade level in the program. At Fairmont there are two designated bilingual classrooms for each grade level K-3. While only 13.4% of the total number of limited-English proficiency children enrolled in the district (Lau A, B and C children, including all 42 language groups) were receiving instruction in bilingual classrooms during 1981-82, 31.03% of the total number of Spanish speaking, elementary level limited-English speaking children were in bilingual classrooms.

No speakers of languages other than Spanish, and no Spanish speaking Lau C children receive instruction in designated bilingual classrooms. The bilingual classrooms are intended to have about 40% limited-English proficiency children, and 60% English proficient children, but the actual figures deviate from this goal. Students who are placed in bilingual classrooms merge with the rest of the student body for classes in art, music and physical education, and for lunch and recess.

There are differences in the teaching staff in the desegregated bilingual schools. Each bilingual classroom is taught by a certified teacher, but many of those teachers are monolingual English. Most teachers, including all of the monolingual English teachers, have a bilingual aide to assist in communicating with those children who do not speak English. It is a fair inference that any instruction in Spanish, in classrooms led by monolingual English teachers, occurs through these bilingual aides. In several designated bilingual classrooms, there are full or part-time ESL (English as a Second Language) tutors to assist in English language instruction. In other classrooms ESL is taught by the teachers and aides.

In addition, each bilingual school, except for Mitchell, has a bilingual resource teacher who serves in an administrative and supportive role. (Del Pueblo and Valdez have two bilingual resource teachers; while Bryant-Webster and Greenlee have half-time bilingual resource teachers.) The resource teacher's duties are extensive, including: coordinate between the classroom teacher and the aide in establishing an instructional program; provide technical and other assistance to bilingual classrooms; coordinate the total bilingual effort within the school; meet weekly with the teachers

and aides to discuss student progress and other program concerns; provide at least two hours of in-service training to the aides weekly; develop curriculum and materials; involve parents and the community in the program; assess and evaluate limited-English speaking children; diagnose their needs and prescribe specialized curricula; demonstrate techniques and methodologies involved in bilingual instruction, second language acquisition, ESL, and Spanish oral language development; read to children in Spanish; and work with children on conceptual development using the child's native language. All the bilingual resource teachers are bilingual.

For those Lau A and B elementary level children who are not in designated bilingual classrooms--about 1,200 in all languages and about 500 Spanish-speaking children--the district provides two modes of ESL instruction. Four elementary schools--Brown, Cheltenham, Goldrick and Mitchell--have a full-time ESL teacher. The remaining elementary schools (and the non-Spanish speaking Lau A and B children in the twelve bilingual schools) are served by full or part-time tutors who instruct in ESL. All ESL instruction, whether it is by a teacher or tutor, occurs on a "pull-out" basis; the children are taken from their regular classrooms to receive from 30 to 60 minutes of ESL instruction each day. The *1513 school district's 55 tutors serve Lau A and B children in 75 elementary schools, generally meeting with groups of two to four children at one time, and tutoring an average of 20 children per six-hour day. For the rest of the day, the child receives content instruction in the regular classroom, entirely in English. Some regular classroom teachers are bilingual and the child may receive some content instruction in his native language through those teachers. The elementary ESL program uses the "IDEA Kit," which employs pictures, actions and other materials to teach Lau A and B children oral skills in English.

At the secondary level, there is no program comparable to that found in the designated bilingual elementary schools.

The principal program for secondary level limited-English proficiency students is ESL taught by teachers and tutors for about 45 minutes each day. The ESL curriculum consists of four

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

sequential levels of reading, writing and conversation instruction: levels I and II are for Lau A students; levels III and IV are for Lau B students. Lau C students do not receive ESL instruction unless they choose to take courses offered as electives, such as "Practical English," "Language Development in English," or language lab courses.

The October, 1981, survey identified 146 Spanish A and B Category students in the junior high schools. Of this number 121 or 82.8% attended schools with ESL programs. 108 of those students (89.2%) were in ESL programs conducted by a bilingual teacher.

In the senior high schools ESL programs are available in schools attended by 78 of the 86 identified Spanish speaking A and B students. In addition, 316 A and B students in other identified language groups attended schools with structured ESL programs.

At four of the district's thirty secondary schools--Hill Junior High, Hamilton Junior High, Manual High, and Thomas Jefferson High--ESL instruction is not available. At the time of trial there were either no limited-English speaking students, or only Lau C students, at Hill and Hamilton. For Lau A and B students at secondary schools without established ESL programs, and for some limited-English speaking students at other secondary schools in the district, the Fred Thomas Career Center provides ESL instruction. Students travel to the Center, which had an enrollment of 55 students in 1981-82, for ESL instruction by a teacher and two aides.

In addition to the specific ESL programs, course materials in content areas of American History, geography, physical science, natural science, mathematics, sex education, health and hygiene, and general hygiene have been translated into the five major language groups for use in the school curriculum. Materials have also been translated for use in the home economics, physical education, and industrial arts areas. Ms. Bonilla, the director of this program, is also engaged in the development of a program known as Transference of Learning from Native Language to English through Content Area Cassette Tapes and Supplementary Materials. This

is a project designed to meet the needs of two populations--those students who are literate in their native language and need to develop cognitive skills while learning English, and, secondly, those who are illiterate in their own language and thus need to hear the content area material in order to have an understanding of it.

A final component of the school district's program is a summer ESL program. According to Mr. Hal Anderson, who directs the program, it was expected to serve from 400 to 500 Lau A and B children in 22 classrooms. Students are selected for the summer program based on teacher referrals.

Testing.

The identification of limited-English speaking children, and the placement of those children in Lau categories A, B and C, does not occur through a formal testing process. Instead, the school district employs the Lau questionnaire. The questionnaire is filled out by each child's parents and is reviewed by a teacher. If the parents and teacher concur that the child is *1514 not limited-English speaking, the district determines him to be ineligible for the bilingual/ESL program. It is common for parents to overstate the language abilities of their children, and the teacher's involvement in the questionnaire is intended to safeguard against that. Most of the district's teachers are not trained in linguistics, bilingual education, other languages, or in detecting language problems. At the secondary level those students who are identified as LEP are given an ESL test to place them in ESL level I, II, III or IV.

To measure the progress of elementary children receiving ESL instruction, the school district uses the IDEA Test, which is a part of the IDEA Kit. In addition to the IDEA Test, the district relies on the opinions of its teachers and staff to determine whether and how much the child has progressed. If the student achieves "mastery" of the IDEA Test, he leaves the ESL program, unless his tutor or teacher determines that it would not be appropriate to "mainstream" him at that point. The IDEA Test is also used for those students receiving instruction in designated bilingual classrooms, because part of the transitional bilingual program is ESL instruction through the IDEA Kit. If the child achieves mastery in the test, he will be released from the

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 11

bilingual program. Of course, if a child becomes proficient in English during the school year he can remain in the bilingual classroom and simply do without the ESL instruction, effectively joining the English speaking children already in the classroom.

At the secondary level, the school district measures progress in the ESL program through the Structure Test of English Language, or STEL. That test is administered twice a year, on a pre/post basis.

The school district does not keep records of the progress of children who have left either the bilingual or ESL program. There is no continuing support provided to students who have exited from either program, and the district does not compare their performance against that of non-limited-English speaking children. None of the tests used by the district measures the capabilities of limited-English speaking children in their native languages in either language skills or content areas.

Staffing.

Teachers in designated bilingual classrooms are placed by the school district's personnel office, rather than by the bilingual program administrator, Mr. Moses Martinez. These placement decisions do not depend upon the teacher's proficiency in a second language or in bilingual instruction skills. For example, the personnel office often will assign tenured teachers or teachers already working within a particular school, to fill vacancies in bilingual classrooms, even though those teachers are not bilingual and have no training for bilingual teaching, and even though a non-tenured bilingual teacher is available. There is no state endorsement for bilingual classroom teachers. Selection is based on an oral interview. The district does not administer a written test to evaluate either language skills or bilingual instruction skills.

No special training is required for ESL teachers and there is no state endorsement for ESL teachers. There is no formal district procedure to assess them for language proficiency or ESL teaching skills. ESL teachers are not required to be bilingual.

During the 1980-81 school year, over 200 of the district's teachers-- predominantly teachers who did

not lead designated bilingual classrooms or teach ESL--received an 18-hour in-service training course which covered the basics of linguistics, ESL (including the IDEBA Kit curriculum), and multicultural awareness. The school district did not follow up on whether those teachers actually used such training in their classrooms; nor did the school district know whether those teachers taught in classrooms or schools with large numbers of limited-English speaking children.

There are regular classroom teachers in the district who are bilingual, generally in English and Spanish. The evidence did not show the number of bilingual teachers who were working in the district during the 1981-82 school year.

*1515 The district's ESL tutors are classified as Paraprofessional III staff, which means they must have two years of college or equivalent experience. According to Mr. Martinez, many of the tutors have college and graduate degrees; a few have less than two years of college. ESL tutors are not required to have state certification for teaching, previous training in language acquisition or ESL instruction, bilingual capabilities, or past experience teaching ESL. The school district provides a two-day training session for new ESL tutors at the start of each school year. If tutors are hired during the school year (due to vacancies, which occur frequently), they receive one day of training at the office of bilingual education, and two days of observation in the field.

Bilingual classroom aides are designated as Paraprofessional II staff, which means they must have completed high school. Aides' bilingualism is measured through an oral interview only, without any written examination or classroom observation. The evidence does not disclose what, if any, training is required for bilingual aides. Bilingual resource teachers must be bilingual. As with other teachers, there is no written instrument for determining their bilingualism; instead, that determination is based on an oral interview.

Program Administration.

The school district's program for limited-English speaking students is directed by the Department of Bilingual and Multi-cultural Education headed by

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 12

Mr. Martinez. That office is responsible for the coordination of the programs of Bilingual Education, English for Speakers of Other Languages, ESL Tutorial Programs and others. The staff consists of one secretary, three clerks, four teachers on special assignment, six paraprofessionals who serve as translators and interpreters, one paraprofessional for community liaison, one paraprofessional resource librarian, and instrumental consultants. The community liaison paraprofessional works in the elementary bilingual program, does some liaison work at the secondary level, and works actively with Indochinese parents. She also teaches an English class for parents. The six paraprofessionals include native language speakers of Hmong, Laotian, Vietnamese, Cambodian, and Spanish. The paraprofessionals are primarily responsible for translating curriculum, and interpreting and translating messages and information for the parents of limited-English speaking students. The curriculum translations include units in social studies, science, and mathematics in the five major languages.

Program growth and funding.

The program of services for limited-English speaking students in the Denver Public Schools has been developed with the assistance of expert consultants from the Colorado Department of Education and from Bueno Bilingual Service Center at Boulder, Colorado. The current program began in September, 1980.

There has been an increase in the number of bilingual teachers from three (3) to thirty-six (36), an increase in tutors from twelve (12) to seventy-two (72), an increase of four (4) schools at the elementary level with ESL programs, and the placement of seventeen (17) tutors in addition to the regular classroom teachers and full-time ESL teachers in twenty-seven (27) secondary schools.

During this same period, the school district substantially increased its funding for bilingual and ESL instruction from \$139,326 in 1979 to \$1,293,625 at the time of the trial. This commitment is in addition to the salaries of the regularly assigned teachers in the program. During the 1981-82 school year, the school district received \$81,687 under a Title VII Computer Demonstration

Grant, \$137,200 under the Transition Act for Refugee Children, and \$991,137 in state funds under the English Language Proficiency Act.

The funds from the state are computed pursuant to the formula set out in the Colorado English Language Proficiency Act, C.R.S. § 22-24-104. That section of the Act sets limits on the funding allowed for limited-English speaking children, and allots funds on a per-student basis. The maximum amount is \$400 per year for a Lau A or B child, and \$200 per year for a *1516 Lau C child as that term is used in the Act. In addition, the Act prohibits funding of a particular student's educational program for longer than two years. *Id.* § 22-24-104(3).

HAS DENVER DESIGNED A PROGRAM
 BASED ON A SOUND EDUCATIONAL
 THEORY?

The defendant district has a freedom of choice among several educational theories which experts have recognized as valid strategies for language remediation in public schools. It is, of course, subject to the requirements of Colorado statutes. While the Colorado English Language Proficiency Act is essentially a funding program, it does establish an affirmative duty on Colorado school districts in § 22-24-105 which reads as follows:

- (1) It is the duty of each district to:
 - (a) Identify, through the observations and recommendations of parents, teachers, or other persons, students whose dominant language may not be English;
 - (b) Assess such students, using instruments and techniques approved by the department, to determine if their dominant language is not English;
 - (c) Certify to the department those students in the district whose dominant language is not English;
 - (d) Administer and provide programs for students whose dominant language is not English.

The state has not, however, directed the use of any particular type of language program.

Denver has elected to use what is called a "transitional bilingual approach" which is well described in the following language from the Denver Public Schools' Bilingual Program Model for the 1981-82 School Year:

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 13

The intent of bilingual education is to facilitate the integration of the child into the regular school curriculum. English is not sacrificed, in fact it is emphasized; the native language is used as a medium of instruction to ensure academic success in content areas such as math, social studies, etc., while the child at the same time is acquiring proficiency of the English language.

(Intervenors' Exhibit 26).

The parties are in agreement and the testifying experts have all said that this is a recognized and satisfactory approach to the problem of educating LEP children. Mr. Martinez testified that this is a two-pronged approach. One is to provide the student with an opportunity to develop English language skills and the other is to provide content area to him in a language he understands while he is learning English. The experts agree that this approach not only should enable LEP students to enter the mainstream of instruction, it also helps to overcome the emotional barriers of fear, frustration, discouragement and anger by providing understandable content instruction in their native language during the transitional phase.

HAS DENVER PURSUED ITS PROGRAM WITH ADEQUATE RESOURCES, PERSONNEL AND PRACTICES?

The elementary bilingual classroom program is the best which Denver has to offer LEP children. Accordingly, the analysis should begin with a focus on the deficiencies in that program.

The key to an effective elementary bilingual classroom is the ability of the teacher to communicate with the children. Thus, if it is expected that understandable instruction will take place, there must be assurance that the teacher has the necessary bilingual skills. That is not the fact in Denver.

Teachers are designated as bilingual in Spanish and English based on an oral interview. There are no standardized testing procedures to determine the competence of the bilingual teacher in speaking and writing both languages. Accordingly, it is inappropriate to assume that effective communication is taking place even with the

fortunate few Lau A Spanish speaking students who are assigned to bilingual classrooms *1517 with bilingual teachers in the twelve elementary schools having that program.

Given the district's declaration of a transitional bilingual policy and the obvious need for the services of competent bilingual teachers, it would be reasonable to expect that the placement of teachers with those skills would be matched with the programs in the designated schools. That is not the case in Denver.

The assignment of teachers to bilingual schools in the defendant district is accomplished by the same procedure used for the assignment of teachers to all other schools. Teachers with tenure have preferential rights for assignment to vacancies according to their seniority. Accordingly, a monolingual English teacher may fill a vacancy in a bilingual classroom at a bilingual school even though a qualified bilingual teacher with less seniority is available for placement there. Likewise, tenured monolingual teachers cannot be removed from a bilingual classroom to create a vacancy for a competent bilingual teacher. The justification for this contradiction of common sense is that the movement and placement of teachers is restricted by personnel regulations and contractual commitments.

The ESL component of the program is being delivered by ESL designated instructors who have not been subjected to any standardized testing for their language skills and they receive very little training in ESL theory and methodology. The record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that the policy objectives of the program are being met in such schools. The tutorial program relies on paraprofessionals who may have second language skills but who are not required to show any competence or experience with content area knowledge, or teaching techniques, and who receive scant in-service training.

It should be noted that the inadequacy of the delivery system for the bilingual education program in Raymondville, Texas was one of the specific defects which the court required to be remedied in

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 14

the *Castaneda v. Pickard*, *supra*, case from which opinion the following comment is taken:

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students.

648 F.2d at 1013.

The Spanish speakers in the elementary bilingual classrooms are the most fortunate of the limited-English proficient children. Most LEP students are not in those classrooms. Accordingly, it follows that for those students there is less commitment and effort to achieve implementation of the transitional bilingual policy. Significant numbers of limited-English proficient children attend schools which are not bilingual. Some of the secondary students from certain schools are brought together for extended ESL services at the Fred Thomas Center. That type of "clustering" has not *1518 been used elsewhere. What appears from the record is that outside of the bilingual classrooms, the Lau A children and perhaps the Lau B children, are not receiving content area instruction in a language which they understand and

that, at best, some remedial oral English training is being given to them.

The emphasis on the acquisition of oral English skills for LEP students is another cause for concern. The record indicates that on the average, ESL instruction by a teacher or tutor is limited to 40 minutes per day of remedial English instruction using an audiolingual approach. While there is no doubt that acquisition of oral English skills is vital for the students' participation in classroom work, it is equally obvious that reading and writing skills are also necessary if it is expected that "parity in participation" in the total academic experience will be achieved.

Another matter of concern is the apparent disregard of any special curriculum needs of Lau C children. The defendant considers Lau C children to be bilingual, presumably with equal proficiency in English and another language. The apparent assumption is that such students need not be participants in a remedial English language program. That view disregards the other element of the applicable definition in the Colorado Language Proficiency Act that the English language development and comprehension of such bilingual students is at or below the district mean or below an acceptable proficiency level on a national standardized test or a test developed by the Colorado Department of Education. Lau C students are within the class of persons for whom there is a statutory duty under both the Colorado Act and § 1703(f). Denver is not meeting that obligation.

The defendant's program is also flawed by the failure to adopt adequate tests to measure the results of what the district is doing. The operative philosophy exhibited in the evidence is that there is a "good faith" effort to provide "some service" to as many LEP students as possible. The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional bilingual policy.

In summary, what is shown by this record is that the defendant district has failed, in varying degrees, to satisfy the requirements of § 1703(f) of the Equal Educational Opportunities Act.

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 15

The defendant seeks to justify its program by talking in numbers, and quoting from the concurring opinion of Justice Blackmun in *Lau v. Nichols*, 414 U.S. 563, 572, 94 S.Ct. 786, 791, 39 L.Ed.2d 1 (1974) and from the opinion in *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir.1974). There are two pertinent observations. First, the numbers of Lau A, B and C children for whom appropriate action has not been taken are substantial and significant. Second, the importance of numbers in an equal protection analysis under the Constitution is materially different from their use in considering the adequacy of compliance with the statutory mandate of § 1703(f). As the plaintiff-intervenors have observed, under § 1706, any individual denied an equal educational opportunity as defined in the Act may institute a civil action for private relief.

HAS THE DENVER TRANSITIONAL
 BILINGUAL PROGRAM ACHIEVED
 SATISFACTORY RESULTS?

This is the most difficult question in the *Castaneda* case analysis because it implies the establishment of a substantive standard of quality in educational benefits. It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government.

Fortunately, it is not now necessary to discuss this question because of the findings of the district's failure to take reasonable action to implement the bilingual education policy which it adopted. The inadequacies of the programs and practices shown in this record make it premature to consider any analysis of the results. Moreover, *1519 the program is still under development.

What is subject to comment are two very significant indications of failure in achieving the objective of equal educational opportunity for LEP children. One is the number of Hispanic "drop-outs" peaking in the tenth grade. There is an interesting relationship between that surge of drop-outs and the sharp decline in the overall number of Lau C category students between grades 7-9 and grades

10-12. A second indicator of failure is the use of "levelled English" handouts for the district's LEP student population in the secondary schools. The evidence includes illustrations of such handouts and it is apparent from examining those exhibits that they are not comparable to the English language textbooks. The use of such materials is an acknowledgement by the school district that the LEP students have failed to attain a reasonable parity of participation with the other students in the educational process at the secondary school level.

CLAIMS FOR DENIAL OF EQUAL
 PROTECTION AND VIOLATION OF TITLE VII
 OF THE CIVIL
 RIGHTS ACT OF 1964

In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) the Supreme Court held that the failure of the San Francisco school system to provide meaningful education to non-English-speaking Chinese students had the effect of denying them equal educational opportunity in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI). The Court did not find it necessary to consider whether that was also a violation of the Equal Protection Clause of the Fourteenth amendment to the United States Constitution. Here, it is not necessary to consider either the constitutional question or Title VI. Section 1703(f) is a much more specific direction and to take appropriate action under it would necessarily redress any violation of the equal educational opportunities requirements of Title VI of the Civil Rights Act of 1964 and of the Constitution. It may be observed parenthetically, that the vitality of *Lau v. Nichols, supra*, has been questioned since *Regenis of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). See discussion in *Otero v. Mesa County Valley School District No. 51*, 470 F.Supp. 326, 330 (D.Colo.1979), *aff'd on other grounds* 628 F.2d 1271 (10th Cir.1982). If *Bakke* has altered *Lau*, to require a discriminatory intent, the evidence in the record in this case does not support a finding of such an intent with respect to Hispanic or any other language group.

The inquiry is not necessary here because it is clear from the plain language of the statute and from the opinion in *Castaneda, supra*, that the affirmative

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 16

obligation to take appropriate action to remove language barriers imposed by 20 U.S.C. § 1703(f) does not depend upon any finding of discriminatory intent, and a failure to act is not excused by any amount of good faith.

REMEDY

The defendant district has amply demonstrated the many practical difficulties involved in attempting to take appropriate action to achieve equal educational opportunity for the limited-English proficiency student population. Denver does have public education burdens which are different from other districts in the state of Colorado. It serves a core city community. Students with many different language backgrounds and varying degrees of literacy in any language enter and leave the public schools of Denver, at all grade levels, and without any predictable patterns. This creates uncertainties making both the planning and delivery of remedial language services very difficult. The problem is further complicated by the great diversity of cultural and socio-economic conditions among the pupil population.

It is unreasonable to expect that the school district could provide a full bilingual education to every single LEP student who attends or will ever attend a Denver Public School. The law does not require such perfection. But the defendant does have *1520 the duty to take appropriate action to eliminate language barriers which currently prevent a great number of students from participating equally in the educational programs offered by the district.

The findings made in this memorandum opinion compel the conclusion that the defendant has failed to perform this duty. Accordingly, under § 1706 of the EEOA, the members of the plaintiff-intervenors' class are entitled to "such relief as may be appropriate." That will include changes in the design of the program and in the system for delivery of services. Such changes must remedy the failure to give adequate consideration to Lau classifications in the pupil assignment plan; the failure to consider the need to serve Lau C children; the lack of adequate standards and testing of the qualifications for bilingual teachers; ESL teachers; tutors and aides; the lack of adequate tests for classifying Lau

A, B and C students; the failure to provide remedial training in the reading and writing of English; the lack of adequate testing for effects and results of the remedial program provided to the students; and the absence of any standards or testing for educational deficits resulting from their lack of participation in the regular classrooms.

These changes will increase the capacity of the system. That alone will not be effective. There must be a change in the institutional commitment to the objective and a recognition that to assist disadvantaged children to participate in public education is to help them enter the mainstream of our social, economic and political systems. The resulting benefits to the community are self-evident and the production of such benefits is the purpose of tax supported education in the United States. "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982). The character of the disadvantage, whether it results from racial identities or the language influences of different ethnicity, is relevant only to the methodology to be employed. Throughout the trial and in the post trial brief, the defendant district has consistently claimed that there has been a good faith effort to provide some service to every student in the district who needs assistance in gaining proficiency in English. To the extent that "good faith" is equated with a lack of discriminatory intent or an absence of a complete disregard for students who are disadvantaged by a lack of English language proficiency, the record supports that contention. That, however, is not an adequate defense to claims under 42 U.S.C. § 1706. What is required is an effort which will be reasonably effective in producing the intended result of removing language barriers to participation in the instructional programs offered by the district.

Whether that effort will be made internally through the normal processes of local government or externally, through the procedures of litigation in this court, will depend upon the degree of

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 17

acceptance of responsibility by those who direct the defendant district. Those who are most critical of this nation's civil rights laws and court decisions must surely realize that the need for the use of the coercive forces of the legal system is in inverse proportion to the degree of recognition that the viability of a pluralistic democracy depends upon the willingness to accept all of the "thems" as "us." Whether the motives of the framers be considered moralistic or pragmatic, the structure of the Constitution rests on the foundational principle that successful self-governance can be achieved only through public institutions following egalitarian policies.

The approach to developing a remedy for the defendant's failure to obey the congressional mandate in 42 U.S.C. § 1703(f) must be considered in the complete context of this civil action. The record which was before the Tenth Circuit Court of Appeals at the time of its rejection of the "Cardenas plan" aspects of the desegregation order in *1521 1975 did not include any consideration of the claims under that statute. Indeed, the enactment of the EEOA in 1974 is one of the legal developments which occurred during the pendency of this case. Consideration of the claims concerning language remediation is a new facet in this old problem.

During the course of this litigation, this court has repeatedly stressed the importance of recognizing that disestablishing a dual school system and creating a unitary system with equal educational opportunity requires attention to all aspects of public education. Unfortunately, the record of this case shows that those who have governed the district during the past decade have consistently centered their attention on the shibboleth of "forced busing." The requirement that some students must be transported from their residential areas to achieve a mix of racial and ethnic groups in individual schools has never been intended to be more than a lever to try to energize other efforts to ameliorate the historical disadvantages of race and national origin in a society which has long been dominated by a single group. Limited-English proficiency is one of those disadvantages.

The Congress had justification when, in § 1702 of the EEOA, they criticized the failure of the courts to articulate adequate guidance for local public

officials in desegregation cases. The Denver Board of Education has expressed the same frustration. Yet, it is noted that the legislative mandate to take "appropriate action to overcome language barriers" appearing in § 1703(f) is not a particularly helpful contribution. As observed in the quotations from the *Castaneda* opinion, the lack of precision in that phraseology has resulted in a return to the courts to litigate these issues.

Perhaps what Congress did achieve is to give added emphasis to the importance of the *educational opportunities* which should be provided and to remind those who govern school districts that removing the vestiges of a dual school system requires more than maintaining ratios in pupil assignments.

Consideration of the deficiencies in Denver's efforts to remove the barriers to participation by limited-English proficiency students demonstrates, again, the inter-relationship of each integral aspect of a truly unitary school system. To remedy the lack of bilingual teachers involves aspects of the affirmative action plan which has never been completed in this case, and may require alterations in the use of the seniority system. The placement of pupils into appropriate bilingual language programs may require changes in pupil assignments and transfers, which impact on the mix of students in individual schools. The use of "clustering" and magnet schools are approaches which may be productive, but which also impact on other aspects of the system. Perhaps the computer can be a very significant teaching tool for language remediation as suggested by the demonstration grant program which was discussed in the testimony at trial.

In sum, the issues which have been brought before the court by the plaintiff-intervenors are part and parcel of the mandate to establish a unitary school system. Accordingly, no discrete remedy for these issues will now be ordered, but the school district has the responsibility for implementing appropriate action as a part of compliance with the mandate to remove the effects of past segregative policies and to establish a unitary school system in Denver, Colorado.

In a memorandum opinion and order entered on May 12, 1982, accepting a "consensus" pupil

576 F.Supp. 1503
 15 Ed. Law Rep. 796
 (Cite as: 576 F.Supp. 1503)

Page 18

assignment plan, I gave the following definition of a unitary school system:

A unitary school system is one in which all of the students have equal access to the opportunity for education, with the publicly provided educational resources distributed equitably, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an *1522 identification with any racial or ethnic groups.

Keyes v. School District No. 1, Denver, Colorado,
 540 F.Supp. 399, 403-04 (D.Colo.1982).

A failure to take appropriate action to remove language barriers to equal participation in educational programs is a failure to establish a unitary school system.

On December 16, 1982, an order was entered appointing three persons as the Compliance Assistance Panel and at a hearing held on January 4, 1983, it was established that the panel would attempt to work with the district on the ten matters identified in an earlier order to show cause as necessary steps toward developing a final order in this case. While this court has some awareness that there have been contacts by the panel members with the Board of Education and administrative staff of the district, there has been no formal submission to this court on any of those items.

It being apparent that the remedying of the failure to take appropriate action to remove language barriers is implicitly involved in many of these matters, it is this court's conclusion that a hearing should be set for the purpose of establishing procedures and timing for the defendant to make the required submissions for consideration through the formal procedures of the litigation process and that the development of remedies for the discrete issues discussed in this memorandum opinion will be considered as a part of the total process directed toward the entry of a final judgment establishing the parameters of federal law within which the district will be governed according to the educational policies established by those who are selected for that purpose. Accordingly, it is

ORDERED, that a hearing will be held on January 20, 1984 at 10:00 a.m. in Courtroom A, Second Floor, Post Office Building, 18th and Stout Streets (use 19th Street entrance), Denver, Colorado.

576 F.Supp. 1503, 15 Ed. Law Rep. 796

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Westlaw.

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

Page 1

▷

YAMAHA CORPORATION OF AMERICA,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, Defendant
and Appellant.

No. S060145.

Supreme Court of California

Aug. 27, 1998.

SUMMARY

The trial court entered judgment in favor of a taxpayer, a seller of musical instruments, in the taxpayer's action against the State Board of Equalization for a refund of use taxes paid for promotional gifts of instruments and informational material, previously stored in a California warehouse, then given to parties in other states. (Superior Court of Los Angeles County, No. BC079444, Daniel A. Curry, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B095911, reversed, concluding that the board's published annotation interpreting the pertinent statute disposed of the issue against the taxpayer.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the cause to that court for further proceedings. The court held that the Court of Appeal used the incorrect standard of review in concluding that the annotation was dispositive. In effect, the Court of Appeal found that the board's annotations were entitled to the same weight or deference as an administrative agency's quasi-legislative rules. Although an agency's interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to make law, and which, if authorized by the enabling legislation,

bind courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual. Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Thus, the reviewing court exercises its independent judgment in reviewing an agency's interpretation of law, giving deference to the determination of the agency appropriate to the circumstances of the agency's action. In this case, the Legislature had not conferred adjudicatory powers on the board to determine sales and use tax liability, nor had the board promulgated regulations. Although the annotations had substantial precedential value within the agency, they were not entitled to the judicial deference due quasi-legislative rules. (Opinion by Brown, J., with George, C. J., Kennard, Baxter, and Chin, JJ., concurring. Concurring opinion by Mosk, J., with George, C. J., and Werdegar, J., concurring.) *2

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Administrative Law § 35--Administrative Actions--Effect and Validity of Rules and Regulations--Standard of Judicial Review--Agency's Interpretation of Statutes. In reversing a trial court's judgment awarding a taxpayer a refund of use taxes paid for certain promotional gift transactions, the Court of Appeal erred in determining that the State Board of Equalization's published annotation interpreting the pertinent statute disposed of the issue against the taxpayer. In effect, the Court of Appeal found that the board's annotations were entitled to the same weight or deference as an administrative agency's quasi-legislative rules. Although an agency's interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided

Copr. © Bancroft-Whitney and West Group 1998

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

the power to make law, and which, if authorized by the enabling legislation, bind courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual. Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Thus, the reviewing court exercises its independent judgment in reviewing an agency's interpretation of law, giving deference to the determination of the agency appropriate to the circumstances of the agency's action. In this case, the Legislature had not conferred adjudicatory powers on the board to determine sales and use tax liability, nor had the board promulgated regulations. Although the annotations had substantial precedential value within the agency, they were not entitled to the judicial deference due quasi-legislative rules. (Disapproving to the extent inconsistent: *Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853 [32 Cal.Rptr.2d 892]; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11 [194 Cal.Rptr. 722]; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132 [98 Cal.Rptr. 281, 490 P.2d 793].)

[See 7. Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 99.]

(2) Administrative Law § 35--Administrative Actions--Effect and Validity of Rules and Regulations--Judicial Review--Degree of Scrutiny. The appropriate degree of judicial scrutiny of an administrative agency's rules and regulations in any particular case is not susceptible of precise formulation, but lies somewhere along a continuum, with *3 nonreviewability at one end and the exercise of independent judgment at the other. Quasi-legislative administrative decisions are properly placed at that point on the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum. An administrative interpretation will be accorded great respect by the courts and will be followed if not clearly erroneous. But a tentative interpretation makes no pretense at finality, and it is the court's duty to finally and conclusively state the statute's true meaning, even though this requires the overthrow of an earlier erroneous administrative construction. The ultimate interpretation of a statute is an exercise of the judicial power conferred upon

the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body.

(3) Administrative Law § 35--Administrative Actions--Effect and Validity of Rules and Regulations--Categories of Administrative Rules.

There are two categories of administrative rules, and the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind--quasi-legislative rules--represents an authentic form of substantive lawmaking. Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. Because agencies granted this power are truly making law, their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end. The other category of administrative rules are those interpreting a statute. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of a statute's legal meaning and effect, which are questions lying within the constitutional domain of the courts. Because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with legal and regulatory issues. However, because the interpretation is an agency's legal opinion, rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference.

(4) Administrative Law § 35--Administrative Actions--Effect and Validity of Rules and Regulations--Judicial Review--Rules Interpreting Statute--Factors Considered.

Whether judicial deference to an *4 agency's interpretation of a statute is appropriate and, if so, its extent is fundamentally situational. A court assessing the value of an interpretation must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought to command. There are two broad

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211
(Cite as: 19 Cal.4th 1)

Page 3

categories of factors relevant to a court's assessment of the weight due an agency's interpretation: those indicating that the agency has a comparative interpretive advantage over the courts, and those indicating that the interpretation in question is probably correct. In the first category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. The second group of factors includes those suggesting the agency's interpretation is likely to be correct: indications of careful consideration by senior agency officials; evidence that the agency has consistently maintained the interpretation in question, especially if it is long-standing, and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted.

COUNSEL

Daniel E. Lungren, Attorney General, Carol H. Rehm, Jr., David S. Chaney and Philip C. Griffin, Deputy Attorneys General, for Defendant and Appellant.

Bewley, Lassleben & Miller, Jeffrey S. Baird, Joseph A. Vinatieri and Kevin P. Duthoy for Plaintiff and Respondent.

Daniel Kostenbauder, Lawrence V. Brookes, Wm. Gregory Turner and Dean F. Andal as Amici Curiae on behalf of Plaintiff and Respondent.

BROWN, J.

For more than 40 years, the State Board of Equalization (Board) has made available for publication as the Business Taxes Law Guide summaries of opinions by its attorneys of the business tax effects of a wide range of transactions. Known as "annotations," the summaries are prompted by actual requests for legal opinions by the Board, its field auditors, and businesses subject to statutes within its jurisdiction. The annotations are *5 brief statements—often only a sentence or two—purporting to state definitively the tax consequences of specific hypothetical business

transactions. [FN1] More extensive analyses, called "back-ups," are available to those who request them.

[FN1] Two examples, drawn at random, illustrate the annotation form: "Beer Can Openers, furnished by breweries to retailers with beer, are not regarded as 'self consumed' by the breweries. 10/2/50." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1998) Annot. No. 280.0160, p. 3731.) "Bookmarks Sold For \$2.00 Postage And Handling. A taxpayer located in California offers a bookmark to customers for a \$2.00 charge, designated as postage and handling. Most of the orders received for the bookmark are from out of state. [¶] Assuming that the charge for the bookmark is 50 percent or more of its cost, the taxpayer is considered to be selling the bookmarks rather than consuming them (Regulation 1670 (b)). Accordingly, when a bookmark is sent to a California customer through the U.S. Mail, the amount of postage shown on the package is considered to be a nontaxable transportation charge. For example, when a bookmark is sent to a California customer, if the postage on the envelope is shown as 25 cents, then the taxable gross receipts from the transfer is \$1.75. If the bookmark is mailed to a customer located outside California, the tax does not apply to any of the \$2.00 charge. 12/5/88." (*Id.*, Annot. No. 280.0185, pp. 3731-3732.)

Facts

The taxpayer here, Yamaha Corporation of America (Yamaha), sells musical instruments nationwide. It purchased a quantity of these outside California without paying tax ("extax"), stored them in its resale inventory in a California warehouse, and eventually gave them away to artists, musical equipment dealers and media representatives as promotional gifts. Delivery was made by shipping the instruments via common carrier, either inside or outside California. Yamaha made similar gifts of brochures and other advertising material. Following

Copr. © Bancroft-Whitney and West Group 1998

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

an audit, the Board determined Yamaha had used the musical instruments and promotional materials in California and was thus subject to the state's use tax, an impost levied as a percentage of the property's purchase price. (See Rev. & Tax. Code, § 6008 et seq.) Yamaha paid the taxes determined by the Board to be due (about \$700,000) under protest and then brought this refund suit. Although it did not contest the tax assessed on property given to California residents, Yamaha contended no tax was due on the gifts to *out-of-state* recipients.

The superior court decided Yamaha's out-of-state gifts were excluded from California's use tax, and ordered a refund. That disposition, however, was overturned by the Court of Appeal. Casting the issue as whether Yamaha's promotional gifts had occurred in California or in the state of the donee, the Court of Appeal looked to an annotation in the Business Taxes Law Guide. According to the guide, gifts are subject to California's use tax *6 "[w]hen the donor divests itself of control over the property in this state." [FN2] (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra*, Annot. No. 280.0040, p. 3731). Adopting that annotation as dispositive, the Court of Appeal reversed the judgment of the superior court and reinstated the Board's tax assessment. We granted Yamaha's petition for review and now reverse the Court of Appeal's judgment and order the matter returned to that court for further proceedings consistent with our opinion.

FN2 The annotation on which the Board relied—Annotation No. 280.0040—purports to interpret section 6009.1 of the Revenue and Taxation Code, excluding from the definition of storage and use "keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state." Captioned "Advertising Material-Gifts," the annotation provides that "Advertising or promotional material shipped or brought into the state and temporarily stored here prior to shipment outside state is subject to use tax when a gift of the material [is] made and title passes to the donee in this state. When the donor divests itself of control over the

property in this state the gift is regarded as being a taxable use of the property, 10/11/63." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra*, Annot. No. 280.0040, p. 3731.)

Discussion

I

(1a) The question is what legal effect courts must give to the Board's annotations when they are relied on as supporting its position in taxpayer litigation. In the broader context of administrative law generally, the question is what standard courts apply when reviewing an agency's *interpretation* of a statute. In effect, the Court of Appeal held the annotations were entitled to the same "weight" or "deference" as "quasi-legislative" rules. [FN3] The Court of Appeal adopted the following formulation: "[A] long-standing and consistent administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is either 'arbitrary, capricious or without rational basis' [citations], *7 or is 'clearly erroneous or unauthorized.' [Citation.] Opinions of the administrative agency's counsel construing the statute," the court went on to say, "are likewise entitled to consideration. [Citations.] Especially where there has been acquiescence by persons having an interest in the matter," the court added, "courts will generally not depart from such an interpretation unless it is unreasonable or clearly erroneous." As this extract from the Court of Appeal opinion indicates, the court relied on a skein of cases as supporting these several, somewhat inconsistent, propositions of administrative law.

FN3 Throughout, we use the terms "quasi-legislative" and "interpretive" in their traditional administrative law senses; i.e., as indicating both the constitutional source of a rule or regulation and the weight or judicial deference due it. (See, e.g., 1 Davis & Pierce, *Administrative Law* (3d ed. 1994) § 6.3, pp. 233-248.) Of course, administrative rules do not always fall neatly into one category or the other;

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576 [38 Cal.Rptr.2d 139, 888 P.2d 1268]; cf. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575 [59 Cal.Rptr.2d 186, 927 P.2d 296] [comparing the two kinds of rules and suggesting that while interpretive rules are not quasi-legislative in the traditional sense, "an agency would arguably still have to adopt these regulations in accordance with [Administrative Procedure Act rulemaking requirements].") The issue is not strictly presented by this case, however: Government Code section 11342, subdivision (g) declares that "[r]egulation" does not include "legal rulings of counsel issued by the ... State Board of Equalization."].)

We reach a different conclusion. An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. (2) Justice Mosk may have provided the best description when he wrote in *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal.4th 559, that "The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." [Citation.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." (*Id.* at

pp. 575-576; see also *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326 [109 P.2d 935] [An "administrative interpretation ... will be accorded great respect by the courts and will be followed if not clearly erroneous. [Citations.] But such a tentative ... interpretation makes no pretense at finality and it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. [Citations.] The ultimate interpretation of a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body."].)

(1b) Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending *8 on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (See *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206 [54 Cal.Rptr.2d 434].) Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action." (Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, italics added.)

II

Here, the Court of Appeal relied on language from its prior cases suggesting broadly that an agency interpretation of a statute carries the *same* weight—that is, is reviewed under the same standard—as a quasi-legislative regulation. Unlike the annotations here, however, quasi-legislative rules are the substantive product of a delegated *legislative* power conferred on the agency. The

19 Cal.4th 1
 960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211
 (Cite as: 19 Cal.4th 1)

formulation on which the Court of Appeal relied is thus apt to lead a court (as it led here) to abdicate a quintessential judicial duty—applying its independent judgment de novo to the merits of the *legal* issue before it. The fact that in this case the Court of Appeal determined Yamaha's tax liability by giving the Board's annotation a weight amounting to unquestioning acceptance only compounded the error.

We derive these conclusions from long-standing administrative law decisions of this court. Although the web making up that jurisprudence is not seamless, on the whole it is both logical and coherent. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86 [130 Cal.Rptr. 321, 550 P.2d 593] (*Culligan*), the taxpayer sued for a refund of sales and use taxes paid under protest on ion-exchange equipment used to condition water and leased to residential subscribers. Because it came from a service business rather than the rental of property, the taxpayer contended, the income was not subject to the Sales and Use Tax Law. In refund litigation, the Board relied on an affidavit of its assistant chief counsel characterizing the transactions as leases taxable under the Sales and Use Tax Law. The trial court rejected the Board's position, calling it an unwarranted extension of the words of the statute, and awarded judgment to the taxpayer. (17 Cal.3d at p. 92.)

Justice Sullivan began his opinion for a unanimous court by asking what was "the appropriate standard of review applicable to the [use tax] assessment against" the taxpayer. (*Culligan, supra*, 17 Cal.3d at p. 92.) The Board *9 contended its assessment was based on an "administrative classification" and could be judicially overturned only if it was "arbitrary, capricious or without rational basis." (*Ibid.*) Our opinion pointed out, however, that the basis for the Board's tax assessment "was not embodied in any formal regulation or even interpretative ruling covering the water conditioning industry as a whole." (*Ibid.*) Instead, its basis "was nothing more than the Board auditor's interpretation of two existing regulations." (*Ibid.*) "If the Board had promulgated a formal regulation determining the proper classification of receipts derived from the rental of exchange units ... and the regulation had been challenged in the [refund] action," our

Culligan opinion went on to say, "the proper scope of reviewing such regulation *would* be one of limited judicial review as urged by the Board. [Citations.]" (*Ibid.*, italics added.)

That was not the case in *Culligan*, however. Instead of adopting a formal regulation, the Board and its staff had considered the facts of the taxpayer's particular transactions, interpreted the statutes and regulations they deemed applicable, and "arrived at certain conclusions as to plaintiff's tax liability and assessed the tax accordingly." (17 Cal.3d at p. 92.) Far from being "the equivalent of a regulation or ruling of general application," the Board's argument was "merely its litigating position in this particular matter." (*Id.* at p. 93.) In an important footnote to its opinion, the *Culligan* court disapproved language in several Court of Appeal decisions "indicating that the proper scope of review of such litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit) is to determine whether the Board's assessment was arbitrary, capricious or had no reasonable or rational basis." (*Id.* at p. 93, fn. 4.)

Although the Court of Appeal in this case cited *Culligan, supra*, 17 Cal.3d 86, it regarded *American Hospital Supply Corp. v. State Bd. of Equalization* (1985) 169 Cal.App.3d 1088 [215 Cal.Rptr. 744] (*American Hospital*) as the decisive precedent. The question there was whether disposable paper menus, used for patients' meals in hospitals, were subject to the sales tax. In concluding they were, the Court of Appeal relied on a ruling of Board counsel interpreting a quasi-legislative regulation of the Board. "Interpretation of an administrative regulation," the court wrote, "like [the] interpretation of a statute, is a question of law which rests with the courts. However, the agency's own interpretation of its regulation is entitled to great weight." (*Id.* at p. 1092.) The Board's interpretation could be overturned, the opinion went on to state, only if it was "arbitrary, capricious or without rational basis." (*Ibid.*)

The *American Hospital* opinion also rejected the taxpayer's contention that because the rule at issue was only an interpretation and not a quasi-legislative rule, it was not entitled to deference. (*American Hospital, supra*, *10 169

Cal.App.3d at p. 1092.) Instead, the court read *Culligan* as standing for the *opposite* proposition. Because we had said the rule at issue there did not cover an entire industry, the Court of Appeal reasoned *Culligan* had held in effect that it was nothing more than a "litigating position" and could be ignored. (169 Cal.App.3d at p. 1093.) On that basis, *American Hospital* concluded that because the Board's position on the taxability of paper menus was embodied in a "formal regulation" and covered the entire hospital industry, it was entitled to the same deference as a quasi-legislative rule: "[It] must prevail because it is neither 'arbitrary, capricious or without rational basis' (*Culligan Water Conditioning v. State Bd. of Equalization*, *supra*, 17 Cal.3d 86, 92) nor is it 'clearly erroneous or unauthorized' (*Rivera v. City of Fresno* [(1971)] 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793])." (*Ibid.*)

We think the Court of Appeal in *American Hospital*, *supra*, 169 Cal.App.3d 1088, and the Court of Appeal in this case by relying on it, failed to distinguish between two classes of rules-quasi-legislative and interpretive-that, because of their differing legal sources, command significantly different degrees of deference by the courts. Moreover, *American Hospital* misread our opinion in *Culligan* when it identified the feature that distinguishes one kind of rule from the other. Although the Court of Appeal here did not rely on other prior cases as much as on *American Hospital*, it cited several that appear to perpetuate the same confusion. (See *Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861 [32 Cal.Rptr.2d 892]; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722]; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793].)

(3) It is a "black letter" proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind-quasi-legislative rules-represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. (See, e.g., 1 Davis & Pierce, *Administrative Law*, *supra*, § 6.3, at pp. 233-248; 1 Cooper, *State Administrative Law*

(1965) *Rule Making: Procedures*, pp. 173-176; Bonfield, *State Administrative Rulemaking* (1986) *Interpretive Rules*, § 6.9.1, pp. 279-283; 9 Witkin, *Cal. Procedure* (4th ed. 1997) *Administrative Proceedings*, § 116, p. 1160 [collecting cases].) Because agencies granted such substantive rulemaking power are truly "making law," their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it *11 is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65 [219 Cal.Rptr. 142, 707 P.2d 204] (*Wallace Berrie*): "[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation]. [Citation.] These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity [Citation.] Our inquiry necessarily is confined to the question whether the classification is 'arbitrary, capricious or [without] reasonable or rational basis.' (*Culligan*, *supra*, 17 Cal.3d at p. 93, fn. 4 [citations].)" [FN4]

FN4 In one respect, our opinion in *Wallace Berrie* may overstate the level of deference-even quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has "final responsibility for the interpretation of the law" under which the regulation was issued. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757 [151 P.2d 233, 155 A.L.R. 405]; see cases cited, *post*, at pp. 11-12;

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

Page 8

Environmental Protection Information Center v. Department of Forestry & Fire Protection (1996) 43 Cal.App.4th 1011, 1022 [50 Cal.Rptr.2d 892] [Standard of review of challenges to "fundamental legitimacy" of quasi-legislative regulation is "respectful nondeference."].)

It is the other class of administrative rules, those *interpreting* a statute, that is at issue in this case. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction; it may possess special familiarity with satellite legal and regulatory issues. It is this "expertise," expressed as an interpretation (whether in a regulation or less formally, as in the case of the Board's tax annotations), that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion*, however "expert," rather than the exercise of a delegated legislative power to make law; it commands a commensurably lesser degree of judicial deference. (*Bodinson Mfg. Co. v. California E. Com.*, *supra*, 17 Cal.2d at pp. 325-326.)

In *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923 [163 Cal.Rptr. 782, 609 P.2d 1], we contrasted the narrow *12 standard under which quasi-legislative rules are reviewed—"limited," we wrote, "to a determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law" (*id.* at p. 931, fn. 7)—with the broader standard courts apply to interpretations. The quasi-legislative standard of review "is *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the

administrative construction. [Citation.]" (*Ibid.*, italics added; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11 [270 Cal.Rptr. 796, 793 P.2d 2] ["courts are the ultimate arbiters of the construction of a statute"]; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67, 743 P.2d 1323] ["The final meaning of a statute ... rests with the courts."]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697] ["'final responsibility for the interpretation of the law rests with the courts'"].)

(4) Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the "weight" it should be given—is thus fundamentally *situational*. A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command. Professor Michael Asimow, an administrative law adviser to the California Law Revision Commission, has identified two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: Those "indicating that the agency has a comparative interpretive advantage over the courts," and those "indicating that the interpretation in question is probably correct." (Cal. Law Revision Com., Tent. Recommendation, *Judicial Review of Agency Action* (Aug. 1995) p. 11 (Tentative Recommendation); see also Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157, 1192-1209.)

In the first category are factors that "assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (Tentative Recommendation, *supra*, at p. 11.) The second group of *13 factors in the Asimow classification—those suggesting the agency's

Copr. © Bancroft-Whitney and West Group 1998

interpretation is likely to be correct—includes indications of careful consideration by senior agency officials ("an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member" (Tentative Recommendation, *supra*, at p. 11)); evidence that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing" (*ibid.*) ("[a] vacillating position ... is entitled to no deference" (*ibid.*)), and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted. If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act provisions which include procedures (e.g., notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative "product"—that circumstance weighs in favor of judicial deference. However, even formal interpretive rules do not command the same weight as quasi-legislative rules. Because "the ultimate resolution of ... legal questions rests with the courts" (*Culligan, supra*, 17 Cal.3d at p. 93), judges play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules.

A valuable judicial account of the process by which courts reckon the weight of agency interpretations was provided by Justice Robert Jackson's opinion in *Skidmore v. Swift & Co.* (1944) 323 U.S. 134 [65 S.Ct. 161, 89 L.Ed. 124] (*Skidmore*), a case arising under the federal Fair Labor Standards Act. The question for the court was whether private firefighters' "waiting time" was countable as "working time" under the act and thus compensable. (323 U.S. at p. 136 [65 S.Ct. at p. 163].) "Congress," the *Skidmore* opinion observed, "did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." (*Id.* at p. 137 [65 S.Ct. at p. 163].) "Instead, it put this responsibility on the courts. [Citation.] But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain

violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining [the issue in suit] and a knowledge of the customs prevailing in reference to their solution.... He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. [Citation.]" (*Id.* at pp. 137-138 [65 S.Ct. at p. 163].) *14

No statute prescribed the deference federal courts should give the administrator's interpretive bulletins and informal rulings, and they were "not reached as a result of ... adversary proceedings." (*Skidmore, supra*, 323 U.S. at p. 139 [65 S.Ct. at p. 164].) Given those features, Justice Jackson concluded, the administrator's rulings "do not constitute an interpretation of the Act or a standard for judging factual situations which binds a ... court's processes, as an authoritative pronouncement of a higher court might do." (*Ibid.*, italics added.) Still, the court held, the fact that "the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." (*Id.* at p. 140 [65 S.Ct. at p. 164].) "We consider that the rulings, interpretations and opinions of the Administrator under this Act while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Ibid.*)

(1c) The parallels between the statutory powers and administrative practice of the Board in interpreting the Sales and Use Tax Law, and those of the federal agency described in *Skidmore*, are extensive. As with Congress, our Legislature has not conferred adjudicatory powers on the Board as the means by which sales and use tax liabilities are determined; instead, the validity of those assessments is settled in tax refund litigation like this case. (Rev. & Tax. Code, § 6933.) Like the federal administrator in *Skidmore*, the Board has not adopted a formal regulation under its quasi-legislative rulemaking powers purporting to interpret the statute at issue here. As in *Skidmore*, however, the Board and its staff have accumulated a substantial "body of experience and informed judgment" in the

administration of the business tax law "to which the courts and litigants may properly resort for guidance." (323 U.S. at p. 140 [65 S.Ct. at p. 164].) Some of that experience and informed judgment takes the form of the annotations published in the Business Taxes Law Guide.

The opinion in the *Skidmore* case and Professor Asimow's account for the Law Revision Commission-together spanning a half-century of judicial and scholarly comment on the characteristics and role of administrative interpretations-accurately describe their value and the criteria by which courts judge their weight. The deference due an agency interpretation-including the Board's annotations at issue here-turns on a legally informed, commonsense assessment of their contextual merit. "The weight of such a judgment in a particular case," to borrow again from Justice Jackson's opinion in *Skidmore*, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power *15 to control." (*Skidmore, supra*, 323 U.S. at p. 140 [65 S.Ct. at p. 164], italics added.)

As we read the brief filed by the Attorney General, the Board does not contend for any greater judicial weight for its annotations. Its brief on the merits states that "Yamaha is correct that the annotations are not regulations, and they are not binding upon taxpayers, the Board itself, or the Court. Nevertheless, the annotations are digests of opinions written by the legal staff of the Board which are evidentiary of administrative interpretations made by the Board in the normal course of its administration of the Sales and Use Tax Law [T]he annotations have substantial precedential effect within the agency. [¶] The interpretation represented in [the] annotations is certainly entitled to some consideration by the Court."

We agree.

Conclusion

In deciding this case, the Court of Appeal gave greater weight to the Board's annotation than it warranted. Although the standard used by the Court

of Appeal was not the correct one and prejudiced the taxpayer, regard for the structure of appellate decisionmaking suggests the case should be returned to the Court of Appeal. That court can then consider the merits of the use tax issue and the value of the Board's interpretation in light of the conclusions drawn here. To the extent language in *Rizzo v. Board of Trustees, supra*, 27 Cal.App.4th at page 861, *DeYoung v. City of San Diego, supra*, 147 Cal.App.3d at page 18, and *Rivera v. City of Fresno, supra*, 6 Cal.3d at page 140, is inconsistent with the foregoing views, it is disapproved. We express no opinion on the merits of the underlying question of Yamaha's use tax liability.

Disposition

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

George, C. J., Kennard, J., Baxter, J., and Chin, J., concurred.

MOSK, J.

I concur in the judgment of the majority that the Court of Appeal's formulation of the standard of review for tax annotations, the summaries of tax opinions of the State Board of Equalization's (Board) legal counsel published in the Business Taxes Law Guide, was not quite correct. Specifically the Court of Appeal erred in suggesting that it would defer to *16 the Board's or its legal counsel's rule unless that rule is "arbitrary and capricious." The majority do not purport to change the well-established, if not always consistently articulated, body of law pertaining to judicial review of administrative rulings, but merely attempt to clarify that law. I write separately to further clarify the relevant legal principles and their application to the present case.

The appropriate starting point of a discussion of judicial review of administrative regulations is an analysis of quasi-legislative regulations, those regulations formally adopted by an agency pursuant to the California Administrative Procedures Act (APA) and binding on the agency. "The proper

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

Page 11

scope of a court's review is determined by the task before it." (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679 [170 Cal.Rptr. 484, 620 P.2d 1032], italics added.) In the case of quasi-legislative regulations, the court has essentially two tasks. The first duty is "to determine whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate." (*Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697] (*Morris*)). As the *Morris* court made clear, this is a matter for the independent judgment of the court. "While the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight, nevertheless 'Whatever the force of administrative construction ... final responsibility for the interpretation of the law rests with the courts.' [Citation.] Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]" (*Ibid.*, italics added.) This duty derives directly from statute. "Under Government Code [FN1] section 11373 [now § 11342.1], '[e]ach regulation adopted [by a state agency], to be effective, must be within the scope of authority conferred....' Whenever a state agency is authorized by statute 'to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute....' ... ([§ 11342.2].)" (*Morris, supra*, 67 Cal.2d at p. 748, fn. omitted, italics added by *Morris* court.)

FN1 All further statutory references are to the Government Code unless otherwise stated.

The court's second task arises once it has completed the first. "If we conclude that the [agency] was empowered to adopt the regulations, we must also determine whether the regulations are 'reasonably necessary to effectuate the purpose of the statute.' ([§ 11342.2].) In making such a determination, the court will not 'superimpose its own policy judgment upon the *17 agency in the absence of an arbitrary and capricious decision.'

[Citations.]" (*Morris, supra*, 67 Cal.2d at pp. 748-749.)

In *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11 [270 Cal.Rptr. 796, 793 P.2d 2] (*Rank*) we further clarified the two tasks and two distinct standards of review for courts scrutinizing agency regulations. We stated: "As we said in *Pitts v. Perluss* (1962) 58 Cal.2d 824 [833] [27 Cal.Rptr. 19, 377 P.2d 83], '[a]s to quasi-legislative acts of administrative agencies, 'judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law.' " [Citations.] When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. Thus, [the *Morris* court] in finding that the challenged regulations contravened legislative intent, rejected the agency's claim that the only issue for review was whether the regulations were arbitrary and capricious." (*Ibid.*, fn. omitted.) The *Rank* court then proceeded to reiterate the *Morris* formulation that "[w]hile the construction of a statute by officials charged with its administration ... is entitled to great weight, ... final responsibility for the interpretation of the law rests with the courts." (*Ibid.*) [FN2] (We will henceforth refer to this standard as the "independent judgment/great weight standard.")

FN2 Certain of our own cases have confused the standards of review in this two-pronged test. For example, in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65 [219 Cal.Rptr. 142, 707 P.2d 204], after stating the above two-pronged test, declared that neither prong "present[s] a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity" [Citation.] Our inquiry necessarily is confined to the question whether the classification is arbitrary, capricious or [without] reasonable or

Copr. © Bancroft-Whitney and West Group 1998

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

Page 12

rational basis.' [Citation.]" As the discussion of *Rank* and *Morris* above makes clear, the first prong of the inquiry—whether the regulation is "within the scope of the authority conferred"—is not limited to the "arbitrary and capricious" standard of review, but employs the independent judgment/great weight standard. (*Rank, supra*, 51 Cal.3d at p. 11; *Morris, supra*, 67 Cal.2d at pp. 748-749.) This confusion is in part responsible for the misstatements of the Court of Appeal in the present case.

There is an important qualification to the independent judgment/great weight standard articulated above, when a court finds that the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency. A court may find that the Legislature has intended to delegate this interpretive or gap-filling power when it employs open-ended statutory language that an agency is authorized to apply or "when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make." (Asimow, *The Scope of Judicial Review of Decisions of *18 California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157, 1198-1199 (Asimow).) For example, in *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999 [9 Cal.Rptr.2d 358, 831 P.2d 798] (*Moore*), we reviewed a regulation by the Board of Accountancy, the agency statutorily chartered to regulate the accounting profession in this state. The regulation provided that those unlicensed by that board could not use the title "accountant," interpreting a statute, Business and Professions Code section 5058, that forbids use of titles "likely to be confused with" the titles of "certified public accountant" and "public accountant." (2 Cal.4th at p. 1011.) As we stated, "the Legislature delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public." (*Id.* at pp. 1013-1014.)

Thus, the agency's interpretation of a statute may be subject to the most deferential "arbitrary and capricious" standard of review when the agency is expressly or impliedly delegated interpretive authority. Such delegation may often be implied

when there are broadly worded statutes combined with an authorization of agency rulemaking power. But when the agency is called upon to enforce a detailed statutory scheme, discretion is as a rule correspondingly narrower. In other words, a court must always make an independent determination whether the agency regulation is "within the scope of the authority conferred," and that determination includes an inquiry into the extent to which the Legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.

The above schema applies to so-called "interpretive" regulations as well as quasi-legislative regulations. As the majority observe, "administrative rules do not always fall neatly into one category or the other" (Maj. opn., *ante*, at p. 6, fn. 3.) Indeed, regulations subject to the formal procedural requirements of the APA include those that "interpret" the law enforced or administered by a government agency, as well as those that "implement" or "make specific" such law. (§ 11342, subd. (b).) As we recently stated: "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575 [59 Cal.Rptr.2d 186, 927 P.2d 296], italics added.) [FN3] Moreover, all regulations are "interpretive" to some extent, because all *19 regulations implicitly or explicitly interpret "the authority invested in them to implement and carry out [statutory] provisions" (*Morris, supra*, 67 Cal.2d at p. 748.)

FN3 I note that in federal law, by contrast, the term "interpretive rule" is given a particular significance and legal status. According to statute, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" are required to be published in the Federal Register. (5 U.S.C. § 552(a)(1)(D).) But such "interpretive rules," and "general statements of policy" are explicitly exempt

Copr. © Bancroft-Whitney and West Group 1998

19 Cal.4th 1

Page 13

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

from the notice and hearing provisions of the federal APA. (5 U.S.C. § 553(b)(3)(A).) No such distinction exists in California law.

Of course, some regulations may be properly designated "interpretive" inasmuch as they have no purpose other than to interpret statutes. (See, e.g., *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923 [163 Cal.Rptr. 782, 609 P.2d 1].) In the case of such regulations, courts will be engaged only in the first of the two tasks discussed above, i.e., ensuring that the regulation is within the scope of the statutory authority conferred, employing the independent judgment/great weight test. (See *id.* at p. 931, fn. 7.)

In sum, when reviewing a quasi-legislative regulation, courts consider whether the regulation is within the scope of the authority conferred, essentially a question of the validity of an agency's statutory interpretation, guided by the independent judgment/great weight standard. (*Rank, supra*, 51 Cal.3d at p. 11.) This is in contrast to the second aspect of the inquiry, whether a regulation is "reasonably necessary to effectuate the statutory purpose," wherein courts "will not intervene in the absence of an arbitrary or capricious decision." (*Ibid.*, citing *Morris, supra*, 67 Cal.2d at p. 749.) Courts may also employ the "arbitrary and capricious" standard in reviewing whether the agency's construction of a statute is correct if the court determines that the particular statutory scheme in question explicitly or implicitly delegates this interpretive or "gap-filling" authority to an administrative agency. (See *Moore, supra*, 2 Cal.4th at pp. 1013-1014; *Asimow, supra*, 42 UCLA L.Rev. at p. 1198.)

What standard of review should be employed for administrative rulings that were not formally adopted under the APA? Such regulations fall generally into two categories. The first is the class of regulations that *should* have been formally adopted under the APA, but were not. In such cases, the law is clear that in order to effectuate the policies behind the APA, courts are to give no weight to these interpretive regulations. (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal.4th at p. 576; *Armistead v. State Personnel*

Board (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1, 583 P.2d 744].) To hold otherwise would help to perpetuate the problem of avoidance by administrative agencies of "the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the [California Code of Regulations]." *20 (*Armistead, supra*, 22 Cal.3d at p. 205.) For these reasons, and quite apart from any expertise the agency may possess in interpreting and administering the statute, courts in effect ignore the agency's illegal regulation.

In the second category are those regulations that are not subject to the APA because they are expressly or implicitly exempted from or outside the scope of APA requirements. For such rulings, the standard of judicial review of agency interpretations of statutes is basically the same as for those rules adopted under the APA, i.e., the independent judgment/great weight standard. (See, e.g., *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501 [138 Cal.Rptr. 696, 564 P.2d 848] [applying essentially this standard to a statutory interpretation arising within the context of the Workers' Compensation Appeals Board's decisional law]; see also *Asimow, supra*, 42 UCLA L.Rev. at pp. 1200-1201; *Judicial Review of Agency Action* (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) pp. 81-82 (Judicial Review of Agency Action).)

The Board counsel's legal ruling at issue in this case is an example of express exemption from the APA. Section 11342, subdivision (g), specifies that the term "regulation" for purposes of the APA does not include "legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization" It is therefore evident that our decisions pertaining to regulations that fail to be approved according to required APA procedures are inapposite. It also appears evident that these rulings, as agency interpretations of statutory law, are also to be reviewed under the independent judgment/great weight standard.

But, as the majority point out, the precise weight to be accorded an agency interpretation varies depending on a number of factors. Professor *Asimow* states that deference is especially appropriate not only when an administrative agency

19 Cal.4th 1

Page 14

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211
(Cite as: 19 Cal.4th 1)

has particular expertise, but also by virtue of its specialization in administering a statute, which "gives [that agency] an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations." (Asimow, *supra*, 42 UCLA L.Rev. at p. 1196.) Moreover, deference is more appropriate when, as in the present case, the agency is interpreting "the statute [it] enforces" rather than "some other statute, the common law, the [C]onstitution, or prior judicial precedents." (*Ibid.*)

Another important factor, as the majority recognize, is whether an administrative construction is consistent and of long standing. (Maj. opn., *ante*, at p. 13.) This factor is particularly important for resolution of the present case because the tax annotation with which the case is principally concerned, *21 Business Taxes Law Guide Annotation No. 280.0040, was first published in 1963, and Yamaha Corporation of America does not contest that it has represented the Board's position on the tax question at issue at least since that time. (See now 2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1998) Annot. No. 280.0040, p. 3731 (hereafter Annotation No. 280.0040).)

As the Court of Appeal has stated: "Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous." (*Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861 [32 Cal.Rptr.2d 892]. This principle has been affirmed on numerous occasions by this court and the Courts of Appeal. (See, e.g., *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722]; *Nelson v. Dean* (1946) 27 Cal.2d 873, 880-881 [168 P.2d 16, 168 A.L.R. 467]; *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757 [151 P.2d 233, 155 A.L.R. 405]; *Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1256-1257 [6 Cal.Rptr.2d 375]; *Lute v. Governing Board* (1988) 202 Cal.App.3d 1177, 1183 [249 Cal.Rptr. 161]; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 252 [239 Cal.Rptr. 395]; *Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382 [116 Cal.Rptr. 113].)

Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations. (See, e.g., *DeYoung, supra*, 147 Cal.App.3d 11, 19-21 [long-standing interpretation of city charter provision embodied in city attorney's opinions]; *Napa Valley Educators' Assn., supra*, 194 Cal.App.3d at pp. 251-252 [evidence in the record of the case, including a declaration by official with the State Department of Education, shows long-standing practice of following a certain interpretation of an Education Code provision].)

Two reasons have been advanced for this principle. First, "When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (*Whitcomb Hotel, Inc. v. Cal. Emp. Com., supra*, 24 Cal.2d at p. 757; see also *Nelson v. Dean, supra*, 27 Cal.2d at p. 881; *Rizzo v. Board of Trustees, supra*, 27 Cal.App.4th at p. 862.)

Second, as we stated in *Moore, supra*, 2 Cal.4th at pages 1017-1018, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be *22 presumed to know of it." As the Court of Appeal has further articulated: "[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication [that] the administrative practice was consistent with underlying legislative intent." (*Rizzo v. Board of Trustees, supra*, 27 Cal.App.4th at p. 862; see also *Thornton v. Carlson, supra*, 4 Cal.App.4th at p. 1257; *Lute v. Governing Board, supra*, 202 Cal.App.3d at p. 1183; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist., supra*, 194 Cal.App.3d at 252; *Horn v. Swoap, supra*, 41 Cal.App.3d at p. 382.) I note that in the present case, the statute under consideration, Revenue and Taxation Code section 6009.1, has been amended twice since the issuance of Annotation No. 280.0040. (Stats. 1965, ch. 1188, § 1, p. 3004; Stats. 1980, ch. 546, § 1, p. 1503.)

Copr. © Bancroft-Whitney and West Group 1998

19 Cal.4th 1

Page 15

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211
(Cite as: 19 Cal.4th 1)

To state the matter in other terms, courts often recognize the propriety of assigning great weight to administrative interpretations of law either by reference to an explicit or implicit delegation of power by the Legislature to an administrative agency (see *Moore, supra*, 2 Cal.4th at pp. 1013-1014; *Asimow, supra*, 42 UCLA L.Rev. at pp. 1198-1199), or by noting the agency's specialization and expertise in interpreting the statutes it is charged with administering (see *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982 [8 Cal.Rptr.2d 565]; *Asimow, supra*, 42 UCLA L.Rev. at pp. 1195-1196). But there is a third reason for paying special heed to an administrative interpretation: the reality that the administrative agency-by virtue of the necessity of performing its administrative functions-creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs and, after a sufficient passage of time, is presumptively accepted by the Legislature. In the present case, this third rationale for according great weight to an administrative interpretation is particularly applicable. Thus, judicial deference in this case is owed not so much to the tax annotation per se but to a long-standing practice of enforcement and interpretation by Board staff of which the annotation is evidence.

There are also particularly sound reasons why the principle of giving especially greater weight to long-standing administrative practice should apply when, as in this case, that practice is embodied in a published ruling of the Board's legal counsel. These rulings have a special legal status. As noted, they have been specifically exempted from the APA by section 11342, subdivision (g). The purpose of this exemption was stated by the Franchise Tax Board staff in its enrolled bill report to the Governor immediately prior to the enactment of the 1983 amendment containing the exemption, and its statement could be equally well applied to the Board of *23 Equalization. "Department counsel issues a large number of legal rulings in several forms which address specific problems of taxpayers. While these opinions address specific problems, they are intended to have general application to all taxpayers similarly situated. This bill provides that such rulings are not regulations,

and accordingly, not subject to the [Office of Administrative Law (OAL)] review process. This statutory determination will permit the department to continue to provide a valuable service to taxpayers. If rulings were deemed to be regulations, the service would have to be discontinued because of the administrative burdens created by the OAL review process." (Franchise Tax Bd. staff, Enrolled Bill Rep., Assem. Bill No. 227 (1983-1984 Reg. Sess.) Sept. 16, 1983, p. 3, italics added.)

Thus, the passage of the 1983 amendment to section 11342 was evidently designed for the benefit of taxpayers, so that they would continue to have information about the effective legal positions of the two tax boards. The complexity of tax law and its application to the manifold factual situations of individual taxpayers appears to far outpace an agency's capacity to promulgate and amend formal regulations. Given the importance of certainty in tax law, the Board has long engaged in the practice of issuing legal opinions to individual taxpayers. (See 1 Cal. Taxes (Cont.Ed.Bar Supp. 1996) § 2.152, p. 347.) The Legislature recognized such practice, and recognized the propriety of taxpayer reliance on such rulings, in Revenue and Tax Code section 6596. That section provides that if a person's failure to make a timely payment or return "is due to the person's reasonable reliance on written advice from the [Board," that person would be relieved of certain payment obligations. The authorization in section 11342 to publish such individual rulings without following APA requirements is a further legislative means of facilitating business planning and increasing taxpayer certainty about tax law. Publication of this information allows taxpayers subject to the sales and use tax to structure their affairs accordingly, and, if they perceive the need, lobby the Board or the Legislature to overturn these legal rulings. As the Attorney General states in his brief, such rulings, while not binding on the agency, "have substantial precedential effect within the agency." There is accordingly no reason to decline to extend to such legal rulings, insofar as they embody the Board's long-standing interpretations of the sales and use tax statutes, the especially great weight accorded to other representations of long-standing administrative practice. [FN4].

FN4 Yamaha and amicus curiae claim that

Copr. © Bancroft-Whitney and West Group 1998

tax annotations are frequently inconsistent, and that the Board legal staff has been lax in purging the Business Taxes Law Guide of outdated annotations. Obviously, to the extent that an old annotation does *not* represent the Board's long-standing, *consistent*, interpretation, it does not merit the same consideration. (See *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125 [41 Cal.Rptr.2d 46].) In the present case, Yamaha does not contend that Annotation No. 280.0040 is inconsistent with other annotations, or with the Board's actual practice, since it was issued.

Tax annotations representing the Board's long-standing position may usefully be contrasted to positions the Board might adopt in the context of *24 litigation. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86 [130 Cal.Rptr. 321, 550 P.2d 593], we found that such litigating positions were not entitled to as great a level of deference as administrative rulings that were "embodied in formal regulation[s] or even interpretive ruling[s] covering the ... industry as a whole" (*Id.* at p. 92). [FN5] The tax annotation at issue in this case, although originally addressing an individual taxpayer's query, was published and has represented the Board's categorical position regarding taxation of gifts originating from a California source. The annotation, therefore, being both an interpretive ruling of a general nature, and one of long standing, is deserving of significantly greater weight than if the Board had adopted its position only as part of the present litigation. [FN6]

FN5 I note that some of the *Culligan* court's language may be open to misinterpretation. The Board in that case contended that the proper standard of review was whether its position was "arbitrary, capricious or without rational basis." (17 Cal.3d at p. 92.) The court disagreed, holding that "[t]he interpretation of a regulation, like the interpretation of the statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its

own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with courts." (*Id.* at p. 93.) In expressing its disagreement with the proposition that the Board's litigating position deserves the highest level of deference, the *Culligan* court differentiated such positions from "formal regulation" of a general nature, which, the court agreed, would be overturned only if arbitrary and capricious. (*Id.* at p. 92.) Perhaps because the *Culligan* court was focused on making a distinction between regulations of a general nature and litigating positions, it did not articulate the two-pronged judicial inquiry into the validity of quasi-legislative regulations as discussed above, nor did it specify that the arbitrary and capricious standard applied only to the *second* prong. Nonetheless, the *Culligan* court was correct in holding that statutory interpretations contained in formal regulations merit more deference, all other things being equal, than an agency's litigating positions.

FN6 Moreover, although the *Culligan* court referred to "litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit)" (*Culligan Water Conditioning v. State Bd. of Equalization*, *supra*, 17 Cal.3d at p. 93, fn. 4), it was not implying that all material contained in tax bulletins were "litigating positions." Indeed the *Culligan* court cited *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009 [106 Cal.Rptr. 867] as an example of a case typifying the limited judicial review appropriate for regulations of a general nature. (*Culligan*, *supra*, at p. 92.) The court in *Henry's Restaurants* considered the Board's interpretation of a sales tax question issued in the form of a General Sales Tax Bulletin. (30 Cal.App.3d at p. 1014.) The citation to *Henry's Restaurants* shows that the *Culligan* court's reference to "litigating positions of the Board ... announced ... in tax bulletins" was not to legal rulings of a

19 Cal.4th 1

960 P.2d 1031, 78 Cal.Rptr.2d 1, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

(Cite as: 19 Cal.4th 1)

Page 17

general nature that might be contained in tax bulletins.

It may be argued that regulations formally adopted in compliance with the APA should intrinsically be assigned greater weight than tax annotations, because the former are promulgated only after a notice and comment period, whereas the latter are devised by the Board's legal staff without public input. *25 In the abstract, that argument is not without merit. But even if the statutory interpretations contained in tax annotations are not, *ab initio*, as reliable or worthy of deference as formally adopted regulations, the well-established California case law quoted above demonstrates that such reliability may be earned subsequently. Tax annotations that represent the Board's administrative practices may, if they withstand the test of time, merit a weight that initially may not have been intrinsically warranted. Or in other words, while formal APA adoption is one factor in favor of giving greater weight to an agency construction of a statute, the fact that a rule is longstanding and the statute it interprets has been reenacted are other such factors.

In sum, as the Attorney General correctly sets forth in his brief, the appropriate standard of review for Annotation No. 280.0040 can be stated as follows: (1) the court should exercise its independent judgment to determine whether the Board's legal counsel correctly construed the statute; (2) the Board's construction of the statute is nonetheless entitled to "great weight"; (3) when, as here, the Board is construing a statute it is charged with administering and that statutory interpretation is longstanding and has been acquiesced in by persons interested in the matter, and by the Legislature, it is particularly appropriate to give these interpretations great weight. (*Rizzo v. Board of Trustees, supra*, 27 Cal.App.4th at p. 861.) [FN7]

FN7 The majority quote at length from *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, [65 S.Ct. 161, 89 L.Ed. 124]) to describe the proper standard of judicial review of administrative rulings. I note that the United States Supreme Court has at least partly abandoned *Skidmore's*

open-ended formulation in favor of a more bright line one. (See *Chevron U.S.A. v. Natural Res. Def. Council* (1984) 467 U.S. 837 [104 S.Ct. 2778, 81 L.Ed.2d 694].) In any case, I agree with the majority that many of the factors discussed in Justice Jackson's opinion in *Skidmore* are appropriate considerations under the governing California decisions, and that the discussion in *Skidmore* may be a useful guide to the extent it is consistent with the independent judgment/great weight test subsequently developed under California law.

The Court of Appeal in this case, although it stated the standard of review nearly correctly, reflected some of the confusion found in our case law when it suggested that it would defer to the Board's annotation unless it was "arbitrary, capricious or without rational basis." It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review.

George, C. J., and Werdegar, J., concurred. *26

Cal. 1998.

Yamaha Corp. of America v. State Bd. of Equalization

END OF DOCUMENT

**DEPARTMENT OF
FINANCE**

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 27, 2004

RECEIVED

AUG 31 2004

COMMISSION ON
STATE MANDATESCOMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter dated July 28, 2004, the Department of Finance has reviewed the draft analysis of Test Claim Number CSM-00-TC-16 (California English Language Development Test (CELDT)), submitted by the Modesto City School District (claimant) asking the Commission to determine whether specified costs incurred under Chapter 936, Statutes of 1997 (AB 748, Escutia), Chapter 78, Statutes of 1999 (AB 1115, Strom-Martin), Chapter 678, Statutes of 1999 (SB 638, Alpert), and Chapter 71, Statutes of 2000 (SB 1667, Alpert) are reimbursable State mandated costs.

We concur with the staff analysis for this claim, which finds that the proposed activities do not impose a new program or higher level of service, and therefore does not impose reimbursable costs mandated by the State.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your July 25, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other State agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Michael Wilkening, Principal Program Budget Analyst, at (916) 445-0328 or Keith Gmeinder, State mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Jeannie Oropeza
Program Budget Manager

Attachment

Attachment A

DECLARATION OF MICHAEL WILKENING
DEPARTMENT OF FINANCE
CLAIM NO. CSM-00-TC-16

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.
2. We concur that the Chapter 936, Statutes of 1997 (AB 748, Escutia) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

August 27, 2004

at Sacramento, CA

Michael Wilkening

Michael Wilkening

PROOF OF SERVICE

Test Claim Name: California English Language Development Test (CELDT)
Test Claim Number: CSM-00-TC-16

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On August 27, 2004, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-29

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

B-8

State Controller's Office
Division of Accounting & Reporting
Attention: Glenn Haas
3301 C Street, Room 500
Sacramento, CA 95816

E-8

Department of Education
Fiscal and Administrative Services Division
Attention: Gerald Shelton
1430 N Street, Suite 2213
Sacramento, CA 95814

B-8

State Controller's Office
Division of Audits
Attention: Jim Spano
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Mandate Resource Services
Attention: Harmeet Barkschat
5325 Elkhorn Blvd., Suite 307
Sacramento, CA 95842

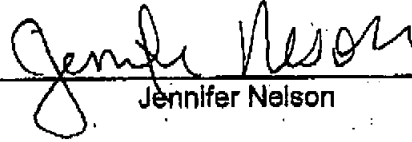
Steve Smith Enterprises, Inc.
Attention: Steve Smith
One Capitol Mall, Suite 200
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Spector, Middleton, Young, Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds, President
P.O. Box 987
Sun City, CA 92586

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 27, 2004, at Sacramento, California.



Jennifer Nelson