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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.

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

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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.

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[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. Secondarily, 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."[7] 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

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[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

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[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." 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

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[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 statutes[17] and regulations[18] 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 11303.

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 apportionment[20] 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 Constitution[21] 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

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[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 subds. (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.

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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.

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[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.

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[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 advisory[44] 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

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[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

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[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 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.[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.

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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.*

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.

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

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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

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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)

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JACK 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 ***197**Ed. 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 MeasuresAuthority 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.

(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

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

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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

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 ; *Rossi 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

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. Secondarily, 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

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

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

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 waiver 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

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

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

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."

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 irremediable 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

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 [*221 267 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

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

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 ...;

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.)

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.

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BILL HONIG
SUPERINTENDENT OF PUBLIC INSTRUCTION

FSB: 87/8-2

PROGRAM ADVISORY

CALIFORNIA STATE DEPARTMENT OF EDUCATION
721 CAPITOL MALL, SACRAMENTO, CA 95814

DATE: August 26, 1987

PROGRAM: Five Education Programs Which Have Sunset

CONTACT: See Page 23

PHONE: See Page 23

August 26, 1987

To: County and District Superintendents
Attention: Consolidated Programs Directors and Directors of Indian Early Childhood Education Programs

From: 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]

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[1]Unless 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.

[2]Education 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.

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.

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

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

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.

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

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.)

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

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?

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,

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[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

[3]The program "Economic Impact Aid" as specified in Section 62000.2(d) means the Educationally Disadvantaged Youth Programs governed by former sections 54000-54059.

> 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?

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?

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."

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

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) EIA/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:

- 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]

- 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).)

- Academic assessment of LEP students in order to determine when "academic instruction through the

[4]Section 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.

primary language" is necessary. (Section 62002; former Section 52161; and 20 U.S.C. Section 1703(f).)

- 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.)

- 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.)

- 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.)

- "[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.)

- 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.)

- Long term accountability for results: The district's instructional program should, over time, enable the LEP students to learn English and

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).)

- 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

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?

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[5]When 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 langauge 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.

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.

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

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[6]See footnote 5 on page 19.

[7]It 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.

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.)

CONCLUSION

The Department is working to define more clearly the effects of Sections 62000-62007 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.

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:

Date	Location	Time	Contact Number for Directions
Sept. 10	Santa Rosa Sonoma County Office of Education 410 Fiscal Drive Santa Rosa, CA Board Room	10 AM-Noon	(707) 527-2443
Sept. 11	Sacramento Employment Development Dept. 800 Capitol Mall Sacramento, CA 1098 Auditorium (First Floor)	9-11 AM	(916) 322-5205
Sept. 11	Alameda Alameda County Office of Education 313 W. Winton Hayward, CA Board Room	3-5 PM	(415) 887-0152
~~Sept. 14~~	~~Fresno~~ Fresno County Administrators Bldg. 2314 Mariposa St. Fresno, CA Auditorium	~~10 AM-Noon~~	~~(209) 225-6612~~ Ext. 215

Sept. 15	Los Angeles Levy School 3420 W. 229th Place Torrence, CA (Near Del Amo Shopping Center--South of LAX) Multipurpose Room	9-11 AM	(213) 533-4269
Sept. 15	Riverside Riverside County Office of Education 3939 13th Street Riverside, CA Board Room	3-5 PM	(714) 788-6530
Sept. 16	San Diego San Diego USD Bandini Center 3550 Logan Avenue San Diego, CA Auditorium	9-11 AM	(619) 235-6191

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

648 F.2d 989
(Cite as: 648 F.2d 989)

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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'Conor, 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

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 made 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

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

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

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.

> FN1. 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,

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 rubuttal 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

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

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

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

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

> 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

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.

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 six-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;

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. Beaird-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

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 from 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

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

> 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

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

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 propostion 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

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 pursing 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.

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

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

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

> 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, plaintiff's 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

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

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(Cite as: 724 F.Supp. 698)

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.; Giovani 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

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. Zlokovich 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

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.

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

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 BUSDs 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

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

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

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

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

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

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

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 ***710** 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.

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.

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 ESL 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.

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

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

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.

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.

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

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576 F.Supp. 1503
15 Ed. Law Rep. 796
(Cite as: 576 F.Supp. 1503)

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.

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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;

> (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 vitally 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

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

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 ***1508** 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

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

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

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

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

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

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 IDEA 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

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)

> 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

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.

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 *Regents 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

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

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

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

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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)

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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

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

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. Gregrory 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

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;

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

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;

> *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

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

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

> 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

> 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

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.)

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 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 [B]oard," 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

> 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

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

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