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Program Background

The governor signed Senate Bill 376 authorizing the Standardized Testing and Reporting (STAR) Program in October 1997. The State Board of Education, as required by statute, designated the Stanford Achievement Test Series, Ninth Edition (Stanford 9) as the national norm-referenced achievement tests for the Program. These tests were first administered to students in grades two through eleven in California public schools during spring 1998 and were last administered as part of the STAR Program during spring 2002. School districts were required to administer the tests to all students in grades two through eleven except for:

- Students who were receiving special education services with Individualized Education Plans (IEPs) that specified that the students were to have an alternate assessment, and
- Students whose parents/guardians submitted written requests to exempt the students from testing.

Students in grades two through eleven were tested in reading, language, and mathematics. Students in grades two through eight were also tested in spelling, and students in grades nine through eleven were tested in science and social science. All questions on the tests were multiple choice. The purpose of the Stanford 9 was to compare each student's achievement of general skills taught throughout the United States to the achievement of a national sample of students tested in the same grade at the same time of the school year.

In 1998, the State Board of Education designated the Spanish Assessment of Basic Education, Second Edition (SABE/2) as the primary language test for the Program. Beginning in spring 1999, Spanish-speaking English learners who were enrolled in California public schools less than 12 months when testing began were required to take the SABE/2, as well as taking the Stanford 9 and the Stanford 9 Augmentation/California Standards Tests (CSTs). Districts were given the option of also testing Spanish-speaking English learners enrolled 12 months or more with the SABE/2.

During the 1998 – 99 school year, multiple-choice questions were developed specifically to assess the California English-Language Arts and Mathematics Content Standards. These questions that were initially referred to as the Stanford 9 Augmentation were administered for the first time during spring 1999. Students received California Standards scores based on questions selected from the Stanford 9 tests and the California specific questions. The California Standards Tests (CSTs) then evolved during the next several years.

- 2000 Stand-alone mathematics CSTs that used no Stanford 9 questions developed for grades 8 – 11
- 2001 Stand-alone history-social science and science CSTs developed and administered in grades 9 – 11
  Writing component added to the grade 4 and 7 English-Language Arts CSTs
  Performance levels reported for English-Language Arts CSTs
- 2002 Performance levels reported for all CSTs
  The grade 4 and 7 writing components combined with the multiple-choice components to produce the English-Language Arts CST scores
- 2003 Grade 9 history-social science CST moved to grade 8
  All CSTs administered as stand-alone tests

- 2004 Grade 5 science CST added

The purpose of the CSTs is to determine students' achievement of the California Academic Content Standards for each grade or course. Students' scores are compared to preset criteria to determine if the students' performance on the test is advanced, proficient, basic, below basic, or far below basic. The state target is for all students to score at the proficient and advanced levels.

The legislature reauthorized the STAR Program during 2002, and the State Board of Education selected the California Achievement Tests, Sixth Edition Survey (CAT/6 Survey) to replace the Stanford 9 as the national norm-referenced test for the Program beginning with the spring 2003 test administration. The State Board also authorized the development of the California Alternate Performance Assessment (CAPA), an individually administered assessment for students with significant cognitive disabilities whose disabilities preclude them from taking the CSTs and CAT/6 Survey. The CAPA assesses a subset of the California English-Language Arts and Mathematics Content Standards that were identified as appropriate for students with significant cognitive disabilities. The CAPA was first administered during spring 2003.

The 2004 STAR Program included four components:

- California Standards Tests (CSTs)
- California Alternate Performance Assessment (CAPA)
- California Achievement Tests, Sixth Edition Survey (CAT/6 Survey)
- Spanish Assessment of Basic Education, Second Edition (SABE/2)

The CSTs are a major component of California's accountability system for schools and districts. CST and CAPA results are the major component used for calculating each school's Academic Performance Index (API). These results are also used for determining if elementary and middle schools are making adequate yearly progress in helping all students become proficient on the state's academic content standards as required by the federal No Child Left Behind Act of 2001. High school students may also use CST results to qualify for the California Golden State Seal Merit Diploma.

The STAR Program will be reauthorized before the spring 2005 test administration.

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Motions, Pleadings and Filings

United States District Court,
S.D. New York.
ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, et al.,
Plaintiffs,
v.
NEW YORK CITY DEPARTMENT OF EDUCATION; Joel Klein, Chancellor, New York City
Department of Education; Albany School District; and Lonnie Palmer,
Superintendent, Albany School District, Defendants.
No. 03 CIV. 1080(JGK).

June 20, 2003.

Community organization and parents, on behalf of themselves and others similarly situated, brought § 1983 suit against two local school districts and their superintendents or district heads, alleging violations of the No Child Left Behind Act (NCLBA). On, inter alia, defendants' motion to dismiss for failure to state claim, the District Court, Koeltl, J., held that provisions of the NCLBA, requiring local educational agencies to notify parents of students enrolled in schools that were identified for "school improvement" "corrective action" or "restructuring" of such identification and of students' rights to transfer to different schools, and to offer supplemental educational services (SES) to certain students in schools, did not create individual rights that were enforceable under § 1983.

Motion granted.

West Headnotes

[1] **Civil Rights** 1070
78k1070 Most Cited Cases
Provisions of the No Child Left Behind Act (NCLBA), requiring local educational agencies to notify parents of students enrolled in schools that were identified for "school improvement" "corrective action" or "restructuring" of such identification and students' rights to transfer to different schools, and to offer supplemental educational services (SES) to certain students, did not create individual rights that were enforceable under § 1983. 42 U.S.C.A. § 1983; Elementary and Secondary Education Act of 1965, § 1116, as amended, 20 U.S.C.A. § 6316.

[2] **Civil Rights** 1027
78k1027 Most Cited Cases
(Formerly 78k108.1)
Initial inquiry for deciding whether federal statute creates personal rights that may be enforced through § 1983 action is determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries; if Congress wishes to create new rights it must do so in clear and unambiguous terms. 42 U.S.C.A. § 1983.

[3] **Action** 3
13k3 Most Cited Cases

[3] **Civil Rights** 1027
78k1027 Most Cited Cases
(Formerly 78k108.1)
If text and structure of federal statute do not evince clear and unambiguous Congressional intention to create individual rights, there is no basis for a private suit, whether under § 1983 or under implied right of action. 42 U.S.C.A. § 1983.

[4] **Civil Rights** 1027
78k1027 Most Cited Cases
(Formerly 78k108.1)
When statute has sufficient "rights-creating" language, so as to be enforceable under § 1983, statute focuses on conferring benefit or entitlement on an individual or class of individuals and does not focus on entity or person that statute intends to regulate; statutes that focus on person regulated rather than individuals protected create no implication of intent to confer rights on particular class of persons. 42 U.S.C.A. § 1983.

[5] **Civil Rights** 1027
78k1027 Most Cited Cases
(Formerly 78k108.1)
Fact that statute's provisions have only "aggregate focus" and are not concerned with whether needs of any particular person have been satisfied is indicative of Congress' intent not to create individual rights that are enforceable under § 1983. 42 U.S.C.A. § 1983.
***339** Charles King, Crowe, Deegan Dickson and Benrubi, LLP, Glen Cove, NY, for Plaintiffs.

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Lisa Grumet, Michael D. Hess Corp. Counsel, New York, NY, for Defendants.

OPINION AND ORDER

KOELTL, District Judge.

This class action lawsuit [FN1] is brought pursuant to 42 U.S.C. § 1983 by the Association of Community Organizations for Reform Now and the parents of schoolchildren residing in New York against two local school districts and their superintendents or district heads for alleged violations of the No Child Left Behind Act ("NCLBA" or "the Act"), 20 U.S.C. § 6301 *et seq.* The Association of Community Organizations for Reform Now, along with the parents of schoolchildren, including Eunice Staton, Charlene Mingo, Latasha Gibbs, Charlene Wilson, Keikola Valentine, Laverne Jones, Carmella Glass, Deborah Powell-Jasper, Birdie Kite, Michelle Tucker, and, (collectively "the plaintiffs") have raised two causes of action against the New York City Department of Education and its Chancellor, Joel Klein (the "New York City defendants"); and the Albany School District and its superintendent, Lonnie Palmer (the "Albany defendants") (collectively "the defendants"), including a claim pursuant to 42 U.S.C. § 1983 for violation of the NCLBA (Count 1) and a claim under Article XI, Section I of the New York State Constitution (Count 2), and they seek various injunctive and equitable relief. [FN2]

FN1. A class has not yet been certified in this action.

FN2. The original complaint also named the Hempstead Union Free School district and its superintendent, Nathaniel Clay, and the Buffalo School City School District, and its head, Marion Canedo, as defendants, and Shello Hardy and Olive Warner as plaintiffs. At the oral argument on the motions, the parties indicated that the actions against these original defendants were withdrawn and dismissed without prejudice pursuant to Fed.R.Civ.P. 41. The original plaintiffs listed in this footnote are no longer parties to the action because they are parents of children in the Buffalo and Hempstead school districts rather than in the New York City and Albany school districts.

The plaintiffs now seek a preliminary injunction requiring the defendants, among other things, to comply immediately with various provisions of the NCLBA and preventing the defendants from using for any other purpose funds previously allocated for compliance with NCLBA requirements.

In addition, pursuant to Fed.R.Civ.P. 12(b)(6), the defendants have moved to dismiss the plaintiffs' claim alleging violations of the NCLBA, on the grounds that based on the standards articulated by the Supreme Court in *Gonzaga Univ. v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), the plaintiffs cannot maintain individual lawsuits under the NCLBA. ***340** The defendants have also urged the Court to decline to exercise supplemental jurisdiction over the remaining claim under the New York State Constitution.

Because the Rule 12(b)(6) motion to dismiss is potentially dispositive of the motion for a preliminary injunction, the Court will resolve that motion prior to deciding the remaining motion.

I.

On a motion to dismiss, the allegations in the Complaint are accepted as true. *See Grandon v. Merrill Lynch & Co.,* 147 F.3d 184, 188 (2d Cir.1998). In deciding a motion to dismiss, all reasonable inferences are drawn in the plaintiffs' favor. *See Gant v. Wallingford Bd. of Educ.,* 69 F.3d 669, 673 (2d Cir.1995); *Cosmas v. Hassett,* 886 F.2d 8, 11 (2d Cir.1989). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden,* 754 F.2d 1059, 1067 (2d Cir.1985). Therefore, the defendants' motion to dismiss should only be granted if it appears that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *See Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Grandon,* 147 F.3d at 188; *Goldman,* 754 F.2d at 1065.

In deciding the motion, the Court may consider documents that are referenced in the Complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken. *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002); *see also Brass v. Am. Film Techs., Inc.,* 987 F.2d 142, 150 (2d Cir.1993); *Cortec Indus., Inc. v. Sum*

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Holding L.P., 949 F.2d 42, 47-48 (2d Cir.1991); *VTech Holdings Ltd. v. Lucent Techs., Inc.*, 172 F.Supp.2d 435, 437 (S.D.N.Y.2001). "[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it relies and which is integral to the complaint, the court may nonetheless take the document into consideration in deciding the defendant[s'] motion to dismiss, without converting the proceeding to one for summary judgment." *International Audiotext Network, Inc. v. AT & T Co.*, 62 F.3d 69, 72 (2d Cir.1995) (internal citation and quotation marks omitted); *see Yucyco, Ltd. v. Republic of Slovenia*, 984 F.Supp. 209, 215 (S.D.N.Y.1997).

A.

In order to resolve the merits of the defendants' motion to dismiss, it is necessary to outline the basic provisions of the NCLBA.

The purpose of the NCLBA is "to ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301. The NCLBA, which is aimed a strengthening elementary and secondary schools, is a comprehensive education reform statute. 20 U.S.C. § § 6301(1)-(12). The NCLBA's purpose is to be accomplished through a variety of means including, among other things,

> holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high quality education to their students, while providing alternatives to students in such schools to ***341** enable the students to receive a high-quality education.

20 U.S.C. § 6301(4). It is the implementation of the NCLBA's provisions aimed at satisfying § 6301(4) that are issue in the current litigation.

Congress has authorized, pursuant to its federal spending powers, states as well as local educational agencies to receive federal funds in order to carry out the purposes of the NCLBA, provided that they abide by various conditions and requirements imposed by the Act. *See* 20 U.S.C. § § 6302(i), 6303(g), 6311(a)(1), 6316(a)(1). [FN3] States receiving NCLBA funds must have the State educational agency "submit to the [Secretary of Education] a plan" that "demonstrate[s] that the State has adopted challenging academic content standards ..." 20 U.S.C. § § 6311(a)(1),(b)(1)(A). Local educational agencies, such as the New York City and Albany school districts, that receive NCLBA funds must abide by the requirements in § 6316 of the Act. *See* 20 U.S.C. § 6316.

> FN3. Local educational agencies, as is true in this case, are usually the local school districts responsible for schools located within a particular geographic area within a state.

Section 6316 provides, in relevant part, that local educational agencies receiving NCLBA funds "use the State academics assessments ... described in the State plan to review annually the progress of each school served ... to determine whether the school is making adequate yearly progress..." 20 U.S.C. § 6316(a)(1)(A). What constitutes "adequate yearly progress" is to be defined by the State in which the local educational agency is located and in accordance with the standards outlined in § 6316(b)(2). Those schools that fail to achieve adequate yearly progress for two consecutive years are to be designated for "school improvement." 20 U.S.C. § 6316(b)(1)(A). A school that continues to fail to achieve adequate yearly progress for two years after being designated for school improvement must be identified by the local education agency for "corrective action." 20 U.S.C. § 6316(b)(7)(C). If after a year of being designated for "corrective action" a school fails to make adequate yearly progress, the school is to be designated for "restructuring." 20 U.S.C. § 6316(b)(8)(A).

When a school has been identified for "school improvement" "corrective action" or "restructuring", the NCLBA's transfer and parental notification provisions are triggered. 20 U.S.C. § § 6316(b)(1)(E), (5)(A), (7)(C)(i), 8(A)(i), (b)(6). The local educational agency must, for schools falling into any of these three categories, "not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local education agency, which may include a public charter school, that has not been identified for school improvement..." 20 U.S.C. § 6316(b)(1)(E)(i).

This option to transfer to schools that have not been identified for school improvement, corrective action or restructuring is not without exception. The option to transfer is not available if such a transfer is prohibited by state law. *See id.* In addition, the NCLBA requires that in providing the option to

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transfer, the "local educational agency shall give priority to the lowest achieving children from low-income families ..." 20 U.S.C. § 6316(b)(1)(E)(ii). Also, if all of the schools to which a student may transfer are designated for improvement, corrective action or restructuring, the local education agency "shall to the extent practicable, establish a cooperative agreement with ***342** other local educational agencies in the area for a transfer." 20 U.S.C. § 6316(b)(11). However, absent a cooperative agreement, a transfer may not be available. *See id.*

In addition to the transfer condition, the schools in the second year of being designated for improvement and continuing while they are designated as needing "corrective action" or "restructuring" must, in order to continue to receive NCLBA funds, offer what are known as "supplemental educational services" ("SES"). 20 U.S.C. § § 6316(b)(5)(B), (7)(C)(iii), 8(A)(ii). SES are to be provided to eligible children "from a provider with a demonstrated record of effectiveness, that is selected by the parents and approved for that purpose by the State educational agency in accordance with reasonable criteria ..." 20 U.S.C. § 6316(e)(1).

As with the school transfer provisions, there are exceptions to the requirement that the local educational agency provide SES. First, the only children eligible for SES are those children from a low-income family. 20 U.S.C. § 6316(e)(12)(A). Second, SES need only be made available so long as there are sufficient funds allocated for that purpose. 20 U.S.C. § 6316(b)(10)(C). Finally, the requirements that a local educational agency provide SES may be waived by a State upon the request of the local educational agency. 20 U.S.C. § 6316(e)(10)(A).

In connection with the SES and transfer provisions, the NCLBA contains a parental notification provision that requires, among other things, that the local educational agency provide notice to parents if a school in which their child is enrolled is designated for school improvement, corrective action or restructuring and notice to parents if transfer is an option or if their child is eligible to receive SES. *See* 20 U.S.C. § 6316(b)(6).

The "Penalties" section of the NCLBA outlines the procedures available in the event of noncompliance by States with NCLBA provisions. This section of the statute contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the Act. *See* 20 U.S.C. § 6311(g)(2). The section is not directed towards noncompliance by local educational agencies and only contemplates penalties that may be taken against individual states. *See id.* The only remedy the penalties provision provides in the case of a state's failure to comply is that "the Secretary [of Education] may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements." *Id.* In addition to these provisions contained in the NCLBA, there are remedies available to the Secretary of Education to take action against a federal funds recipient who fails to comply with legal requirements imposed by a federal education statute, including withholding of funds and conducting proceedings for the recovery of funds and the issuance of cease and desist orders. *See* 20 U.S.C. § § 1234(a)-(i).

The plaintiffs' class action complaint alleges that the defendants deprived, and continue to deprive, the parents of schoolchildren residing in the New York City and Albany school districts of their right under the NCLBA to transfer their children out of schools and to receive appropriate SES. (Compl.¶ 1.) In addition, the plaintiffs allege that parents in these districts were never given appropriate notice, as required under the NCLBA, of their rights to transfer their children and the rights of their children to receive SES. (Compl.¶ 28.)

For the purposes of this motion, the following facts, as alleged in the Complaint, are accepted as true.

***343** Eunice Staton, Latasha Gibbs, Charlene Mingo, Laverne Jones, Carmella Glass, Deboarah Powell-Jasper, and Keikola Valentine are all parents of children who attend New York City public schools that were identified as failing schools by the New York State Education Department on September 4, 2002. (Compl.¶ ¶ 7-13.) The New York City Department of Education, the relevant New York City local educational agency, only notified parents in New York City of their NCLBA rights in an untimely fashion, or failed to notify them at all of such rights. (Compl.¶ ¶ 45, 48, 51-53.) To the extent that parents in the New York City area did receive information regarding their rights to transfer their children pursuant to the NCLBA, the information provided to them was inaccurate and misled parents by incorrectly informing them that their transfer requests would be rejected for a variety of reasons. (Compl.¶ ¶ 47-50.) In addition, in violation of the NCLBA, the New York City

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Department of Education rejected outright the vast majority of transfer requests. (Compl.¶ ¶ 46, 49.)

With respect to SES, the New York City Department of Education continues to represent that it will provide SES, but fails to inform parents adequately about their ability to obtain SES, and as a result, children eligible to receive SES are unable to obtain them. (Compl.¶ ¶ 54-57.) SES are also increasingly difficult to obtain for a variety of reasons, including confusing information regarding eligible SES providers. (Compl.¶ ¶ 57-62.)

Charlene Wilson, Michelle Tucker, and Bridie Kite are all parents whose children attend schools in the Albany School District that were identified as failing schools by the New York State Education Department on September 9, 2002. (Compl.¶ ¶ 14-16.) The allegations raised against the Albany School District are similar to those raised against the New York City School district, namely that adequate parental notification was not given to parents of children in the respective schools regarding the rights to transfer children and the rights of children to receive SES, (Compl.¶ ¶ 64-68), that parents were denied their rights to transfer their children out of failing schools, (Com pl.¶ ¶ 69-75), and that SES were not provided appropriately as required by the NCLBA, (Compl.¶ ¶ 76-80).

The defendants have moved to dismiss the plaintiffs' allegations on the grounds that the text and structure of the NCLBA does not evince an unambiguous Congressional intent to confer rights upon the parents of schoolchildren, and consequently, pursuant to the Supreme Court's recent decision in *Gonzaga v. Doe,* the plaintiffs cannot maintain an action pursuant to 42 U.S.C. § 1983 for violations of the NCLBA.

B.

[1] In *Gonzaga,* the Supreme Court held that an individual may not bring a § 1983 action to enforce provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), because the statute created no personally enforceable rights. 536 U.S. at 276, 122 S.Ct. 2268. FERPA, like the NCLBA, was enacted pursuant to Congress' spending power and conditioned the receipt of federal funds on various requirements relating to the access and disclosure of students' educational records. *Id.* at 278, 122 S.Ct. 2268.

[2][3] In reaching this conclusion, the Court determined that the initial inquiry for deciding whether a federal statute creates personal rights that may be enforced through a § 1983 action is identical to the initial inquiry for determining whether a federal statute creates an implied private right of action. *Id.* at 285, 122 S.Ct. 2268. ***344** That inquiry is a determination "as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285, 122 S.Ct. 2268. And as the Court explained, "if Congress wishes to create new rights ... it must do so in clear and unambiguous terms ..." *Id.* at 290, 122 S.Ct. 2268; *see also Taylor v. Vermont Dep't of Educ.,* 313 F.3d 768, 783 (2d Cir.2002). If the text and structure of a federal statute do not evince this clear and unambiguous Congressional intention to create individual rights, "there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga,* 536 U.S. at 286, 122 S.Ct. 2268.

In view of these standards, it is clear that Congress did not intend to create individually enforceable rights with respect to the notice, transfer or SES provisions contained in the NCLBA. [FN4]

FN4. The New York City defendants have also argued that the "transition" provision of the NCLBA also does not create personal rights. This "transition" provision provides that for schools which have previously been identified for improvement or corrective action prior to the enactment of the NCLBA, transfer and SES benefits may be available before the school has been identified as failing to make adequate yearly progress for two consecutive years, as would otherwise would be required. *See* 20 U.S.C. § 6316(f)(1)(A)(i). Because this provision only relates to the timing of when the notice, SES and transfer provisions of the NCLBA become effective, the transition provision could not by itself create personal rights should the notice, transfer and SES provisions themselves not create any rights. Consequently, because the notice, transfer and SES provisions do not provide for individual rights, the "transition" provision, which the plaintiffs must rely on for relief it seeks for the 2002-03 school year, could also not create such individual rights.
It is not necessary to decide whether the language of the transitional provision provides an additional reason to find no right to relief for the 2002-2003 school year.

[4] First, the notice, transfer and SES provisions do not contain the kind of "rights-creating" language that

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the Supreme Court has deemed "critical to showing the requisite congressional intent to create new rights." *Id.* at 287, 122 S.Ct. 2268. When a statute has sufficient "rights-creating" language, the statute focuses on conferring a benefit or entitlement on an individual or a class of individuals and does not focus on the entity or person that the statute intends to regulate. *See id.* at 287, 122 S.Ct. 2268. As the Court explained in *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), "statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Id.* at 289, 121 S.Ct. 1511 (quotations omitted). The provisions of the NCLBA at issue focus on two entities--states and local educational agencies--and the restrictions that flow from their decisions to receive NCLBA funding. The NCLBA is drafted to focus on the regulation of these entities and not on conferring any direct benefit, entitlement or right upon individual, such as parents and students. Congress, well aware of how to confer entitlements on individuals, could have drafted the NCLBA to provide that parents have the right to transfer their children or that students have the right to receive SES, but instead focused on what states and local educational agencies must provide to parents and children and on regulating the states and local educational agencies. [FN5] *See, e.g.,* 20 U.S.C. § § 6316(b)(1)(E)(i) ("the local educational ***345** agency ... shall .. provide all students enrolled in the school with the option to transfer..."); 6316(b)(5)(B) ("the local educational agency serving such school ... shall make supplemental educational services available..."). The NCLBA requires that states and local educational agencies give parents notice, the ability to transfer their children, and SES as a condition to their receiving federal funds, but does not provide those benefits in the first instance to parents or children. *See id.;* 20 U.S.C. § 6316(b)(6) (requiring that local educational agencies provide notice to parents of ability to transfer their children). When a statute focuses on the entity to be regulated, and the benefit to be conferred on an individual is a secondary consideration that flows from that regulation, Congress has not chosen to create the sort of "*individual* entitlement" that characterizes an unambiguous intention to create personal rights. *Gonzaga,* 536 U.S. at 287, 122 S.Ct. 2268 (quotations omitted) (emphasis in original).

FN5. As the Court noted in evaluating another federal statute in *Touche Ross & Co. v. Redington*, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." 442 U.S. 560, 572, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979).

[5] Second, the fact that a statute's provisions have only an "aggregate focus" and is not concerned "with whether the needs of any particular person have been satisfied" is indicative of Congress' intent not to create individual rights. *Id.* at 288, 290, 122 S.Ct. 2268. The NCLBA's transfer and SES provisions have an aggregate focus, and are not concerned with a particular individual student's ability to receive a benefit under the statute. For example, both the transfer and SES provisions give priority for receiving those benefits to children from low-income families. *See* 20 U.S.C. § § 6316(b)(1)(E)(ii), 6316(e)(1), 6316(e)(12)(A). This indicates that Congress was concerned with improving the educational conditions of children as a whole, and specifically, the condition of the subset of children from lower income families, rather than ensuring that each individual child was provided with a right to transfer out of a failing school or a right to receive SES. In addition, with respect to the transfer provisions, the terms and conditions on transfers can be altered collectively for an entire group of students because the local educational agency can enter into cooperative agreements with other local educational agencies, but those agreements are required only "to the extent practicable" and depend on the agreement of other local educational agencies. 20 U.S.C. § 6316(b)(11). The same is true of the ability of children to receive SES, which the local educational agency may choose to waive on behalf of all of its students. 20 U.S.C. § 6316(e)(10)(A). The decisions whether to seek a waiver or to enter into cooperative agreements cannot be made by individual students, and are collective judgments that affect all students attending failing schools under the control of the local educational agency. As such, the NCLBA has an aggregate focus, which indicates that Congress did not intend to create individually enforceable rights under the statute.

Third, the nature of the enforcement mechanisms in the NCLBA also support the conclusion that Congress did not intend to create individual rights. The fact that this statutory scheme contains no procedures for individuals to enforce violations of the statute suggests that such a Congressional intent is not present. The NCLBA contains no provision for individuals to enforce the notice, transfer or SES provisions--there are no administrative or judicial procedures for any individual to use. Rather the statute contemplates that any enforcement actions for

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violations of the statute by states be taken by the Secretary of Education and vests such authority solely in the Secretary. *See* ***346**20 U.S.C. § 6311(g)(2). [FN6] The fact that the Secretary of Education is provided with the sole enforcement authority for violations of the Act suggests that Congress intended that the interpretation of NCLBA be centralized with the Secretary of Education. As the Court explained with respect to FERPA, where the enforcement provisions also spoke only to the Secretary of Education, when Congress has created a centralized review and enforcement scheme "[i]t is implausible to presume that the Congress nonetheless intended private suits to be brought before thousands of federal-and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid." *Id.* at 290, 122 S.Ct. 2268.

FN6. There are no provisions for the Secretary of Education to penalize local educational agencies for violations of the NCLBA, although each local educational agency must submit plans for, among other things, the nature of SES to be provided to the State for approval. *See* 20 U.S.C. § § 6312(a)(1),(b),(e).

The plaintiffs rely on two Supreme Court opinions decided prior to *Gonzaga, Wright v. Roanoke Redevelopment & Housing Authority,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) and *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), to argue that the NCLBA does reflect the necessary Congressional intent to create individually enforceable rights. Although the Court did find that the statutes in *Wright* and *Wilder* did provide for the creation of individual rights, neither of those statutes is similar to the NCLBA and the Court went to great lengths in *Gonzaga* to explain that *Wright* and *Wilder* were exceptional cases.

In *Gonzaga* the Court explained that since the "clear and unambiguous" standard had been articulated, the Court had "only twice" found that legislation enacted pursuant to Congress' spending powers reflected an intention to create individual rights and that the more recent cases "have rejected attempts to infer enforceable rights from Spending Clause statutes." *Gonzaga,* 536 U.S. at 280-81, 122 S.Ct. 2268.

In any event, neither of the statutes at issue in *Wright* nor *Wilder* is sufficiently similar to NCLBA to counsel in favor of concluding that Congress intended to create individual rights in the NLCBA. In *Wright,* in interpreting a rent-ceiling provision of the Public Housing Act, the Court permitted tenants to recover past rent overcharges because the FHA provision in question created a mandatory entitlement that was "focus[ed] on the individual family and its income." *Wright,* 479 U.S. at 430, 107 S.Ct. 766. In the NCLBA, there is no similar focus on the educational rights and benefits of individuals, and the statute focuses instead on the states and the local educational agencies, the entities to be regulated. The Court in *Gonzaga* noted that its finding in *Wright* that Congress had intended to create individual rights was supported by the fact that the Department of Housing and Urban Development ("HUD") had never provided a procedure by which tenants could complain to it about the failures of local public housing authorities. *Gonzaga,* 536 U.S. at 280, 122 S.Ct. 2268. In *Wright,* the Court detailed a decentralized enforcement mechanism whereby Congress directed HUD to continue its longstanding regulatory requirement that each public housing authority provide formal grievance procedures for the resolution of tenant disputes, but HUD had not provided a procedure for raising complaints to it. This decentralized enforcement structure was plainly inconsistent with the argument that Congress intended enforcement to be exclusively ***347** with HUD. *Wright,* 479 U.S. at 426, 107 S.Ct. 766. Unlike the decentralized enforcement structure at issue in *Wright,* the NCLBA, as discussed above, provides for centralized enforcement authority.

Wilder is similarly inapplicable. In *Wilder,* the Court found that the Medicaid Act allowed health care providers to enforce a reimbursement provision because the statute had created a specific monetary entitlement payable to health care providers, and there were no sufficient means to police the failure of states to make such payments, if Congress failed to provide health care providers sufficient individual rights so as to allow for private enforcement. *See* 496 U.S. at 522-23, 110 S.Ct. 2510. As explained earlier, the NCLBA creates no entitlement for individuals, and no entitlements that would remain unenforced in the absence of private enforcement actions. [FN7]

FN7. The plaintiffs also argue that because the weak and incomplete nature of the enforcement schemes in *Wright* and *Wilder* led the Court to find that private enforcement actions were permitted under the statutes at issue, and because the enforcement procedures in those cases are far more stringent that those available under

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> the NCLBA, the NCLBA should also be read to permit individual enforcement actions. Neither *Wright* and *Wilder* stand for the proposition that the nature of the enforcement scheme is dispositive of the question of whether Congress intended to confer individual rights and permit private enforcement actions. In *Wright* and *Wilder,* before the Supreme Court reached the issue of whether the enforcement provisions were sufficient to protect the benefits conferred upon individuals, the Court first found that there were such individual benefits. Under the NCLBA, there are no benefits conferred upon individuals directly. Therefore, even if the plaintiffs are correct that the NCLBA enforcement provisions are less stringent than those enforcement provisions in *Wright* and *Wilder,* the absence of an individual benefit makes it impossible to infer a Congressional intent to create individual rights.

Thus, the NCLBA does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights. The statute lacks the necessary rights creating language, because it is focused on the regulation of states and local educational agencies, and focuses on improving the condition of children collectively, and therefore lacks the individual focus suggestive of Congressional intent to create personal rights. Finally, the enforcement scheme of the statute indicates a Congressional intent to centralize enforcement and thereby to avoid the possibility of individual lawsuits and multiple interpretations of provisions of the Act. [FN8] Consequently, the plaintiffs in this case cannot maintain an action under § 1983 to enforce provisions of the NCLBA. The defendants' motion to dismiss the plaintiffs' cause of action under § 1983 to enforce the NCLBA is granted.

> FN8. Although the Supreme Court did not indicate in *Gonzaga* that legislative history is a relevant consideration in determining whether Congress intended to create individually enforceable rights, the plaintiffs have not pointed to any relevant legislative history of the NCLBA that indicates that Congress intended to create such rights.

C.

The only remaining claim is the plaintiffs' claim under the New York State Constitution. Because there is no longer any federal claim, the Court declines to exercise supplemental jurisdiction and dismisses the remaining claim under the New York State constitution. *See* 28 U.S.C. § 1367(c)(3); *Giordano v. City of New York,* 274 F.3d 740, 754 (2d Cir.2001); *Morse v. University of Vermont,* 973 F.2d 122, 128 (2d Cir.1992); *DeVito v. Incorporated Vill. of Valley Stream,* 991 F.Supp. 137, 145 (E.D.N.Y.1998); ***348***Irish Lesbian & Gay Org. v. Bratton,* 882 F.Supp. 315, 319 (S.D.N.Y.), *aff'd,* 52 F.3d 311 (2d Cir.1995); *Lieberman v. Fine, Olin & Anderman, P.C.,* No. 00 Civ. 6533, 2002 WL 142198, at *4 (S.D.N.Y. Jan. 31, 2002).

II.

It is unnecessary to reach the merits of the plaintiffs' motion for a preliminary injunction, because the defendants' motion to dismiss is being granted and the remaining New York State Constitution claim is also being dismissed. In any event, the preliminary injunction argued solely for rights under the NCLBA, rather than the New York State Constitution, and the plaintiff could not establish a likelihood of success for any claim under the NCLBA because such claims must be dismissed. The plaintiffs' motion for a preliminary injunction is denied as moot.

CONCLUSION

For the reasons explained above, the defendants' motion to dismiss the NCLBA claim is granted. The Court declines to exercise supplemental jurisdiction over the remaining claim under the New York State Constitution. The motion for a preliminary injunction is denied as moot. The Clerk is directed to enter Judgment and to close this case. [FN9]

> FN9. The Final Judgment should not be entered until the stipulation dismissing the claims against the Hempstead Defendants is entered. The stipulation has been signed by some but not all of the parties. As the Court has already directed, a fully executed stipulation dismissing the Hempstead defendants should be submitted promptly.

SO ORDERED.

269 F.Supp.2d 338, 179 Ed. Law Rep. 661

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. 1:03CV01080 (Docket) (Feb. 14, 2003)

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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))

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[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

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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

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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.

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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).

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[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

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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

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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%

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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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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.

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)

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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

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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

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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

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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,

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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

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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:

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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

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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

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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.

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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:

> 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

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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

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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

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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

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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

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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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December 2003

New Mandates: Analysis of Measures Requiring Reimbursement

In 2002 and 2003, the Commission on State Mandates determined that 23 sets of state laws impose state-reimbursable mandates on local governments. The commission estimated the state's cost to reimburse local agencies for these mandates is about $400 million.

This report reviews the newly identified mandates, and offers recommendations as to whether each mandate should be repealed, funded, suspended, or modified.

Introduction

This report, submitted in fulfillment of Chapter 1123, Statutes of 2002 (AB 3000, Budget Committee), reviews 23 sets of state requirements that the Commission on State Mandates (CSM) identified as state-reimbursable "mandates" in their 2002 and 2003 reports to the Legislature. These newly identified mandates are *in addition* to over 100 ongoing state requirements that the CSM (or its predecessor agency) previously determined to be state-reimbursable mandates.

The Legislature's intent in requiring the Legislative Analyst's Office (LAO) to prepare an annual analysis of newly identified mandates was to ensure that it had information regarding each new mandate at the time the Legislature considered the annual mandate "claims bill." Pursuant to Government Code Section 17612, the claims bill (1) usually provides the initial state reimbursement for newly identified mandates and (2) gives the Legislature some opportunity to review commission actions. After a mandate receives its initial reimbursement through the claims bill, the Legislature traditionally funds a mandate's ongoing costs in the annual state budget.

Given the mounting costs of state mandates, the Assembly held hearings to review mandates and the mandate reimbursement process. Because of the state's fiscal difficulties, however, the Legislature:

- Did not introduce a claims bill to reimburse local agencies for newly identified mandates.
- Provided no funding for ongoing mandates in the 2003-04 budget.
- Declared its intent in Chapter 228, Statutes of 2003 (AB 1756, Budget Committee), to continue deferring mandate reimbursements through 2004-05.
- Acted to reduce local agency mandate responsibilities and associated state liabilities by suspending local agency requirements to implement 39 mandates in 2003-04, including eight newly identified mandates.

This report reviews the newly identified mandates and offers recommendations as to whether they

Standardized Testing and Reporting (STAR)

We recommend the Legislature request the commission to review its Statement of Decision regarding the STAR program mandate and make any changes necessary to ensure that its decision reflects federal mandates in place at the time the program was enacted.

In 1997, Chapter 828 (SB 376, Alpert), created the STAR program. This program requires districts to test every student in grades 2 through 11 using a test selected by the State Board of Education. In addition, the program requires districts to test specified English Learner (EL) students (students whose primary language is not English and who are not yet proficient in English) in mathematics and language skills in their primary language. The board selected the Stanford-9 (SAT-9) test as the assessment taken by all students and the Spanish Assessment of Basic Education (SABE) as the test for Spanish-speaking EL students. Similar tests in other languages were not available.

Costs of the STAR Mandate. The commission determined that the STAR program imposed a wide array of local-mandated activities on school districts and county offices of education. Activities approved for reimbursement include:

- ***Test Materials, Supplies, and Equipment.*** In the first two years of the program, state law required districts to purchase the SAT-9 and SABE from the publishers using a standard contract developed by the state. The costs of these contracts and of negotiating the contracts are reimbursable.
- ***Administration of the Test.*** Costs associated with duties required of the district and school testing coordinator and other costs created by administering the tests are reimbursable. Time spent by classroom teachers during normal school hours, however, is not reimbursable.
- ***Reporting and Record Keeping.*** Maintaining STAR scores in pupils' records and notifying parents, the school district governing board, and the state Department of Education of STAR results are reimbursable activities.
- ***Developing Policies and Procedures, Training.*** Costs of training district staff and developing district policies and procedures needed to implement the STAR tests are reimbursable. Time spent by classroom teachers during normal work hours is not reimbursable, although costs of substitute teachers to permit the training of teachers taking place during the school day are reimbursable.

The commission estimates costs of $152.3 million over the period from 1997-98 through 2002-03. Annual costs beginning in 2003-04 are estimated at $31.8 million, or about $6.75 per student tested.

Analysis

Estimate Based on Faulty District Claims. The statewide estimates are based on district-mandated cost claims as submitted to the SCO. As with all new mandate claims, they were not subject to a thorough review or audit *before* the development of the statewide estimate. Our review of five district STAR claims revealed significant problems with the

claims. Most significantly, districts often failed to recognize state apportionments for local STAR costs. Since the beginning of the program, SDE provided a per-student payment to districts to pay for local STAR costs. In 1997-98, for instance, the state board approved $6.65 per student for local costs—$4.10 to pay for printing, shipping, and scoring of the SAT-9 tests, and $2.55 for local administrative costs. Four of the five districts we reviewed failed, in full or in part, to recognize these apportionments as an offsetting revenue. If these five districts are representative of all K-12 districts, the statewide estimate greatly overstates actual net costs experienced by districts.

In part, this problem may have been caused by the commission's Ps&Gs, which, in our view, inappropriately narrow the activities against which state funds should apply as offsetting revenues. Most glaringly, the guidelines omit the cost of printing, shipping, and scoring the tests from the list of costs that districts must offset with state funds.

Federal Testing Mandates. The Government Code provisions guiding the mandate process direct the commission to deny reimbursement when the state creates local mandates in implementing a federal law—unless the state law exceeds the federal requirements. The state's decision to enact the STAR program was, at least in part, designed to bring California into compliance with the federal Title 1 program requirements under the Improving America's Schools Act (IASA) of 1994. In the act, the federal government requires statewide systems of assessment and accountability for schools and districts participating in the Title 1 program.

Assessment requirements contained in the IASA that could affect STAR mandates include:

- ***Grades Assessed.*** Tests must be administered to all students in one grade in each of three grade spans (grades 3 through 5, 6 through 9, and 10 through 12). This assessment must be administered to *all students*, not just students attending Title 1 schools. Assessments must cover at least mathematics and reading/language arts.
- ***Special Education.*** Reasonable adaptations and accommodations for students with special learning needs must be provided. This includes special education students.
- ***Parental Notification.*** Federal law required certain Title 1 schools (known as "schoolwide" Title 1 schools) to provide individual student assessment results to parents.

In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. The assessment requirements contained in the new law mirror the STAR requirements even more closely. Under NCLB, annual testing in mathematics and reading is required in grades 3 through 8 and once in grades 9 through 12. In addition, the state must begin to assess students in science beginning in 2005-06 (although not as frequently as in mathematics and reading/language arts).

Commission Fails to Recognize Federal Mandates. The commission uses several tests to determine whether local costs are due to a federal mandate. First, federal law must require the action. State courts have interpreted this to mean that, without state conformity, significant consequences to the state would occur (such as a significant loss of federal funds). In addition, if specific funding is provided by the federal government in support of the requirement, the mandate is not reimbursable.

The commission's approval of the STAR mandate makes no mention of the IASA testing requirements. According to commission staff, IASA requirements were never discussed as a factor in determining the STAR mandate. Commission staff advises that issues of federal mandates are normally raised by the Department of Finance (DOF). The record shows that DOF identified mandates contained in federal *special education* statutes that it believed would reduce STAR mandates for testing special education students. The DOF did not raise IASA mandates, however, and the commission found that the federal special education statutes did not constitute a federal mandate.

Findings and Recommendation

Our review suggests the federal assessment mandates contained in IASA and NCLB should render a significant portion of the STAR mandate costs ineligible for reimbursement. Because the three IASA-mandated tests constitute about one-third of the state-mandated STAR tests, mandated costs should fall by at least that proportion. We would expect the proportion to be higher than that, however, because a number of the activities identified as reimbursable must be done by local agencies regardless of the number of grades tested. For instance, each district would need a test coordinator regardless of whether three grades or ten grades were tested.

Our review also indicates that some costs identified by the commission as state reimbursable, such as testing procedures for special education students and providing student test results to parents in certain Title 1 schools, are the result of federal requirements and therefore not state reimbursable. In addition, because NCLB testing mandates more closely mirror the STAR program, the number of reimbursable activities related to STAR mandates would be even fewer.

The Government Code establishes a three-year time limit for parties involved in the test claim to challenge the commission's Statement of Decision. This three-year period expired on August 24, 2003, without the DOF commencing a challenge to the mandate determination. As a result, the Legislature's only recourse is to request the commission revisit the issue of federal mandates for student assessment and modify the mandate's Statement of Decision as appropriate to reflect the requirements of federal law. To accomplish this, we recommend the Legislature adopt the following language in a future claims bill or other legislation:

The commission shall review its Statement of Decision regarding the *Standardized Testing and Reporting* test claim and make any modifications necessary to this decision to clarify whether federal testing requirements in place at the time the program was enacted should reduce the scope of the state-mandated costs.

While the commission is revisiting this issue, we also suggest it review the directions to districts regarding offsetting revenues that are contained in the Ps&Gs to ensure that all STAR activities are offset by state per-pupil apportionments.

WAYNE L. FERDIG, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendant and Respondent.
Sac. No. 7823.

Supreme Court of California

May 8, 1969.

HEADNOTES

(1) Civil Service § 4.5--Veterans' Preferences.
A civil service applicant was not entitled to any veterans' preference credits under Gov. Code, § 18973, providing therefor and defining veteran, where his service in the merchant marine did not satisfy the statutory service requirement specified as essential for a veterans' preference.

Character of service or connection with military or naval service necessary to entitle one to benefit of veterans' preference statute in relation to civil service, note, 87 **A.L.R.** 1002. See also **Cal.Jur.2d,** Civil Service, § 14; **Am.Jur.2d,** Civil Service, § § 26, 27.

(2) Civil Service § 4.5--Veterans' Preferences.
In the context of civil service, authority to determine the allowance of veterans' preferences emanates from the California Constitution (Cal. Const., art. XXIV, § 7) and has been in turn conferred by the Legislature upon the Department of Veterans Affairs (Gov. Code, § 18976); the department is charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov. Code, § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department (Gov. Code, § 18976).

(3a, 3b, 3c) Civil Service § 4.5--Veterans' Preferences.
The appointment of a state civil service applicant was void, and the State Personnel Board had jurisdiction to revoke it and to remove the appointee from ***97** his position, where his right to appointment was dependent on veterans' preference credits and the appointment had been made as a consequence of the applicant's erroneous representation to the Department of Veterans Affairs that he was a veteran when in fact he was not.

(4) Civil Service § 3--Constitutional and Statutory Provisions.
The action of the Department of Veterans' Affairs invoked by a request for veterans' preference credits is an integral part of the civil service system established by the People and implemented by the Legislature through the State Civil Service Act; the system is grounded on the constitutional mandate that permanent appointments and promotion in the state civil service shall be based upon merit, efficiency and fitness as ascertained by competitive examination; the Legislature has provided a detailed method of carrying out the constitutional mandate, so that appointments shall be based upon merit and fitness.

(5) Civil Service § 4.5--Veterans' Preferences.
Where a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credit, the Department of Veterans' Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) Administrative Law § 37--Validity of Administrative Action--Compliance With Constitutional and Statutory Provisions.
Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute; and an administrative agency must act within the powers conferred upon it by law and may not validly act in excess of such powers.

See **Cal.Jur.2d,** Administrative Law, § 63; **Am.Jur.2d,** Administrative Law, § 188.

(7) Civil Service § 1--State Personnel Board.
The State Personnel Board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

(8) Civil Service § 3--Constitutional and Statutory Provisions.
The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Cal. Const., art. XXIV, § 3, which directs that the board shall administer and enforce the civil service laws, and its authority is governed by the

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Constitution as well as by the Civil Service Act.

See **Cal.Jur.2d,** Civil Service, § 5.

(9) Civil Service § 12(2)--Discharge, Demotion, Suspension and Dismissal-- Hearing--State Personnel Board.
The State Personnel Board was ***98** within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully, though in good faith, made based on unauthorized veterans' preference credits, where the board received the prompt and full cooperation of the Department of Veterans' Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the department only a month after the applicant's appointment, and an objection was made to the board approximately three months later, and where both agencies promptly reviewed the matter.

(10) Civil Service § 10--Discharge, Demotion, Suspension and Dismissal-- Grounds.
Gov. Code, § 19173, providing for rejection of probationers for certain deficiencies, was not intended to cure any defect in certification and appointment deriving from violation of the civil service statutes, and its provisions for rejection of a civil service appointee during a probationary period were inapposite, where the applicant's separation from a position to which he sought reinstatement was effectuated under the implied power of the State Personnel Board to rectify appointments made in violation of the civil service laws in appointing the applicant, who was qualified for the position in question by passing the examination, but not eligible to be certified for the position.

(11) Civil Service § 12(1)--Hearing--Time for Protest.
It was not necessary that a protestor of a civil service appointment file an "appeal" to the State Personnel Board within the time limits prescribed by its rules where the board, upon the matter being called to its attention, had jurisdiction to review and correct its initial action based on allowance of unauthorized veterans' preference credits by which a civil service applicant improperly secured eligibility for certification and appointment; and, in any event, the protest was timely made where 15 days thereafter the Department of Veterans' Affairs formally notified the personnel board that the applicant's veterans' preference had been "removed."

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Mamoru Sakuma, Judge. Affirmed.

Proceeding in mandamus to compel the State Personnel Board to set aside its order revoking an appointment to a civil service position. Judgment denying writ affirmed.

COUNSEL

Walter W. Taylor for Plaintiff and Appellant. ***99**

Thomas C. Lynch, Attorney General, William M. Goode and Robert Burton, Deputy Attorneys General, and Harry T. Kaneko for Defendants and Respondents.

SULLIVAN, J.

This is an appeal from a judgment denying a writ of mandate to compel respondent State Personnel Board (Board) [FN1] to set aside and annul its order revoking the appointment of appellant Wayne L. Ferdig to a state civil service position, and to reinstate appellant in said position.

FN1 Respondents named in the court below were the following: (a) The Board and members Joseph L. Wyatt, Jr., Robert S. Ash, May Layne Bonnell, Ford A. Chatters and Samuel Leask, Jr.; (b) Theodore J. Walas; Frederick Granberg and Murray J. Hunter, three individuals entitled to certification for the position involved on the alleged ground that appellant's certification was illegal; and (c) nine individuals ranking above appellant on the employment list on the alleged ground that the allowance of veterans' preference credits to appellant was illegal. The record discloses that only those named in (a) and (b) appeared in the court below. Respondents named in (a) have appeared in this court through the Attorney General; respondent Walas did not file a brief herein but appeared by counsel at oral argument; the other respondents have not appeared herein.

The facts are not in dispute and, as disclosed by the trial court's findings and the documents in the record,

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are as follows: On May 14, 1962, appellant was appointed to the class of Refrigeration Engineman with no veterans' preference requested or applied to his score. On March 12, 1963, he was transferred to the class of Office Building Engineer.

On July 20, 1963, appellant took an examination for class of Chief Engineer II in the Department of General Services and the employment list established on October 1, 1963, ranked him as number 16. On October 17, 1963, he applied to the Department of Veterans Affairs (Department) for a veterans' preference, presenting a certificate of discharge. This document was issued by the United States Naval Service and certified in substance that appellant, described therein as "Apprentice Seaman, Class M-1" had been honorably discharged from said service. It indicates on its face appellant's service in the United States Naval Reserve, as distinguished from the United States Navy; another document in the record refers to appellant's service as "war-time service in the merchant marine." As a result of said presentation, the Department of Veterans Affairs notified the Board that veterans' preference points were applicable to appellant's score, thereby moving appellant up to number 4 on the list.

As a result of a waiver by a person ahead of him, appellant then became one of the top three on the list and thus eligible ***100** for appointment. On August 24, 1964, he was appointed to the position of Chief Engineer II. Without the addition of veterans' points, he would not have been within the top three on the list.

On September 25, 1964, the question was raised with the Department of Veterans Affairs as to whether the application of veterans' preference points to appellant's case was proper. The Department then requested appellant to resubmit the documents supporting his claim therefor. On November 9, 1964, approximately nine weeks after appellant's appointment to the position, the Department advised appellant that his application for the points had been approved erroneously. Appellant objected to this determination and the Departent directed an inquiry to the appropriate federal agency as to whether appellant's service and training in the Naval Service was considered active duty in the armed forces of the United States.

On January 4, 1965, an officer of Local 411 of the Union of State Employees, by letter to the Board, questioned the legality of appellant's appointment as Chief Engineer II. Shortly thereafter the Judge Advocate of the Department of the Navy advised the Department of Veterans affairs that appellant had performed no active duty or other active naval service. The latter Department thereupon notified both appellant and the Board that it had removed appellant's veterans' preference. On April 9, 1965, the Board, after a hearing, made its order revoking appellant's appointment "from the beginning."

The trial court, concluding that the Board had acted lawfully, denied appellant's petition for a peremptory writ of mandate and discharged the alternative writ theretofore issued. This appeal followed.

Appellant makes no claim before us that he is, or ever was, a veteran as that term is used in Government Code section 18973 [FN2] which provides for additional credits for veterans attaining passing marks in specified examinations. Essentially he advances two contentions: First, that the jurisdiction of the Board to remove civil service employees is expressly limited by statute and appellant's removal was not authorized by any statute; and second, that although the Board's action in crediting him with veterans' preference points was erroneous, ***101** it had nevertheless become final and the Board was without jurisdiction to reconsider or correct it.

FN2 Hereafter, unless otherwise indicated, all section references are to the Government Code.

We turn first to the circumstances of appellant's appointment. The record before us establishes without any contradiction that appellant was not entitled at any time to the veterans preference points which advanced him from number 16 to number 4 and eventually to number 3 on the list, and thereby made him eligible for appointment.

(1) Section 18973 at the times here material provided that in certain examinations "a veteran with 30 days or more of service" who becomes "eligible for certification from eligible lists by attaining the passing mark established for the examination" shall be allowed specified additional points. The statute further provided: "For the purpose of this section, 'veteran' means any person who has served full time for 30 days or more in the armed forces in time of war or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States, or during the period September 16, 1940, to December 6, 1941, inclusive, or during the period June 27, 1950, to

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January 31, 1955, and who has been discharged or released under conditions other than dishonorable, ..." [FN3]

FN3 Section 18973 underwent minor revisions in 1967 and 1968 which are not material in the present case.

(2) Appellant was not a "veteran" within the meaning of the above statute. His service in the merchant marine did not satisfy the statutory service requirements specified as essential for a veterans' preference. The plain fact of the matter is that appellant was not entitled to any veterans' preference credits. Indeed, appellant himself seems to concede all this.

Authority to determine the allowance of veterans' preferences emanates from the California Constitution [FN4] and has been in turn conferred by the Legislature upon the Department of Veterans Affairs. (§ 18976.) [FN5] The Department is thus ***102** charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference. We think it is clear that in carrying out this responsibility the Department must make its determination in accordance with the statute allowing the additional credits. (§ 18973; see fn. 3, *ante.*)

FN4 Section 7 (entitled "Veterans' Preferences") of article XXIV (entitled "State Civil Service") of the California Constitution provides: "Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

FN5 Section 18976 provides: "Request for and proof of eligibility for veterans' preference credits shall be submitted by the veteran to the Department of Veterans Affairs. The procedures and time of filing such request shall be subject to rules promulgated by the Department of Veterans Affairs. After the State Personnel Board certifies that all parts of an examination have been completed and the relative standings of candidates are ready to be computed the Department of Veterans Affairs shall notify the State Personnel Board which candidates have qualified for veteran preference credits on the examination."

But the veteran himself has some responsibility in these matters. Under section 18976: "Request for and *proof of eligibility for veterans' preference credits* shall be submitted *by the veteran* to the Department of Veterans' Affairs." (§ 18976). (Italics added.) In the instant case, appellant's application for veterans' preference made on an official form of the Department is before us. At the top of the document in large bold type appears the following: "Instructions and Eligibility Requirements Are Listed on the Back of This Application." The reverse of the document contains, among other things, an explicit statement of the eligibility requirements in accordance with the language of section 18973. [FN6] Immediately above appellant's signature on the face of the application appears the following: "Signature: I Hereby Certify that I am eligible for veterans' preference and that the statements on this application are true, and I agree and understand that any misrepresentation of material facts herein may cause forfeiture of all right to any employment in the service of the State of California."

FN6 For example the first sentence reads in pertinent part as follows: "Only veterans with active service in the *armed forces* of the United States *in time of war,* or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States ... may receive a 10-point preference on State of California civil service examination ...." (Italics added.)

(3a) In sum, not only was the allowance of a veteran's preference to appellant unauthorized because he was at no time a veteran; it was also made as a consequence of appellant's erroneous representation to the Department that he was a veteran, when in fact he was not. Although appellant's representation may have been made in good faith and the Department's action may be characterized as a mistake, nevertheless the fact remains that the Department notified the Board that appellant was a candidate who qualified for veterans' preference credits on the examination (§ 18976) when in fact he did not.

(4) The action of the Department which appellant invoked by his request for veterans' preference credits was an integral ***103** part of the civil service system established by the people (Cal. Const., art. XXIV; see *Boren v. State Personnel Board* (1951) 37 Cal.2d

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634, 639 [234 P.2d 981]) and implemented by the Legislature through the State Civil Service Act (Act) (§ § 18500-19765). This system is grounded upon the constitutional mandate that permanent appointments and promotion in the state civil service shall be "based upon merit, efficiency and fitness as ascertained by competitive examination." (Cal. Const., art. XXIV, § 1; see Gov. Code, § § 18500, 18930, 18950). The Act provides a detailed method of carrying out this mandate (§ 18500, subds. (a) and (c)) so that among other objectives, appointments shall be based upon merit and fitness (§ 18500, subd. (c) (2)) and state civil service employment can be made a career. (§ 18500, subd. (c) (3).) It is manifest from an examination of the Act that the Legislature has taken great pains to prescribe exactly how appointment to state civil service positions is to be made. (See for example § § 18532, 18900, 18950, 19052.) This finds emphatic confirmation in section 19050: "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, *and not otherwise.* Except as provided in this part, appointments to vacant positions shall be made from employment lists." (Italics added.)

(5) Viewing in this context the provisions of the Act dealing with veterans' preferences, we have no hesitancy in concluding that where, as in the instant case, a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credits, the Department of Veterans Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (*United States Fid. & Guar. Co. v. Superior Court* (1931) 214 Cal. 468, 471 [6 P.2d 243]; *Pacific Employers Ins. Co. v. French* (1931) 212 Cal. 139, 141-142 [298 P. 23]; *Grigsby v. King* (1927) 202 Cal. 299, 304 [260 P. 789]; *Garvin v. Chambers* (1924) 195 Cal. 212, 220- 223 [232 P. 696]; *Motor Transit Co. v. Railroad Com.* (1922) 189 Cal. 573, 577 [209 P. 586]; see ***104***Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822 [215 P.2d 441]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d 264, 266 [125 P.2d 42]; *Allen v. McKinley* (1941) 18 Cal.2d 697, 705 [117 P.2d 342]; 1 Am.Jur.2d Administrative Law, § 70, p. 866.) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (See cases cited immediately above; see 2 Am.Jur.2d, Administrative Law, § 188, pp. 21-22.) (3b) In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void. (See *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192 P.2d 929]; *Patten v. California State Personnel Board* (1951) 106 Cal.App.2d 168, 172-175 [234 P.2d 987]; *Pinion v. State Personnel Board* (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185]; *Campbell v. City of Los Angeles* (1941) 47 Cal.App.2d 310, 313 [117 P.2d 901].) To hold otherwise in the case before us would be to frustrate the purpose of the civil service system.

Having concluded that appellant was not entitled to the appointment in the first place and that his appointment was void, we proceed to determine whether the Board had jurisdiction to revoke his appointment "from the beginning" and to remove him from his position. As we have already pointed out, appellant attacks such action on two broad grounds: First, he argues, the jurisdiction of the Board is expressly limited by statute and no statute authorizes his removal; secondly, since at the time of his removal he had already performed efficient service for more than the six months' probationary period, he had become a permanent employee and his appointment had become final.

Appellant's first argument is launched from section 19500 [FN7] which deals with the tenure of permanent employees and their separation from state civil service. The gist of the argument is that none of the methods of separation delineated in section 19500 apply in the instant case, and that since the Legislature ***105** has designated these methods of separation, it has of necessity excluded all others. The argument is misconceived and indeed ignores the circumstances of the problem before us. We are obviously not dealing with any of the situations covered by section 19500; nor are we dealing with a removal for cause based on any of the causes for discipline specified in section 19572.

FN7 Section 19500 provides: "The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated

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> from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement *or terminated for medical reasons under the provisions of Section 19253.5."*
> Section 19253.5 makes provision for a medical examination of an employee for purposes of evaluating his capacity to perform his duties.

What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

(7) It is true, as appellant argues, that the "State Personnel Board is a body of special and limited jurisdiction [and] ... has no powers except such as the law of its creation has given it." (*Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287 [112 P.2d 341].) (8) But article XXIV, section 3 of the California Constitution directs that the Board "shall administer and enforce" the civil service laws. The jurisdiction of the Board, including its adjudicating power is derived directly from this section. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 637-638; *Neely v. California State Personnel Board* (1965) 237 Cal.App.2d 487, 488-489 [47 Cal.Rptr. 64]) and the Board's authority is governed by the Constitution as well as by the Civil Service Act. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 640- 641.)

Additionally we note that the Act provides in section 18670: "The board may hold hearings and make investigations *concerning all matters relating to the enforcement and effect of this part* and rules prescribed hereunder. It may inspect any State institution, office, or other place of employment affected by this part to *ascertain whether this part and the board rules are obeyed.*

"The board shall make investigations and hold hearings at the direction of the Governor or the Legislature or upon the petition of an employee or a citizen *concerning the enforcement and effect of this part and to enforce the observance of the provisions of Article XXIV of the Constitution and of this part* and the rules made hereunder." (Italics added.)

The provisions of the Constitution and of the Act to which ***106** we have just referred, considered in the light of the purpose, objective and entire scheme of the civil service system, convince us that in the matter here under review the Board was invested with the power, and, indeed, charged with the duty, to "administer and enforce" the applicable sections dealing with veterans' preference credits. (§ § 18973, 18976; see text accompanying fn. 3, *ante*; see fn. 5, *ante.*) Thus, after having been notified by the Department of Veterans Affairs which candidates had qualified for veterans' preference credits (§ 18976), it was the duty of the Board to apply such credit (§ 18974) and eventually to certify the three highest names on the eligible list to the appointing power. (§ 19057.) Essentially and in the final analysis, it was the Board which was charged with the responsibility of coordinating all of the procedures of the Act to the end of certifying only those persons who were lawfully entitled to the position. [FN8] In this constitutional and legislative scheme, a determination made by the Department contrary to the provisions of the Act, albeit in good faith, as to qualification for veterans' preference credits could not be conclusive upon the Board. If this were so, the Board's power to administer and enforce the Act would be eroded and that body would be compelled to certify for appointment persons who were in fact not entitled to the position.

> FN8 We emphasize that the determination of eligibility for veterans' preference credits is only one step in a procedure designed to have promotions and appointments based upon merit, efficiency and fitness. To accomplish this objective, the Board is charged, inter alia, with the responsibility of administering competitive examinations (§ 18930), setting passing grades (§ 18937), determining each competitor's earned rating (§ 18936), modifying these ratings by applying veterans' preference points (§ 18974), preparing eligible lists of those persons who may be lawfully appointed to any position within the class for which the examination is held (§ 18900), and certifying the three highest names to the appointing power. (§ 19057.)

(3c) We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the

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certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws. *107

(9) We are satisfied that the Board was well within its power in entertaining the challenge made to the legality of appellant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully made, although made in good faith. In this, as we have already pointed out, the Board apparently received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined appellant's eligibility for veterans' preference credits and removed the preference. In the light of this background-an objection raised with the Department only a month after appellant's appointment, an objection made to the Board approximately three months later, and the prompt review of the matter by both agencies-appellant's insistent claim to an appointment to which he was not entitled in the first place, is exposed as utterly groundless. We can apprehend neither reason nor fairness in the position of appellant, who seemingly acknowledges that he was at no time a veteran within the terms of the statute but nevertheless insists that he should be permitted to retain the veteran's benefits to which he was never entitled.

We therefore reject appellant's arguments, first, that the Board having once made a good faith determination as to appellant's position on the list and having acted upon it, had no reserved power to annul its action; and second, that the appointment having once been accepted in good faith by appellant who performed efficiently in the position for the probationary period, could not be thereafter revoked by the Board.

As to the first argument, we have already explained why the Board had jurisdiction to review the matter and to take the corrective action it did. Our conclusions on this point are consistent with California precedents. In the cases already cited exemplifying the principle that appointments in violation of the civil service laws are void, it was recognized that the appropriate board had jurisdiction to correct the unlawful action taken. In *Campbell v. City of Los Angeles, supra,* 47 Cal.App.2d 310, mandate was denied to compel reinstatement of a civil service employee who had been reappointed after having been illegally restored to the eligibility list by the civil service commission and was subsequently discharged on the ground that since his restoration to the list was illegal, his appointment was illegal. Although the discharge seems to have been initially made by the department head, it was ***108** passed upon and sustained by the civil service commission. In *Pinion v. State Personnel Board, supra,* 29 Cal.App.2d 314, the court denied mandate to compel the Board to recognize the petitioners, who had permanent status under civil service, as properly holding certain civil service positions although they had been actually certified for only a class of junior positions. It was there said: "The only positions lawfully held by these petitioners are those for which they were examined and to which they were certified and appointed in the manner provided by law." (29 Cal.App.2d at p. 318.) In *Aylward v. State Board of Chiropractic Examiners, supra,* 31 Cal.2d 833, 839, we said: "Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board [citations], but mandate will lie to compel the board to nullify or rescind its void acts. [Citation.] While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." [FN9]

FN9 Strangely enough, appellant while challenging the jurisdiction of the Board to take corrective action in the case before us, appears to recognize the inherent inequity of his position and goes out of his way to inform us that he is *not* arguing that a court, rather than the Board, "could not ... have

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removed [him] from his position pursuant to its general equity jurisdiction."

(10) Appellant's second argument, namely, that his appointment could not be revoked after the expiration of a six months' probationary period, is also without merit. Section 19173 provides: "Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. ..." Here, appellant was qualified for the position in question because he passed the examination, but he was not eligible to be certified for it; it is not disputed that he ***109** performed satisfactorily up to the time of his dismissal. Therefore, none of the grounds provided in section 19173 were available to the appointing power (Department of General Services) or the Board to dismiss appellant during his probationary period. Nor was section 19173 intended to cure any defect in certification and appointment deriving from violation of the civil service statutes. Appellant's separation from the position to which he now seeks reinstatement was effectuated under the implied power of the Board to rectify appointments made in violation of the civil service laws. For this reason, provisions for rejection during the probationary period are inapposite here.

It is convenient at this point to observe that *after* the occurrence of the events here involved and *after* the decision of the Court of Appeal in this case, the Legislature at its 1968 regular session enacted Government Code section 19257.5 which provides: "Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning *if such action is taken within one year after the appointment.*" (Italics added.) (Added by Stats. 1968, ch. 500, § 1; in effect November 13, 1968.) The above section is of course not applicable to the case at bench. We wish to make clear, nevertheless, that our views and holdings in the instant case apply to a situation arising before the enactment of the statute and should not be deemed as derogating from, or otherwise affecting the proper operative effect of, the above statute, particularly the last clause thereof.

(11) Finally, appellant contends that the Board by its own rules was divested of jurisdiction "to accept the appeal" or to take action on April 9, 1965. The point of this argument is that appellant's appointment was made on August 24, 1964. and under the Board's rule 64 "every appeal shall be filed with the board ... within 30 days after the event happened upon which the appeal is based. Upon good cause being shown the board ... may allow such an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed." Therefore, argues appellant, the protest made by the officer of the union on January 4, 1965, was an untimely appeal.

There are two answers. Assuming, that the above rules ***110** governed, we think that any "appeal" to the Board was timely made after the Department of Veterans Affairs on January 19, 1965, formally notified the Board that appellant's veterans' preference had been "removed." Second, and more importantly, we do not believe that it was necesary to file an "appeal" to the Board, which, upon the matter being called to its attention, clearly had jurisdiction to review and correct the initial action taken.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

Cal.,1969.

Ferdig v. State Personnel Bd.

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In re THIERRY S., a Person Coming Under the Juvenile Court Law. DONALD D. KING, as Chief Probation Officer, etc., Plaintiff and Respondent,
v.
THIERRY S., Defendant and Appellant
Crim. No. 19663.

Supreme Court of California

July 22, 1977.

SUMMARY

A petition was filed in juvenile court alleging that a minor had damaged railroad property. The evidence connecting him with the offense, which the minor admitted, had been obtained when, without a warrant, he was placed in temporary custody by a peace officer called to the scene of a vandalism of school property. The vandalism, thought by the officer to be a misdemeanor, had been reported to him by an eyewitness, and had not been committed in the officer's presence, as required by Welf. & Inst. Code, § 625.1, for detentions of minors without a warrant. Nevertheless, the trial court declared the minor a ward of court pursuant to Welf. & Inst. Code, § 602, and placed him on probation. (Superior Court of San Luis Obispo County, No. 12393, Richard C. Kirkpatrick, Judge.)

The Supreme Court reversed, holding that Welf. & Inst. Code, § 625.1, with its "in the presence of the arresting officer" requirement, prevailed over Welf. & Inst. Code, § 625, subd. (a), which, containing no such limitation, provided for temporary detentions, without a warrant, merely when the officer had reasonable cause to believe the minor was a person described in specified sections of the code, including § 602 (one who has broken the law). This was so because, as far as the "presence of the arresting officer" requirement was concerned, there was an irreconcilable conflict, and Welf. & Inst. Code, § 625.1, being the later enactment, impliedly repealed the conflicting part of Welf. & Inst. Code, § 625, subd. (a). Therefore, the only evidence on which the judgment of the trial court was based, obtained through the illegal detention, was tainted, and should have been suppressed. With regard to the reference to § 602***728** in Welf. & Inst. Code, § 625, subd. (a), the Supreme Court noted that an Assembly bill seeking to eliminate it had failed to take effect when another bill, passed in the same legislative session, and retaining the reference, was the later of the two bills to be approved by the Governor, and thus in the absence of effective "double jointing" by the Legislature, lost precedence under the "highest chapter number rule."(Opinion by Wright, J., [FN*] with Tobriner, Acting C. J., Mosk and Richardson, JJ., Sullivan, J., [FN†] and Kaus, J., [FN‡] concurring. Separate concurring opinion by Clark, J.)

FN* Retired Chief Justice of California sitting under assignment by the Acting Chairman of the Judicial Council.

FN† Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

FN‡ Assigned by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Delinquent, Dependent, and Neglected Children § 25--Judgment, Order, or Decree--Based on Tainted Evidence--Illegal Temporary Detention.
A peace officer's temporary detention of a minor suspected of a misdemeanor or (vandalizing a school building) was invalid, where, though the offense was not committed in the officer's presence but merely reported to him by an eyewitness, the detention was made without a warrant and was thus in violation of Welf. & Inst. Code, § 625.1. Evidence discovered by the officer as an incident to such detention, indicating another offense by the minor, was therefore tainted, and it was reversible error, in a subsequent juvenile court proceeding, to rely solely on such evidence to declare the minor a ward of the court as one who had broken the law (Welf. & Inst. Code, § 602).

[See **Cal.Jur.3d,** Delinquent and Dependent Children, § 76; **Am.Jur.2d,** Juvenile Courts and Delinquent and Dependent Children, § 35.]

(2a, 2b) Statutes § 11--Enactment--Failure of Bill Under Highest Chapter Number Test--Juvenile Court Law--Temporary Detentions.
Assem. Bill No. 911 (1971 Reg. Sess.), to the extent that it sought to delete the reference to "Section 602" in ***729**Welf. & Inst. Code, § 625, subd. (a)

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(providing that a peace officer could, without a warrant, take into temporary custody a minor under the age of 18 when the officer had reasonable cause for believing that such person was a minor described in § § 600, 601, and 602), was without effect on its enactment as Stats. 1971, ch. 1730. Assem. Bill No. 2887 (1971 Reg. Sess.), which affected the same code provision, retained the reference to § 602 therein, and contained no "double-jointing" provision with respect to the other bill, was the later of the two bills to be signed into law by the Governor, thereby receiving the later chapter number (Stats. 1971, ch. 1748), and precedence over the other.

(3a, 3b) Statutes § 51--Construction--Codes--Conflicting Provisions-- Same Session Enactments--"Highest Chapter Number Rule"--Basis and Application.

Under the "highest chapter number rule," applicable when two or more bills, enacted at the same session of the Legislature, are at variance or in conflict, the one that prevails, on being translated into a statute, is the one with the highest chapter number assigned to it by the Secretary of State, irrespective of the order of passage of the bills by the Legislature itself. The rule, deriving from the proposition that a bill is not enacted into a statute until it has been signed by the Governor and transmitted by him to the Secretary of State, and from the provision, in Gov. Code, § 9605, that the statute that is enacted last prevails, is based on the presumption (Gov. Code, § 9510) that the order of receipt by the Secretary of State, upon which the chapter number depends, is the order in which the bill was approved by the Governor. Such presumption may, however, be overcome (Evid. Code, § 602 et seq.), by evidence that the Governor actually approved the bills in an order different from that indicated by the chapter numbers.

(4) Statutes § 51--Construction--Codes--Conflicting Provisions--Same Session Enactments--"Double Jointing" Procedure.

"Double jointing," a procedure that may be applied by the Legislature when two pending bills, amendatory in nature, would affect the subject code provision or statute in a conflicting or varying manner, consists of drafting an alternative version of the code section or statute in question in incorporating the changes proposed by both bills, which is then included in at least one of the two bills, and of adding thereto a statement of legislative intent to the effect that if both bills are enacted then the amendments proposed by both bills shall be given effect in the form set forth in the alternative version.***730**

(5a, 5b) Constitutional Law § 36--Distribution of Governmental Powers-- Between Branches of Government--Doctrine of Separation of Powers--Governor's Control Over Legislation--Order of Approval.

No abridgment of the separation of powers doctrine can validly be predicated on the fact that, whereas Cal. Const., art. IV, § 10 (specifying the manner in which the Governor may act on bills sent to him after passage by both houses of the Legislature) does not expressly grant him the authority to control legislation by the order in which he approves them, Gov. Code, § § 9510, 9605, may effectively allow him to do so, in the case of multiple bills intended to amend the same code section or statute, either by virtue of the order in which he signs them, or by virtue of the order in which, having signed them, he transmits them to the Secretary of State, who must give them consecutive chapter numbers in the order of their receipt, thereby raising the presumption that the latest enactment to be received was the latest to be approved and thus the one to be given precedence. The separation of powers doctrine is maintained because, regardless of the actual or presumed order of approval by the Governor, the Legislature may ensure the particular result it desires by inserting "double jointing" provisions in the bills.

(6a, 6b) Delinquent, Dependent, and Neglected Children § 8--Care and Custody of Children--Arrest and Detention--Statutory Conflict--Offense in Presence of Arresting Officer.

Insofar as Welf. & Inst. Code, § 625.1, imposes an "in the presence of the arresting officer" requirement for arrests of juvenile misdemeanants without a warrant, whereas Welf. & Inst. Code, § 625, contains no such limitation, there is no rational way in which the two statutes may be reconciled. Of the two code provisions, Welf. & Inst. Code, § 625.1, being the later enactment with respect to such conflict, prevails, it being immaterial that the effective date of an amendment to Welf. & Inst. Code, § 625, introduced in the same legislative session as Welf. & Inst. Code, § 625.1, was the same as the effective date of the latter, where the amendment bore no relation to the conflict in question.

(7) Statutes § 16--Repeal--By Implication--As Limited to Irreconcilable Conflicts.

When two or more statutes concern the same subject matter and are in irreconcilable conflict, the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature and thus, to the extent of the conflict, impliedly

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repeals the earlier enactment. There is, however, a***731** presumption against operation of the doctrine, which is recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(8) Statutes § 51--Construction--Codes--Conflicting Provisions--Same Session Enactments--Highest Chapter Number Rule as Exclusive Method of Interpretation.
When two or more bills, enacted at the same session of the Legislature, are at variance or in conflict, the "highest chapter number rule" and related analyses constitute the exclusive method designated by the Legislature for interpreting legislative intent and resolving the variance or conflict.

COUNSEL

Grundell, Smith & Farmer, Duenow, Burke & Smith, David C. Fitzpatrick, Christopher A. Helenius and Harry E. Woolpert for Defendant and Appellant.

Alden J. Fulkerson, Keith C. Monroe and Stephan G. Saleson as Amici Curiae on behalf of Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, James H. Kline and Kathleen M. Crain, Deputy Attorneys General, for Plaintiff and Respondent.

Bion M. Gregory and James L. Ashford as Amici Curiae on behalf of Plaintiff and Respondent.

WRIGHT, J. [FN*]

FN* Retired Chief Justice of California sitting under assignment by the Chairman of the Judicial Council.

Thierry S. was declared a ward of the juvenile court after a finding was made that he was a person described in ***732** Welfare and Institutions Code section 602. [FN1] He appeals from the ensuing judgment (a dispositional order granting probation) and asserts on both statutory interpretation and constitutional grounds that his arrest without a warrant for an alleged misdemeanor was illegal because the offense was not committed in the presence of the arresting officer. He argues that evidence obtained as a result of such arrest and custody which followed was tainted and should have been suppressed by the juvenile court.

FN1 Section 602 provides in relevant part: "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime ... is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."
Unless otherwise specified, all statutory references are to sections of the Welfare and Institutions Code.

(1a) In light of applicable rules of statutory interpretation, we agree with the minor's statutory contentions and conclude that a warrant is required before a minor may be arrested or taken into temporary custody based on the alleged commission of a misdemeanor outside the presence of the arresting officer. Lack of compliance with the warrant requirement in the present case tainted evidence essential to the wardship finding and, accordingly, we reverse the judgment. [FN2]

FN2 Because we reverse the judgment on a statutory basis we do not reach the further contention that the warrantless arrest was constitutionally impermissible on equal protection grounds. (See, however, *People v. Olivas* (1976) 17 Cal.3d 236, 245-251 [131 Cal.Rptr. 55, 551 P.2d 375].)

An extended recitation of the facts in this case is not essential to our resolution of the central issue before us. Although there is considerable disagreement over the necessity of obtaining a warrant before taking a juvenile into custody under circumstances such as those in the present case, the People have never disputed the minor's assertion that if he was taken into custody illegally the evidence relied upon by the juvenile court was tainted by that initial illegality. Consequently, we summarize only the most basic facts.

Deputy Sheriff Bolts was dispatched to a local schoolyard in response to a citizen's telephone call. When he arrived he saw the minor and another juvenile seated on the ground, their legs bound by a rope. An adult approached Deputy Bolts and indicated that he had detained the two boys after he had observed them standing near the broken window of a schoolroom which had apparently been vandalized only a short time***733** before his arrival.

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Based on the representation of the citizen-informant and an inspection of the damaged schoolroom, Bolts concluded that there was probable cause to believe that the juveniles were responsible for the damage and that they therefore fell within section 602 as minors who had violated the law defining misdemeanor vandalism (Pen. Code, § 594, subd. (c)). He informed the boys that they were under arrest and transported them to a local detention facility from which they were ultimately released to the custody of their parents. At about the time of their release, Bolts observed certain physical evidence which later connected the boys with vandalism of a number of railroad signal boxes and produced other evidence relied upon by the juvenile court in reaching its section 602 finding. The finding is based solely on evidence of the railroad vandalism and no further action was taken in regard to the schoolroom incident. [FN3]

FN3 The People suggest, as an additional ground for upholding the judgment, that the custody of the boys was a citizen's arrest to which Deputy Bolts simply provided assistance. (Pen. Code, § § 837, 839.) That theory lacks merit for two reasons. First, such a justification was never put forth by the People in the trial court. Second, even if such a theory had been raised, Bolts testified that he and no other person placed the boys under arrest for an offense not committed in his presence.

(2a) The minor relies on section 625.1 as imposing by negative implication a requirement that a warrant must be obtained before a peace officer can take a juvenile into temporary custody based on the alleged commission of a misdemeanor outside of the arresting officer's presence. [FN4] The People, on the other hand, argue that section 625, subdivision (a) rather than section 625.1 controls in such situations and further contend that section 625 expressly authorizes peace officers to take juveniles into "temporary custody" without a warrant for violation of a criminal law as long as any such arrest is based upon reasonable cause. [FN5] The minor, in response, does not dispute that section controlled***734** the taking of minors into custody pursuant to section 602 prior to the enactment of section 625.1. He argues, however, that when section 625.1 was enacted in 1971 it took precedence over section 625 insofar as arrests pursuant to section 602 were concerned. Resolution of these conflicting claims necessitates a review of the statutory history of both section 625 and section 625.1 and also involves the application of certain rules of statutory interpretation including those set forth in Government Code section 9605. [FN6]

FN6 Before proceeding further with our analysis, we must first clarify certain terminology which we utilize in the remainder of this opinion. Neither section 625 nor section 625.1 refer to the term "arrest." (Cf. Pen. Code, § 836.) Instead, both sections use the phrase "take into temporary custody" to describe the procedure employed by peace officers acting pursuant to those sections to detain juveniles believed to have violated a criminal law. When an individual, be he adult or juvenile, has had his personal liberty restrained by a peace officer acting on the belief that the individual has violated a criminal law, there is no meaningful difference between characterization of that detention as an "arrest" or "temporary custody." (Cf.

FN4 Section 625.1 provides: "A peace officer may, without a warrant, take a minor under the age of 18 into temporary custody as a person described in Section 602:
(a) Whenever the officer has reasonable cause to believe that the minor has committed a public offense *in his presence*.
(b) When the minor has committed a felony, although not in the officer's presence.
(c) Whenever the officer has reasonable cause to believe that the minor has committed a felony, whether or not a felony has in fact been committed.
(d) Whenever the minor has been involved in a traffic accident and the officer has reasonable cause to believe that the minor had been driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug." (Italics added.)

FN5 The People argue that at the time that the minor was taken into custody in 1975 section 625, subdivision (a) provided: "A peace officer may, without a warrant, take into temporary custody a minor: (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Sections 600, 601, or *602*, ..." (Stats. 1971, ch. 1748, § 69, italics added.)
The foregoing version of the statute is that

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which appeared in the unofficial codes following the 1971 session of the Legislature and which was retained in those codes until the statute was again amended in 1976. (See Deering's Ann. Welf. & Inst. Code, § 625, subd. (a) (1976 pocket supp.) p. 56; West's Ann. Welf. & Inst. Code, § 625, subd. (a) (1972 ed.) p. 145.) As we describe hereinafter, there is some dispute over whether this version of the statute was that which became operative on the effective date of the Statutes of 1971. *People v. Olivas, supra,* 17 Cal.3d 236, 244-245.) Furthermore, the Penal Code itself defines arrest as "taking a person into custody, in a case and in the manner authorized by law." (Pen. Code, § 834.) In the present case Deputy Bolts testified that after he took the two boys into custody he informed them that "they were under arrest." As "temporary custody" and "arrest" constitute essentially identical procedures we use those terms interchangeably and attach no particular significance to the use of either one.

At common law it was the general rule that a warrant was required for a misdemeanor arrest unless the offense amounted to a breach of the peace and was committed in the presence of the arresting officer. (5 Am.Jur.2d, Arrest, § 28, p. 718; 1 Torcia, Wharton's Criminal Procedure (12th ed. 1974) Arrest, § 63, p. 168; Comment, *Arrest With and Without a Warrant* (1927) 75 U.Pa.L.Rev. 485-486.) The warrant requirement was designed as a protection against the abuses of arbitrary arrests and continues to serve that purpose today. As society became increasingly complex and personal mobility increased, however, the need for public security resulted in the development of statutes expanding the authority of peace officers to undertake misdemeanor arrests. In California the*735 breach of the peace requirement was eliminated and officers are now authorized to make misdemeanor arrests without a warrant as long as the arresting officer has reasonable cause to believe that such an offense has been committed in his presence. (Pen. Code, § 836.)

Prior to 1960, Penal Code section 836 provided the only statutory standard for misdemeanor arrests in either adult or juvenile contexts. In that year the Governor's Special Study Commission on Juvenile Justice issued a report on the juvenile court law, culminating a three-year comprehensive review of that subject. The commission's report contained findings and proposed a large number of statutory changes designed to make the juvenile court law, which had gone without basic revision since its enactment in 1915, more responsive to the needs of a modern and more complex society. One recommendation was the enactment of a provision in the Welfare and Institutions Code specifically authorizing warrantless juvenile misdemeanor arrests if based on reasonable cause to believe that a minor had broken any state or federal law or local ordinance. (Rep. of the Governor's Special Study Com. on Juvenile Justice (1960) pt. I, pp. 42-43, 65 (hereinafter, Report).)

In support of its recommendation the commission noted that under the then existing state of the law there was little uniformity in the arrest procedures used by various law enforcement agencies throughout the state. Its research revealed that only a few agencies generally complied with the warrant requirement of Penal Code section 836 when arresting minors, while most police and sheriff's departments simply took juveniles into custody ignoring the fact that the misdemeanor had not been committed in the presence of the arresting officer. Other departments commonly utilized the premise that the minor was not receiving proper parental control or was in danger of leading "an idle, dissolute, lewd, or immoral life," (former § 700, subds. (b), (k), enacted Stats. 1937, ch. 369, repealed Stats. 1961, ch. 1616, § 1) as grounds for an arrest. Some agencies even charged such minors with felonies because of concern over the possibility of false arrest suits. (Report, pt. I, p. 43, pt. II, p. 96.) In view of the foregoing practices the commission concluded that warrantless misdemeanor juvenile arrests based solely on probable cause, i.e., without the "in the presence of the arresting officer" requirement of Penal Code section 836, should be expressly authorized by statute. In addition, because a minor falls within the jurisdiction of the juvenile court whenever he violates any law or ordinance defining*736 crime (§ 602), the commission further concluded that introduction of a warrant requirement by inclusion of an "in the presence" requirement in the new provision would serve no useful purpose.

The result of the commission's recommendation was the enactment of section 625, subdivision (a) which in relevant part then provided as it does now that a peace officer may, without a warrant, take a minor into temporary custody when the officer "has reasonable cause for believing that such minor is a person described in Sections 600, 601, or *602*, ..." (Stats. 1961, ch. 1616, § 2, italics added; see fn. 4, *ante*.) Our concern is with the statute's reference to

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section 602, for it is that provision which confers authority to arrest a juvenile based on the alleged violation of a criminal law. (See fn. 1, *ante*.) No relevant changes were made in section 625 until 1971. In that year a sequence of events occurred involving the amendment of section 625 and the enactment of section 625.1 which gives rise to the dispute over the validity of the arrest in the present case.

Three bills affecting the right of peace officers to undertake misdemeanor juvenile arrests pursuant to section 625 were enacted into statutes during the 1971 session of the Legislature. Two of these bills, Assembly Bill No. 910 (A.B. 910) and Assembly Bill No. 911 (A.B. 911), were concerned solely with the question of juvenile arrests, while the third, Assembly Bill No. 2887 (A.B. 2887), was an omnibus measure which, with a few exceptions, lowered the age of majority from 21 to 18 years by amending a broad range of statutes. One of the many statutes amended by A.B. 2887 to lower an age reference was section 625. A.B. 911 was also designed to amend section 625 but, as we discuss hereinafter, despite the fact that it was enacted and chaptered in the Statutes of 1971, the relationship between A.B. 911 and A.B. 2887 was such that A.B. 911 never acquired the force of law and thus section 625 was never amended thereby. A.B. 910 enacted section 625.1 which, as we have seen, established a stricter standard for misdemeanor juvenile arrests by imposing the "in the presence of the arresting officer" requirement for all warrantless arrests with exceptions not here pertinent. The chaptering sequence of these three bills, and in particular that of A.B. 911 and A.B. 2887 constitutes the central factor in the statutory interpretation analysis involved in this case.

When they were first introduced into the Assembly, only one of the three bills in question, A.B. 910, affected section 625. Among other*737 things, A.B. 910 proposed to amend section 625 by adding language which would have had the effect of prohibiting peace officers from making warrantless arrests of juveniles for alleged misdemeanor violations unless the offenses were committed in the presence of the arresting officers. [FN7] A.B. 910 and A.B. 911 were later completely redrafted in the Senate to propose a two-pronged statutory scheme for temporary juvenile detentions. First, as redrafted A.B. 910 proposed enactment of a new section 625.1 which would be exclusively concerned with standards for juvenile arrests based on alleged violations of any laws defining crime. (See § 602.) Second, A.B. 911 as redrafted proposed to amend section 625, subdivision (a), contingent on the previous enactment of section 625.1, by deletion of the reference to section 602. The effect of the redrafted versions of A.B. 910 and A.B. 911 would have been that section 625 would thereafter have controlled only juvenile detentions pursuant to sections 600 or 601, while new section 625.1 would have been the sole authorization in the Welfare and Institutions Code for arrests pursuant to section 602 - criminal law violations. As we have already noted, the significant feature of new section 625.1 was that it imposed an "in the presence of the arresting officer" standard in misdemeanor cases and thus, unlike section 625, established a warrant requirement when that standard is not met.

FN7 The relevant proposed language read: "For purposes of subdivision (a), reasonable cause for believing that a minor is a person described in Section 602 who has committed a misdemeanor shall be based upon commission of such an offense in the presence of the peace officer detaining the minor." (A.B. 910, as introduced Mar. 11, 1971.)

At the time that A.B. 910 and A.B. 911 were undergoing major revision in the Senate, A.B. 2887 contained no provision affecting section 625. Because subdivision (c) of section 625 contained a reference to the age of 21 years, it was necessary to provide for the reduction of that reference to 18 years. As a result, A.B. 2887 was amended by adding a new provision proposing the necessary change in section 625. [FN8] In order to accommodate the two different amendments to section 625 proposed by A.B. 911 and A.B. 2887, when A.B. 910 and A.B. 911 were redrafted by the Senate a procedure referred to as "double-jointing" took place in regard to A.B. 911. Explication of this term requires a brief summary of the process whereby a bill becomes an operative statute.***738**

FN8 The sole amendment of section 625 as proposed by A.B. 2887 is indicated as follows: "A peace officer may, without a warrant, take into temporary custody a minor: ... (c) Who is under the age of *18* years and who is found in any street or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care." (A.B. 2887, § 69, as amended in the Sen. Nov. 2, 1971.)

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After a single version of a bill has been passed by both houses of the Legislature, it can be enacted into a statute in one of three ways. First, the Governor may sign it within certain time limits set forth in the Constitution. Second, the Governor may veto the bill and return it to the Legislature which may in turn enact the bill into a statute by a two-thirds vote in both houses. Finally, if the Governor fails to take any action on the bill within the constitutional time limits, it automatically becomes a statute. (Cal. Const., art. IV, § 10, subd. (a).)

At any one session of the Legislature more than one bill affecting a particular code section or uncodified law may be enacted into a statute. When a conflict is presented by two or more of such recently enacted statutes it is necessary to provide a procedure to determine which of the conflicting statutes will take precedence. The Constitution itself provides no such mechanism and, therefore, the Legislature consistent with pre-existing judicial authority has provided for rules controlling such situations by enacting Government Code section 9605. [FN9]

FN9 Government Code section 9605 provides: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment. When the same section or part of a statute is amended by two or more acts enacted at the same session, any portion of an earlier one of such successive acts which is omitted from a subsequent act shall be deemed to have been omitted deliberately and any portion of a statute omitted by an earlier act which is restored in a subsequent act shall be deemed to have been restored deliberately.
"In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session and, in the absence of any express provision to the contrary in the statute which has a higher chapter number, it shall be presumed that a statute which has a higher chapter number was intended by the Legislature to prevail over a statute which is enacted at the same session but has a lower chapter number. "For the purposes of this section, every statute of an even-numbered year of a two-year regular session of the Legislature is deemed to bear a higher chapter number than any statute enacted in the odd-numbered year of that session."

(3a) The second paragraph of Government Code section 9605 establishes the rule that when two or more bills enacted at the same session of the Legislature conflict, the statute which is enacted last prevails. When as in the present case two conflicting bills are signed by the Governor during the same session of the Legislature, the bill signed last is the one which takes precedence, for a bill is not *enacted* into a*739 statute until it has been signed by the Governor and transmitted by him to the Secretary of State. (*Davis* v. *Whidden* (1897) 117 Cal. 618, 622 [49 P. 766]; see Note, *Statutory Construction: Conflicting Acts Passed at the Same Session: Higher Chapter Number Prevails* (1956) 3 UCLA L.Rev. 417, fn. 4.) In recognition of this long established rule, the Legislature has provided in Government Code section 9510 a means whereby the order in which bills have been signed can be routinely ascertained: After the Governor has signed and dated a bill it is deposited in the office of the Secretary of State where it is assigned a consecutive chapter number corresponding to the order in which it was received. The order of receipt is presumed to be the order in which the bill was approved by the Governor [FN10] and thereafter when two or more statutes enacted at the same session conflict, the highest chaptered statute is presumed to prevail. [FN11] The "highest chapter number test" has long been the rule in this state and the Governor, the Assembly, the Senate, and the judiciary have consistently relied upon it when acting upon and when interpreting legislation. (*In re McManus* (1954) 123 Cal.App.2d 395, 399-400 [266 P.2d 929].)

FN10 Government Code section 9510 provides: "When the Governor approves a bill, he shall affix his name thereto, with the date of signing, and deposit it in the Office of the Secretary of State, where it becomes the official record. Upon receipt of any such bill, the Secretary of State shall give it a number, to be known as the chapter number. He shall number each bill in the order in which it is received by him, and the order of

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numbering shall be presumed to be the order in which the bills were approved by the Governor."

FN11 Because the Legislature has specified that the statute enacted last is *conclusively* presumed to prevail over earlier statute (Gov. Code, § 9605) but at the same time has not designated the highest chapter number test as a conclusive presumption, we infer that the presumption established by Government Code section 9510 is a rebuttable presumption which can be overcome by evidence that the Governor actually approved bills in a different order than indicated by the chapter numbers. (See Evid. Code, § 602 et seq.)

(4) As a consequence of the highest chapter number rule, the Legislature has developed the procedure known as "double-jointing." In the simplest case of two pending bills affecting the same code section in a conflicting manner, [FN12] double-jointing consists of drafting an alternative version of the code section in question incorporating the changes proposed by both bills which is then included in at least one of the two bills. In addition to the alternative version of the code section a statement of legislative intent is also added to the bill and it provides that if both bills are enacted and affect the same code section, then the amendments proposed by both bills shall be given effect in the form set***740** forth in the alternative version of the code section. (2b) Because the double-jointing provision now before us (see fn. 13 *post*) does not purport to make exception to the highest chapter number rule, however, the double-jointing procedure followed in the instant case would achieve the desired result (incorporation of the changes proposed by both bills) *only* if the statute which is enacted last contains the alternative version of the code section being amended with a relevant declaration of legislative intent. Although the double-jointing procedure took place in the present case it was ineffective because, as we next describe, A.B. 911 and A.B. 2887 were not signed by the Governor in the order contemplated by the Legislature and thus the last-enacted of the two statutes failed to contain the necessary alternative version of section 625.

FN12 We deem that any variance in two such bills constitutes a conflict.

When A.B. 2887 was amended by the Senate to include a provision affecting section 625, that provision of the bill proposed amendment of only subdivision (c) by providing that the age reference therein would be reduced from 21 to 18 years. It is highly significant that the bill *retained* the reference to section 602 in subdivision (a) of section 625.

As stated earlier, when the Senate redrafted A.B. 911 it used a double-jointing procedure by providing for alternative amendments to section 625. Section 1 of A.B. 911 would have made only one change in section 625, deletion of the reference to section 602 in subdivision (a). Due to the fact that A.B. 2887 proposed an amendment of only subdivision (c) of section 625, an alternative version of the amendment to section 625 was proposed. Section 2 of A.B. 911 incorporated both the change proposed by A.B. 2887 and that proposed by section 1 of A.B. 911. Thus section 2 of A.B. 911 proposed not only that section 625 would be amended to delete the reference to section 602 in subdivision (a), but it also proposed that the age reference in subdivision (c) would be reduced from 21 to 18 years.

In order to specify which of the two versions of the amendment to section 625 contained in A.B. 911 and the one version contained in A.B. 2887 would take precedence in the event that both A.B. 911 and A.B. 2887 were enacted into statutes, a statement of legislative intent was incorporated as section 3 of A.B. 911. In sum that statement provided that if A.B. 911 and A.B. 2887 were both enacted into statutes in a form which would affect section 625, and A.B. 2887 was chaptered before A.B. 911 (in other words, if A.B. 911 was approved by the Governor *after* A.B.***741** 2887), then the amendments proposed by both bills would be given effect in the alternative version of section 625 contained in section 2 of A.B. 911. [FN13]

FN13 In far from unambiguous language, section 3 of A.B. 911 declared: "It is the intent of the Legislature, if this bill and Assembly Bill No. 2887 are both chaptered and amend Section 625 of the Welfare and Institutions Code, and this bill is chaptered after Assembly Bill No. 2887, that the amendments to Section 625 proposed by both bills be given effect and incorporated in Section 625 in the form set forth in Section 2 of this act. Therefore, *Section 625* of this act shall become operative only if this bill and Assembly Bill No. 2887 are both chaptered, both amend Section 625, and Assembly Bill No. 2887 is chaptered before this bill, in which case Section 1 of this act shall not become operative." (Italics added.)

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Although neither of the parties to this appeal nor any of amici have noted the point, we observe that the emphasized portion of the second sentence in section 3 contains an obvious mistake which has been present since Section 3 was first incorporated into A.B. 911 in the Senate. Rather than a reference to "Section *625* of this act," we believe the clear intent of the paragraph is that the reference should have been to "Section *2* of this act." This follows because while A.B. 911 contained several references to "Section 625," the bill itself was composed of only four sections. Thus there exists no "Section 625 *of this act*." In order to avoid this obvious absurdity we construe the reference to "Section 625" which appears at the beginning of the second sentence in section 3 of A.B. 911 as meaning "Section 2." (See *People v. King* (1865) 28 Cal. 265, 274-276; *Ex parte Hedley* (1866) 31 Cal. 108, 114; 45 Cal.Jur.2d, Statutes, § 131, p. 638.)

Despite the fact that both bills were enacted into statutes the chaptering sequence specified by section 3 of A.B. 911 never occurred because the Governor signed the bills in the *reverse* order from that in which they were received from the Legislature. A.B. 2887 was enrolled and sent to the Governor by the Legislature on November 23 while A.B. 911 was not sent to him until seven days later on November 30. Had the bills been approved in that same order section 3 of A.B. 911 would have taken complete effect and section 625 would have been amended to reflect the changes proposed by both bills. Although both bills were eventually approved by the Governor on December 14, [FN14] A.B. 911 was signed *before* A.B. 2887. [FN15]*742

FN14 Due to the legislative recess required by article IV, section 3 of the Constitution which began upon adjournment of the Legislature on December 2, 1971, the Governor's approval of the bills on December 14th was within the prescribed time limits for action on enrolled bills.

FN15 It has been suggested that the Governor was simply unaware of the effect of signing the two bills in the order he did particularly because A.B. 2887 (the age of majority bill) and two other controversial measures were signed last on December 14 while the other 25 bills also approved on that date were signed in the order of their bill numbers. The possibility of such an oversight is unlikely, however, in view of the fact that the Governor received a routine "Report on Enrolled Bill" from the Legislative Counsel's office in regard to both A.B. 911 and A.B. 2887 specifically stating the effect of signing the bills in either order.

The effect of this reversed order of enactment was that A.B. 911 was chaptered lower (ch. 1730) than A.B. 2887 (ch. 1748) and therefore pursuant to the highest chapter number rule as set forth in Government Code section 9605 and the failure of the terms of the double-jointing provision to make any exception thereto, the version of section 625 contained in A.B. 2887 prevailed over both versions of section 625 contained in A.B. 911. Thus on the effective date of the statutes enacted in the 1971 legislative session, March 4, 1972, the *only* amendment of section 625 which occurred was reduction of the age reference in subdivision (c). The reference to section 602 in subdivision (a) of section 625 was *unaffected* and it remained as it had since that section was first enacted in 1961.

By itself, the reference to section 602 in subdivision (a) of section 625 creates no ambiguity in the statutory scheme for misdemeanor juvenile arrests. An ambiguity appears, however, because section 625.1 (Stats. 1971, ch. 1415; A.B. 910) also became an operative statute for the first time on March 4, 1972, the effective date of the amendment to section 625. Because both section 625 and section 625.1 now purport to provide for section 602 arrest situations, an obvious conflict exists.

It has been suggested that there is in fact no conflict between section 625 and section 625.1 because the enactment of A.B. 911 resulted in an amendment of section 625 by the removal of the section 602 reference contained in subdivision (a) of section 625. Therefore, it is argued, section 625.1 is the sole authority in the Welfare and Institutions Code controlling section 602 arrests. Such an argument ignores the highest chapter number rule by which A.B. 2887 is deemed to have negated the purported intent to remove the section 602 reference contained in subdivision (a) of section 625. It is claimed, however, that the rule, as adopted by the Legislature in Government Code section 9605, is in violation of article IV, section 10 of the Constitution. That section specifies the manner in which the Governor may act on a bill which has been sent to him after passage by

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both houses of the Legislature. [FN16]*743 Because that constitutional provision fails to grant to the Governor the authority to control legislation by the order in which he approves such bills, it is urged that the highest chapter number rule is an abridgment of the division of powers set forth in the Constitution.

FN16 Article IV, section 10, subdivision (a) of the Constitution provides in relevant part: "Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor. The Governor may veto it by returning it with any objections to the house of origin, which shall enter the objections in the journal and proceed to reconsider it. If each house then passes the bill by rollcall vote entered in the journal, two thirds of the membership concurring, it becomes a statute. A bill presented to the Governor that is not returned within 12 days becomes a statute ...." (The remainder of the subdivision deals largely with the time limit for action which is in effect near the end of legislative sessions.)

(3b) The foregoing contention is nothing more than a request that we overrule our decision in *Davis v. Whidden, supra*, 117 Cal. 618, 622, wherein we held that a bill does not become a statute until it is approved by the Governor, and thus conflicts between statutes enacted at the same legislative session must be resolved by examination of their order of approval by the Governor. We are urged to hold in place of this long-established rule that conflicts between such statutes are to be resolved by examination of the order of their passage by the Legislature. (Compare *People v. Mattes* (1947) 396 Ill. 348 [71 N.E.2d 690].)

(5b) No persuasive grounds are urged which convince us that the highest chapter number rule violates the division of powers doctrine set forth in the Constitution. It does not necessarily follow that because article IV, section 10 does not expressly grant to the Governor the power to control the order in which legislation may take effect, that such a procedure infringes legislative prerogatives. The separation of powers doctrine is necessarily conditioned by the constitutional provision which manifestly involves the Governor in the legislative process to the extent provided therein. It provides not only how, through the Governor's action or inaction a legislative bill becomes a statute but also, inferentially at least, when enactment occurs. As it provides the Governor with the right to control, within limits, when an enactment occurs, it cannot be denied that he may elect, again within limits, the relative order in which enactments may occur. It appears, moreover, that the Legislature has not sacrificed any control to the Governor, as it retains the power to condition the operation of a statute or a series of statutes on the action the Governor may take in respect thereto. It could have, had it chosen to do so, provided "double jointing" provisions in both A.B. 911 and A.B. 2887 which would have insured the particular result it desired regardless of the order of approval by the Governor because in either case the last enacted statute would have contained an alternative version of section 625. We reaffirm our holding in *Davis v. Whidden, supra*, 117 Cal. 618, 622,*744 and continue to follow the highest chapter number rule as set forth in Government Code section 9605.

(6a) As we have previously noted, the significant difference between the two statutes in question is that section 625.1 imposes an "in the presence of the arresting officer" requirement for warrantless juvenile misdemeanor arrests, while section 625 contains no similar limitation. In order to resolve the conflict between these differing arrest provisions we turn to the doctrine of implied repeal. (7) When two or more statutes concern the same subject matter and are in irreconcilable conflict the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier enactment. Repeals by implication, however, are not favored and there is a presumption against operation of the doctrine. (*Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292 [140 P.2d 657, 147 A.L.R. 1028].) "They are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.'" (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].)

(6b, 8) Insofar as section 625.1 imposes an "in the presence of the arresting officer" requirement for warrantless juvenile misdemeanor arrests and section 625 contains no such limitation, there is no rational way in which the two statutes may be reconciled. We must, accordingly, ascertain which statute constitutes the later enactment. Section 625.1 was enacted in the 1971 legislative session and became effective on

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March 4, 1972. Although section 625 as *amended* also became effective on that date, it was amended only as to an unrelated matter. Government Code section 9605 provides for the instant precedence issue: "Where a section or part of a statute is amended, it is not considered as having been repealed and reenacted in the amended form. *The portions which are not altered are to be considered as having been the law from the time when they were enacted.*" (Italics added.) In the present case, the amendment of subdivision (c) in section 625 by the age of majority bill (Stats. 1971, ch. 1748; A.B. 2887) did not, as we have already indicated, alter the reference to section 602 contained in subdivision (a) of the statute. It***745** therefore follows that subdivision (a) of section 625 dates from 1961 when it was first enacted. (Stats. 1961, ch. 1616, § 2.) Accordingly, insofar as section 625, subdivision (a) conflicts with section 625.1 on the subject of misdemeanor juvenile arrests, the former section was impliedly repealed by enactment of section 625.1 in 1971. [FN17]

FN17 Notwithstanding the long and relatively complicated analysis we have engaged in to reach our conclusion one further observation is appropriate. Although it can be argued that we could have reached the same result by simply analyzing the purpose behind section 625.1 and concluding therefrom that the Legislature obviously intended it to supersede the relevant portion of section 625, subdivision (a), having failed to do so only through inadvertence, we have not done so for a very specific reason - in this state the highest chapter number rule and related analyses, when applicable, constitute the exclusive method designated by the Legislature for interpreting legislative intent and resolving conflicts between statutes enacted at the same session. In *People v. Williams* (1954) 124 Cal.App.2d 32 [268 P.2d 156], the court disregarded the highest chapter number rule as set forth in *Davis v. Whidden, supra*, 117 Cal. 618, 622, concluding that the Legislature failed only through inadvertence to include certain language added to section 859 in a statute enacted at an earlier time in the same session when section 859 was again amended by a second statute a short time later. As a consequence of that conclusion the court reasoned that the statute with the *lower* chapter number should prevail. The reaction of the Legislature to the *Williams* decision was swift and unmistakable. It legislatively mandated, through amendment of Government Code section 9605 in 1955 by addition of the language now contained in the second paragraph of that code section, that the highest chapter number rule *must* be used in resolving conflicts between statutes enacted at different times but during the same session of the Legislature. (See Stats. 1955, ch. 5, § 5; Review of Selected 1955 Code Legislation (Cont.Ed.Bar 1955) § 95, pp. 207-209.) Finally, the highest chapter number rule is more desirable than the *Williams* approach because without such a rule the controlling version of a code section which is amended by two or more statutes at a single session of the Legislature could never be ascertained without a judicial determination. (See Note, *Statutory Construction: Conflicting Acts Passed at the Same Session: Higher Chapter Number Prevails, supra*, 3 UCLA L.Rev. 417, 418-419.) Thus it is inaccurate to say that we could have more simplistically resolved the instant case by interpreting the Legislature's intent - for application of the highest chapter number rule is what manifests the Legislature's intent in such a case.

(1b) In view of the foregoing, the arrest of Thierry in 1975 was governed by section 625.1. Because he was arrested without a warrant for the alleged commission of a misdemeanor which had not been committed in the presence of the arresting officer, the arrest was invalid. As a consequence of that illegal arrest the evidence relied upon by the juvenile court was tainted and should have been suppressed. Because there is no other material evidence that the minor came within the provisions of section 602, the finding cannot be supported.

The judgment is reversed.

Tobriner, Acting C. J., Mosk, J., Richardson, J., Sullivan, J., [FN*] and Kaus, J., [FN†] concurred.***746**

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

FN† Assigned by the Chairman of the Judicial Council.

CLARK, J.

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I concur in the majority opinion insofar as it holds that Assembly Bill No. 911 (A.B. 911) did not take effect to delete the reference to Welfare and Institutions Code section 602 from the provisions of section 625 of that code. (*Ante*, p. 742.) The later enacted Assembly Bill No. 2887 (A.B. 2887) restored the reference to section 602. The case then comes within the express provision of the second part of the second sentence of Government Code section 9605: "When the same section or part of a statute is amended by two or more acts enacted at the same session, any portion of an earlier one of such successive acts which is omitted from a subsequent act shall be deemed to have been omitted deliberately and *any portion of a statute omitted by an earlier act which is restored in a subsequent act shall be deemed to have been restored deliberately*." [FN1] (Italics added.)

FN1 Government Code section 9605 provides: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment. When the same section or part of a statute is amended by two or more acts enacted at the same session, any portion of an earlier one of such successive acts which is omitted from a subsequent act shall be deemed to have been omitted deliberately and any portion of a statute omitted by an earlier act which is restored in a subsequent act shall be deemed to have been restored deliberately.
"In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session and, in the absence of any express provision to the contrary in the statute which has a higher chapter number, it shall be presumed that a statute which has a higher chapter number was intended by the Legislature to prevail over a statute which is enacted at the same session but has a lower chapter number.
"For the purposes of this section, every statute of an even-numbered year of a two-year regular session of the Legislature is deemed to bear a higher chapter number than any statute enacted in the odd-numbered year of that session."

I further agree with the majority's conclusion that the "double jointing" provision of A.B. 911 cannot be given effect. By its own terms, the "double jointing" provision only became operative if A.B. 911 was chaptered after A.B. 2887 (see *ante*, p. 741, fn. 13), and this did not occur. Thus, as the majority hold, the duly enacted statutes were ***747**Welfare and Institutions Code section 625, as set forth in A.B. 2887 [FN2] and section 625.1 as set forth in Assembly Bill No. 910. [FN3]

FN2 Welfare and Institutions Code section 625 as amended by A.B. 2887 provided: "A peace officer may, without a warrant, take into temporary custody a minor: (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Sections 600, 601, or *602*, or ...." (Italics added.)
Section 602 of that code refers to a minor "who violates any law ... or any ordinance ...."

FN3 Welfare and Institutions Code section 625.1 provides: "A peace officer may, without a warrant, take a minor under the age of 18 into temporary custody as a person described in Section 602: [¶] (a) Whenever the officer has reasonable cause to believe that the minor has committed a public offense in his presence. [¶] (b) When the minor has committed a felony, although not in the officer's presence. [¶] (c) Whenever the officer has reasonable cause to believe that the minor has committed a felony, whether or not a felony has in fact been committed. [¶] (d) Whenever the minor has been involved in a traffic accident and the officer has reasonable cause to believe that the minor had been driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug."

I also agree with the majority's ultimate conclusion that an arrest without a warrant for the alleged commission of a misdemeanor committed outside the presence of the arresting officer is invalid. However, in reaching this conclusion I travel a different path

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from the majority.

"As we stated in *In re Williamson* (1954) 43 Cal.2d 651, 654 [276 P.2d 593], 'It is the general rule that where the general 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.*' [Citations.]" (Italics added; *People v. Gilbert* (1969) 1 Cal.3d 475, 479 [82 Cal.Rptr. 724, 462 P.2d 580].) This court recently reiterated the principle in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420 [128 Cal.Rptr. 183, 546 P.2d 687], quoting the underscored words. An exception to the general-special rule of construction is made where a contrary legislative intent is clearly expressed. (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588 [35 Cal.Rptr. 601, 387 P.2d 377]; *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 565 [89 Cal.Rptr. 897].)

The general-special rule of construction finds its clearest application when, as in the instant case, the special provision follows closely upon the general provision. Courts commonly set forth a general proposition***748** and then in succeeding sentences proceed to amplify, modify, explain, qualify or set forth exceptions. Indeed, I did so in the immediately preceding paragraph. There is no reason why the Legislature should not be permitted to do so in consecutively numbered code sections.

It is immaterial whether section 625 or section 625.1 is deemed enacted first. Section 625.1 is obviously the special statute, and it should be given effect.

Cal.,1977.

In re Thierry S.

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Briefs and Other Related Documents

Supreme Court of California
Lesli Ann McCLUNG, Plaintiff and Appellant,
v.
EMPLOYMENT DEVELOPMENT DEPARTMENT et al., Defendants and Respondents.
No. S121568.

Nov. 4, 2004.

Background: A state Employment Development Department (EDD) auditor, who alleged she was sexually harassed by a lead auditor, sued EDD and the lead auditor for hostile work environment and failure to remedy hostile work environment under the California Fair Employment and Housing Act (FEHA). The Superior Court, Sacramento County, No. 98AS00092, Joe S. Gray, J., granted summary judgment for defendants. Plaintiff appealed. The Court of Appeal affirmed as to EDD and reversed as to lead auditor. The Supreme Court granted lead auditor's petition for review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:
(1) amendment to FEHA making nonsupervisory employees liable for sex harassment effectuated a change in the law, rather than merely clarifying it, and
(2) amendment imposing liability on nonsupervisory personnel did not apply retroactively.
Judgment of the Court of Appeal reversed and matter remanded.

Moreno, J., filed a concurring and dissenting opinion.

Opinion, 6 Cal.Rptr.3d 504, superseded.

West Headnotes

[1] Constitutional Law 67
92k67 Most Cited Cases
It is the province and duty of the judicial department, to say what the law is; those who apply the rule to particular cases, must of necessity expound and interpret that rule.

[2] Constitutional Law 188
92k188 Most Cited Cases
A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment, because the true meaning of the statute remains the same.

[3] Constitutional Law 188
92k188 Most Cited Cases
A statute has "retrospective effect" when it substantially changes the legal consequences of past events.

[4] Constitutional Law 67
92k67 Most Cited Cases
The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. West's Ann.Cal. Const. Art. 6, § 1.

[5] Constitutional Law 50
92k50 Most Cited Cases

[5] Constitutional Law 67
92k67 Most Cited Cases
Subject to constitutional constraints, the Legislature may enact legislation, but the judicial branch interprets that legislation. West's Ann.Cal. Const. Art. 4, § 1; Art. 6, § 1.

[6] Constitutional Law 67
92k67 Most Cited Cases
Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. West's Ann.Cal. Const. Art. 6, § 1.

[7] Statutes 176
361k176 Most Cited Cases
It is the duty of the court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively. West's Ann.Cal. Const. Art. 6, § 1.

[8] Civil Rights 1106
78k1106 Most Cited Cases
Supreme Court's decision in *Carrisales v.*

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Department of Corrections interpreted the California Fair Employment and Housing Act (FEHA) finally and conclusively as not imposing personal liability on a nonsupervisory coworker for sex harassment, and thus, for purposes of determining the status of the law when state employee's cause of action against her coworker accrued, Legislature's subsequent amendment imposing personal liability on nonsupervisory personnel had to be interpreted as effectuating a change in the law, rather than as a mere clarification of it. West's Ann.Cal.Gov.Code § 12940(j)(3).

|9| Courts 91(1)
106k91(1) Most Cited Cases
The decisions of the California Supreme Court are binding upon and must be followed by all the state courts of California.

|10| Courts 91(.5)
106k91(.5) Most Cited Cases
Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction; it is not their function to attempt to overrule decisions of a higher court.

|11| Statutes 220
361k220 Most Cited Cases
If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration.

|12| Statutes 220
361k220 Most Cited Cases
A legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute.

|13| Constitutional Law 53
92k53 Most Cited Cases
The Legislature has no authority to interpret a statute; interpretation is a judicial task.

|14| Constitutional Law 53
92k53 Most Cited Cases
Although the Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive, the Legislature has no authority simply to say what the statute meant.

|15| Statutes 220
361k220 Most Cited Cases
A declaration that a statutory amendment merely clarified the law cannot be given an obviously absurd effect, and the court cannot accept the legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.

|16| Civil Rights 1006
78k1006 Most Cited Cases

|16| Civil Rights 1106
78k1106 Most Cited Cases
Because the Supreme Court had already finally and definitively interpreted sex harassment provision in the California Fair Employment and Housing Act (FEHA), the Legislature had no power to decide that a later amendment merely declared existing law. West's Ann.Cal.Gov.Code § 12940.

|17| Statutes 174
361k174 Most Cited Cases
A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

|18| Statutes 219(4)
361k219(4) Most Cited Cases
It is the courts' duty to construe statutes, even if this requires the overthrow of an earlier erroneous administrative construction.

|19| Statutes 263
361k263 Most Cited Cases
Generally, statutes operate prospectively only.

|20| Constitutional Law 70.3(3)
92k70.3(3) Most Cited Cases
A statute's retroactivity is, in the first instance, a policy determination for the legislature and one to which courts defer absent some constitutional objection to retroactivity.

|21| Statutes 262
361k262 Most Cited Cases

|21| Statutes 263
361k263 Most Cited Cases
A statute may be applied retroactively only if it

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contains express language of retroactively or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.

|22| Civil Rights 1106
78k1106 Most Cited Cases

|22| Constitutional Law 190
92k190 Most Cited Cases
Amendment to California Fair Employment and Housing Act (FEHA) provision, imposing liability on nonsupervisory personnel for sex harassment, did not apply retroactively to alleged sex harassment in the workplace occurring before amendment; any inference that Legislature intended retroactive application was weak, and creating retroactive liability posed constitutional concerns. West's Ann.Cal.Gov.Code § 12940(j)(2, 3).
See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 760C; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2003) ¶ 10:495 et seq. (CAEMPL Ch. 10-E); Cal. Jur. 3d, Labor, § 74 et seq.; Cal. Civil Practice (Thomson/West 2003) Employment Litigation, § 5:47 et seq.

|23| Constitutional Law 48(1)
92k48(1) Most Cited Cases
Courts are required to construe statutes to avoid constitutional infirmities.

|24| Constitutional Law 46(1)
92k46(1) Most Cited Cases
Before a court entertains the question whether retroactive application of a statute implicates constitutional concerns, the court must be confronted with a statute that explicitly authorized the imposition of liability for preenactment conduct.
*****430 **1017 *469** Law Offices of Guy D. Loranger, Guy D. Loranger; and Shelley Gregory, San Francisco, for Plaintiff and Appellant.

Bill Lockyer, Attorney General, James M. Schiavenza, Louis R. Mauro, Barton R. Jenks and Diana L. Cuomo, Deputy Attorneys General, for Defendant and Respondent Employment Development Department.

Matheny Sears Linkert & Long, Michael A. Bishop and Roger Yang, Sacramento, for Defendant and Respondent Manuel Lopez.

CHIN, J.

[1] "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, ***470** must of necessity expound and interpret that rule." (*Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60.)

This basic principle is at issue in this case. In *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083 (*Carrisales*), we interpreted Government Code section 12940 (hereafter section 12940), part of the California Fair Employment and Housing Act (FEHA). Later, the Legislature amended that section by adding language to impose personal liability on persons *Carrisales* had concluded had no personal liability. (§ 12940, subd. (j)(3).) Subdivision (*****431** j) also contains a statement that its provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).) Based on this statement, plaintiff argues that the amendment ****1018** did not *change,* but merely *clarified,* existing law. Accordingly, she argues, the amendment applies to this case to impose personal liability for earlier actions despite our holding in *Carrisales* that no personal liability attached to those actions.

We disagree. Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power. We also conclude this change in the law does not apply retroactively to impose liability for actions not subject to liability when performed.

I. FACTS AND PROCEDURAL BACKGROUND
In January 1998, plaintiff Lesli Ann McClung filed a complaint against the Employment Development Department and Manuel Lopez, alleging claims of hostile work environment and failure to remedy a hostile work environment under the FEHA, as well as another cause of action not relevant here. The superior court granted summary judgment for defendants, and plaintiff appealed.

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The Court of Appeal affirmed the judgment in favor of the Employment Development Department, but reversed it as to Lopez. In so doing, it held that Lopez was plaintiff's coworker, not supervisor. It also recognized that we had held in *Carrisales, supra,* 21 Cal.4th at page 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, that the FEHA does not "impose personal liability for harassment on nonsupervisory coworkers." Nevertheless, it found Lopez personally liable for harassment under the FEHA. It applied an amendment to the FEHA that imposes personal liability ***471** on coworkers (§ 12940, subd. (j)(3)), even though the amendment postdated the actions underlying this lawsuit. It found that the preexisting statement in section 12940, subdivision (j)(2), that subdivision (j)'s provisions "are declaratory of existing law," "supports the conclusion that [the amendment] merely clarifies the meaning of the prior statute." Ultimately, it concluded that whether "the amendment merely states the true meaning of the statute or reflects the Legislature's purpose to achieve a retrospective change, the result is the same: we must give effect to the legislative intent that the personal liability amendment apply to all existing cases, including this one." "For Lopez," said the Court of Appeal, "the Supreme Court's interpretation of individual liability under FEHA can be said to have come and gone."

We granted Lopez's petition for review to decide whether section 12940, subdivision (j)(3), applies to this case.

II. DISCUSSIOn

A. Background

The FEHA "declares certain kinds of discrimination and harassment in the workplace to be 'unlawful employment practice[s].' (§ 12940.)" (*Carrisales, supra,* 21 Cal.4th at p. 1134, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) In *Carrisales,* we interpreted the FEHA as imposing "on the *employer* the duty to take all reasonable steps to prevent this harassment from occurring in the first place and to take immediate *****432** and appropriate action when it is or should be aware of the conduct," but as not imposing "personal liability for harassment on nonsupervisory coworkers." (*Carrisales, supra,* at p. 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, citing § 12940, former subd. (h)(1).) Later, effective January 1, 2001, the Legislature amended the subdivision of section 12940 that we interpreted in *Carrisales* (now subdivision (j)). (Stats.2000, ch. 1049, § § 7.5, 11.) As amended, section 12940, subdivision (j)(3), provides in relevant part: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee...." It seems clear, and no one disputes, that this provision imposes on nonsupervisory coworkers the personal liability that *Carrisales* said the FEHA had not imposed. Subdivision (j) also states that its ****1019** provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).)

[2][3] We must decide whether the amendment to section 12940 applies to actions that occurred before its enactment. If the amendment merely clarified existing law, no question of retroactivity is presented. "[A] statute that merely *clarifies,* rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" "because the true meaning of the statute remains the same." ***472**(*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507 (*Western Security Bank*).) In that event, personal liability would have existed at the time of the actions, and the amendment would not have changed anything. But if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. "A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Ibid.*) In this case, applying the amendment to impose liability that did not otherwise exist would be a retroactive application because it would "attach[ ] new legal consequences to events completed before its enactment." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (*Landgraf*).) Specifically, it would "increase a party's liability for past conduct...." (*Id.* at p. 280, 114 S.Ct. 1483; accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839, 123 Cal.Rptr.2d 40, 50 P.3d 751 (*Myers*).)

Accordingly, two separate questions are presented here: (1) Did the amendment extending liability in subdivision (j)(3) change or merely clarify the law? (2) If the amendment did change the law, does the change apply retroactively? We consider the former question first. Because we conclude the amendment did, indeed, change the law, we also consider the latter question.

B. Whether the Amendment Changed the Law

[4] "The powers of state government are legislative, executive, and judicial. Persons charged with the

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exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) Thus, "The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326, 109 P.2d 935.)

[5][6][7] The legislative power rests with the Legislature. (Cal. Const., art. IV, § 1.) Subject to constitutional constraints, the Legislature may enact legislation. *****433** (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, 97 Cal.Rptr. 1, 488 P.2d 161.) But the judicial branch *interprets* that legislation. "Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507; see also *People v. Cruz* (1996) 13 Cal.4th 764, 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) Accordingly, "it is the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute finally and conclusively...." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935.)

[8][9][10] ***473** In *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, we interpreted the FEHA finally and conclusively as not imposing personal liability on a nonsupervisory coworker. This interpretation was binding on lower state courts, including the Court of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) "The decisions of this court are binding upon and must be followed by all the state courts of California.... Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Ibid.*)

[11][12][13][14][15][16] It is true that if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what ****1020** an earlier Legislature intended is entitled to consideration. (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.) But even then, "a legislative declaration of an existing statute's meaning" is but a factor for a court to consider and "is neither binding nor conclusive in construing the statute." (*Ibid.*; see also *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52, 276 Cal.Rptr. 114, 801 P.2d 357; *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8, 185 Cal.Rptr. 582.) This is because the "Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean." (*Del Costello v. State of California, supra,* at p. 893, fn. 8, 185 Cal.Rptr. 582, cited with approval in *People v. Cruz, supra,* 13 Cal.4th at p. 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) A declaration that a statutory amendment merely clarified the law "cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214, 187 P.2d 702.) Because this court had already finally and definitively interpreted section 12940, the Legislature had no power to decide that the later amendment merely declared existing law.

On another occasion, the Legislature similarly enacted legislation overruling a decision of this court--which was within its power--but also purported to state that the new legislation merely declared what the law always was--which was beyond its power. In *People v. Harvey* (1979) 25 Cal.3d 754, 159 Cal.Rptr. 696, 602 P.2d 396, we interpreted Penal Code section 1170.1 as not permitting a certain consecutive sentence enhancement. The Legislature promptly amended the statute to permit the enhancement. (Stats.1980, ch. 132, § 2, p. 306.) It also declared that its *****434** intent was "to clarify and reemphasize what has been the legislative intent since July 1, 1977." (Stats.1980, ch. 132, § 1, subd. (c), p. 305.) The judicial response was swift and emphatic. The courts concluded that, although the Legislature may amend a ***474** statute to overrule a judicial decision, doing so *changes* the law; accordingly, they refused to apply the amendment retroactively. (*People v. Savala* (1981) 116 Cal.App.3d 41, 55-61, 171 Cal.Rptr. 882; *People v. Harvey* (1980) 112 Cal.App.3d 132, 138-139, 169 Cal.Rptr. 153; *People v. Cuevas* (1980) 111 Cal.App.3d 189, 198-200, 168 Cal.Rptr. 519; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 866, 168

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Cal.Rptr. 257; *People v. Fulton* (1980) 109 Cal.App.3d 777, 783, 167 Cal.Rptr. 436; *People v. Matthews* (1980) 108 Cal.App.3d 793, 796, 167 Cal.Rptr. 8; see *People v. Wolcott* (1983) 34 Cal.3d 92, 104, fn. 4, 192 Cal.Rptr. 748, 665 P.2d 520.) As one of these decisions explained, this court had "finally and conclusively" interpreted the statute, and a "legislative clarification in the amended statute may not be used to overrule this exercise of the judicial function of statutory construction and interpretation. The amended statute defines the law for the future, but it cannot define the law for the past." (*People v. Cuevas, supra,* at p. 200, 168 Cal.Rptr. 519.)

[17][18] Plaintiff points out that *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, itself postdated the acts alleged in this case and argues that before that decision, nonsupervisory coworkers had been personally liable under the statute. However, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (*Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274; accord, *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 216, 115 S.Ct. 1447, 131 L.Ed.2d 328.) This is why a judicial decision generally applies retroactively. (*Rivers v. Roadway Express, Inc., supra,* at pp. 311-312, 114 S.Ct. 1510; *People v. Guerra* (1984) 37 Cal.3d 385, 399, 208 Cal.Rptr. 162, 690 P.2d 635.) It is true that two administrative decisions had previously interpreted the statute differently than we did. (See *Carrisales, supra,* at pp. 1138-1139, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) But we merely concluded that those decisions ****1021** had misconstrued the statute (*ibid.*); we did not, and could not, amend the statute ourselves. (See *People v. Guerra, supra,* at p. 399, fn. 13, 208 Cal.Rptr. 162, 690 P.2d 635.) It is the courts' duty to construe statutes, " even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935; see also *Rivers v. Roadway Express, Inc., supra,* at pp. 312-313 & fn. 12, 114 S.Ct. 1510 [explaining that a United States Supreme Court decision interpreting a statute stated what the statute had always meant, even if the decision overruled earlier federal appellate court decisions that had interpreted the statute differently].)

Our conclusion that the amendment to section 12940, subdivision (j)(3), changed rather than clarified the law does not itself decide the question whether it applies to this case. It just means that applying the amended section to this case would be a retroactive application. "The fact that application of [the statute] to the instant case would constitute a ***475** retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206, 246 Cal.Rptr. 629, 753 P.2d 585.) We turn now to the question whether the amendment applies retroactively.

*****435 C. Whether the Amendment Applies Retroactively**

[19] "Generally, statutes operate prospectively only." (*Myers, supra,* 28 Cal.4th at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751; see also *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1206-1208, 246 Cal.Rptr. 629, 753 P.2d 585.) "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " (*Landgraf, supra,* 511 U.S. at p. 265, 114 S.Ct. 1483, fns. omitted; see also *Myers, supra,* at pp. 840-841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." (*Landgraf, supra,* at p. 270, 114 S.Ct. 1483.)

[20][21] This is not to say that a statute may never apply retroactively. "[A] statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity." (*Myers, supra,* 28 Cal.4th at p. 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*United States v. Heth* (1806) 3 Cranch 399, 7 U.S. 399, 413, 2 L.Ed. 479; accord, *Myers, supra,* at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "[A] statute may be applied retroactively only if it contains express language of retroactively *or* if other sources

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provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers, supra,* at p. 844, 123 Cal.Rptr.2d 40, 50 P.3d 751.)

[22] We see nothing here to overcome the strong presumption against retroactivity. Plaintiff and Justice Moreno argue that the statement in section 12940, subdivision (j)(2), that the subdivision's provisions merely declared existing law, shows an intent to apply the amendment retroactively. They cite our statement that "where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection ***476** thereto.' " (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507, quoting ****1022***California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d at p. 214, 187 P.2d 702.)

Neither *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, nor *California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d 210, 187 P.2d 702, holds that an erroneous statement that an amendment merely declares existing law is sufficient to overcome the strong presumption against retroactively applying a statute that responds to a judicial interpretation. In *California Emp. etc. Com. v. Payne,* the amendment at issue does not appear to have been adopted in response to a judicial decision. In *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, the only judicial action that had interpreted the statute before the Legislature amended it was a *****436** Court of Appeal decision that never became final. After considering all of the circumstances, we specifically held that the amendment at issue "did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, [the amendment] does not act retrospectively; it governs this case." (*Id.* at p. 252, 62 Cal.Rptr.2d 243, 933 P.2d 507.) Here, by contrast, as we have explained, *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, was a final and definitive judicial interpretation of the FEHA. The amendment at issue here *did* change the law.

Moreover, the language of section 12940, subdivision (j)(2), namely, that "The provisions of this subdivision are declaratory of existing law," long predates the Legislature's overruling of *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083. That language was added to the section in reference to a different, earlier, change to the statute. (Stats.1987, ch. 605, § 1, p.1945.) Any inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law.

Plaintiff and the Court of Appeal also cite statements in the legislative history to the effect that the proposed amendment would only "clarify" the law's original meaning. But these references may have been intended only to demonstrate that clarification was necessary, not as positive assertions that the law always provided for coworker liability. We see no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect to the extent the amendment did change the law. Specifically, we see no clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken. "Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf, supra,* 511 U.S. at pp. 272-273, 114 S.Ct. 1483.)

[23][24] Retroactive application would also raise constitutional implications. Both this court and the United States Supreme Court have expressed concerns that ***477** retroactively creating liability for past conduct might violate the Constitution, although it appears neither court has so held. (*Landgraf, supra,* 511 U.S. at p. 281, 114 S.Ct. 1483 ["Retroactive imposition of punitive damages would raise a serious constitutional question"]; *Myers, supra,* 28 Cal.4th at pp. 845-847, 123 Cal.Rptr.2d 40, 50 P.3d 751; but see also *Landgraf,* at p. 272, 114 S.Ct. 1483 [describing "the *constitutional* impediments to retroactive civil legislation" as "now modest"].) "An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].' [Citations.] That rule reinforces our construction of the [statute] as prospective only." (*Myers, supra,* at pp. 846-847, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "Before we entertained that [constitutional] question, we would have to be confronted with a statute that explicitly authorized" the imposition of liability "for preenactment

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conduct." (*Landgraf, supra,* at p. 281, 114 S.Ct. 1483.) The amendment here contains no such explicit authorization.

For all of these reasons, we conclude that section 12940, subdivision (j)(3), does not apply ****1023** retroactively to conduct predating its enactment.

*****437** III. CONCLUSIon

We reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR and BROWN, JJ.

Concurring and Dissenting Opinion by MORENO, J.

We held in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083 that the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.) does not impose on nonsupervisory coworkers personal liability for harassment. The Legislature later amended Government Code section 12940, subdivision (j), to impose such personal liability. The statute as amended states that its provisions "are declaratory of existing law." (Gov.Code, § 12940, subd. (j)(2).) [FN1]

FN1. All further statutory references are to the Government Code, unless otherwise specified.

I agree with the majority that the Legislature could not, by amending the statute, clarify its meaning in a manner inconsistent with our decision in *Carrisales.* Thus, the amendment must be deemed to have changed, rather than merely clarified, the law. But unlike the majority, I conclude that by purporting to clarify its original intent, the Legislature clearly intended to apply this statutory change retroactively. We must honor this legislative intent, unless prevented from doing so by constitutional concerns.

The majority correctly recognizes that a statute may apply retroactively. As we stated in *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, ***478** 840-841, 123 Cal.Rptr.2d 40, 50 P.3d 751, "[g]enerally, statutes operate prospectively only"; "unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application' [citation].... Under this formulation a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity. [Citation.]"

The majority, however, "see[s] nothing here to overcome the strong presumption against retroactivity." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 435, 99 P.3d at p. 1021.) I disagree. The statute at issue, subdivision (j)(2) of section 12940, states that its provisions "are declaratory of existing law...." In *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244, 62 Cal.Rptr.2d 243, 933 P.2d 507, we recognized the importance of such legislative language: "[E]ven if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. [Citation.] ... Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment.' "

We made the same point half a century earlier in *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213, 187 P.2d 702, in which the Legislature had amended a statute to add a requirement of an "intent to evade the provisions of this act," further stating that the amendment "is hereby declared to be merely a clarification of the original intention of the legislature rather than a substantive change and *****438** such section shall be construed for all purposes as though it had always read as hereinbefore set forth." Despite the Legislature's statement, it was clear that the amendment changed, rather than merely clarified, the law, as no such intent to evade had previously been required. Accordingly, we held that "the language of the 'clarification' provision in this case cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*Id.* at p. 214, 187 P.2d 702.) We recognized, however, that the Legislature's statement indicated a clear ****1024** intent that the amendment apply retroactively: "It does not follow, however, that the 'clarification' provision ... is ineffective for any purpose. It is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of

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its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (*Ibid.*)

***479** In the present case, as in *Western Security Bank* and *California Emp.*, we cannot give effect to the Legislature's statement that the amendment to section 12940, subdivision (j) was declaratory of existing law, but we can give effect to the Legislature's clear expression of its intent that this amendment be given retroactive effect.

The majority notes that the statutory language stating that the provisions of subdivision (j) of section 12940 are declaratory of existing law was originally added to the statute in reference to a 1987 amendment. The majority concludes from this that "[a]ny inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022.) Again, I do not agree.

A statute that is amended is "re-enacted as amended." (Cal. Const., art. IV, § 9.) "The amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions." (*People v. Scott* (1987) 194 Cal.App.3d 550, 554, 239 Cal.Rptr. 588.) As amended, section 12940, subdivision (j) clearly states that its provisions are declaratory of existing law. The circumstance that the same statement had been made in reference to an earlier amendment of the same statute does not lessen the plain meaning of this statutory language. In general, we take it that the Legislature means what it says. In the present case, it is difficult to imagine how the Legislature could have more clearly expressed its intention that the 2000 amendment to subdivision (j) of section 12940, like the earlier amendment, was declaratory of existing law.

Because the Legislature clearly indicated its intent that the amendment to the statute be applied retroactively, we must honor that intent unless there is a constitutional objection to doing so.

The high court addressed the constitutional concerns posed by retroactive application of statutes at some length in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229. The court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *****439**(*Id.* at p. 265, 114 S.Ct. 1483, fn. omitted.) The court noted that "the antiretroactivity principle finds expression in several provisions of our Constitution," including the ex post facto clause, the provision prohibiting the impairment of obligations of contracts, the Fifth Amendment's takings clause, the prohibition of bills of attainder, and the due process clause. (*Id.* at p. 266, 114 S.Ct. 1483.)

***480** The court was careful to make clear, however, that these concerns do not necessarily prohibit retroactive application of statutes: "The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." ****1025**(*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 267-268, 114 S.Ct. 1483, fn. omitted.)

Further, courts must defer to a legislative judgment that a statute should be applied retroactively: "In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483.) Accordingly, the high court declared, "the constitutional impediments to retroactive civil legislation are now modest." (*Ibid.,* italics omitted.)

Significantly, defendant Lopez does not cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, he simply asserts that "to impose personal liability ...

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retroactively should require a 'clear and unavoidable' statement from the Legislature favoring retroactivity...." As explained above, I conclude that the provision stating that the amendment is declaratory of existing law constitutes such a clear statement of intent to apply the amendment retroactively.

Neither does the majority cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, the majority asserts that retroactive application would "raise constitutional implications," while acknowledging that "[b]oth this court and the United States Supreme Court have expressed concerns that retroactively creating liability for past conduct *might* violate the Constitution, *although it appears neither court has so held.* [Citations.]" (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022, italics added.)

I discern no constitutional impediment to giving effect to the Legislature's clear intent to apply the amendment to section 12940, subdivision (j) retroactively. As noted above, the amendment changed the law by imposing upon nonsupervisory coworkers personal liability under the FEHA for harassment, but this did not subject such nonsupervisory coworkers to liability for ***481** harassment for the first time. As we noted in *Carrisales,* "our conclusion [that nonsupervisory coworkers could not be held personally liable under the FEHA] does not necessarily prevent a harasser from being personally liable to the victim under some other statute or theory of tort. All we hold is that the *FEHA* does not *****440** cover harassment short of an unlawful employment practice. The FEHA's noncoverage does not immunize anyone, including a coworker, from the consequences of conduct that is otherwise tortious." (*Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1136, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) And we have recognized "that employment discrimination, including sexual harassment ... can cause emotional distress [and] that such distress is a compensable injury under traditional theories of tort law...." (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 48, 276 Cal.Rptr. 114, 801 P.2d 357, fn. omitted.)

Given the "modest" constitutional impediments to retroactive civil legislation (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483), and the circumstance that harassment by nonsupervisory coworkers was tortious prior to the statutory amendment imposing liability for such conduct under the FEHA, I conclude that there is no constitutional obstacle to the retroactive imposition of personal liability for harassment on nonsupervisory coworkers, as the Legislature intended.

34 Cal.4th 467, 99 P.3d 1015, 20 Cal.Rptr.3d 428, 94 Fair Empl.Prac.Cas. (BNA) 1693, 4 Cal. Daily Op. Serv. 9912, 2004 Daily Journal D.A.R. 13,516

Briefs and Other Related Documents **(Back to top)**

- 2004 WL 1505474 (Appellate Brief) Petitioner's Reply Brief (May. 20, 2004)Original Image of this Document (PDF)

- 2004 WL 1505476 (Appellate Brief) Respondent's Opening Brief on the Merits (May. 03, 2004)Original Image of this Document (PDF)

- 2004 WL 1263741 (Appellate Brief) Petitioner's Opening Brief on the Merits (Apr. 02, 2004)

- 2003 WL 23330868 (Appellate Petition, Motion and Filing) Petition for Review (Dec. 23, 2003)Original Image of this Document (PDF)

- S121568 (Docket) (Dec. 23, 2003)

END OF DOCUMENT

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SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916)
327-4478

SB 1108

UNFINISHED BUSINESS

Bill No: SB 1108
Author: Senate Budget and Fiscal Review Committee
Amended: 7/27/04
Vote: 27 - Urgency

SENATE VOTES NOT RELEVANT

ASSEMBLY FLOOR : 68-7, 7/28/04 - See last page for vote

SUBJECT : Education finance

SOURCE : Author

DIGEST : This bill makes changes to a variety of education-related statutes in order to effectuate the changes included as part of the proposed 2004-05 Budget Act.

Assembly Amendments delete the prior version of the bill and insert the budget-related provisions.

ANALYSIS : This bill makes the following statutory changes:

K-12 Education

School District Equalization . Appropriates $109.9 million for school district revenue limit equalization and specifies the formula for allocating funds. The formula (1) provides funding intended to "equalize" revenue limits up to the 90th percentile of revenue limits statewide, (2)

CONTINUED

is considered "post-SB727" because it equalizes revenue limits after the adjustments that were provided to school districts in the late 1990's based on their excused absence rates, and (3) reflects provisions contained in the most recently amended versions of AB 2178 (Simitian) and SB 1298 (Brulte). This bill also states legislative intent that a new equalization formula be enacted for any equalization funding subsequent to 2004-05 and that the new formula provide an equitable distribution of equalization funding.

Revenue Limit Deficit Factor . Continues deficit factors for school districts and county offices of education revenue limits through 2005-06 and makes adjustments to reflect the appropriation of $270 million in the 2004-05 Budget for deficit factor reduction.

Proposition 98 Split . Suspends the 2004-05 statutory division of Proposition 98 funding among K-12 educational agencies, community colleges, and other state agencies, and instead reflects a division of funding that conforms to that of the 2004-05 Budget.

Proposition 98 Settle Up . Makes annual appropriations of $150 million for each fiscal year, beginning in 2006-07, to school districts and community colleges until the Director of the State Department of Finance reports to the Legislature that the totality of the appropriations have "paid off" any amount that the state owes to fulfill the minimum Proposition 98 guarantee from the 1995-96 fiscal year to the 2003-04 fiscal year. Specifies that funds shall be allocated to school districts based on average daily attendance (ADA) and community colleges based on funded full-time equivalent students (FTES). Further specifies that these appropriations shall be deemed to satisfy any outstanding mandate claims, but permits the Legislature to specify other one-time purposes for the funds.

Education Mandate Suspensions . Expands the 2003-04 suspensions of three reimbursable state mandates--Investment Reports, Law Enforcement Sexual Harassment Training, and County Treasury Oversight Committee--so that the suspensions apply to educational as

well as non-educational agencies. This action conforms to the suspension of these mandates in the 2004-05 budget.

Standardized Testing and Reporting (STAR) Mandate . Requires the Commission on State Mandates to reconsider its decision on the STAR program mandate in light of federal statutes enacted and state court decisions rendered since that decision.

Basic Aid Categorical Funding . Reduces basic aid districts' categorical funding by $2.666 million, a reduction commensurate with the ongoing reductions that non-basic aid districts are taking to their revenue limit funding.

Exclusion of Regional Occupational Centers and Programs (ROC/Ps) from the State Public Employees Retirement System (PERS) Offset . Clarifies existing law to apply the PERS offset (deduction) to joint powers authorities with the exception of ROC/Ps. This language eliminates a loophole in existing law that has been used by school districts to create joint powers authorities for the purpose of avoiding the PERS deduction.

Community Day School Accounting . Allows the "capped" attendance hours of discretionary-expelled community day students to be charged in 2002-03 and 2003-04 against the "uncapped" continuous appropriation for mandatory-expelled attendance hours in order to avoid a deficiency in the funding for discretionary-expelled students.

In-Lieu Cost-of-Living-Adjustment (COLA) . Declares that the 2004-05 COLA rate for K-12 programs (2.41 percent) is in lieu of the COLA that will be applied pursuant to any other law.

2003-04 Proposition 98 Settle-Up Funds . Appropriates $270 million in one-time 2003-04 Proposition 98 funds for a number of specific programs including: $138 million for instructional materials for students in the lowest two deciles of the Academic Performance Index per the Williams lawsuit, $58.4 million for paying off education mandate claims, $12.6 million for Deferred Maintenance per the Williams lawsuit, $6 million to restore funding for the

Arts Work program, and $5 million to restore funding for the Academic Improvement and Achievement program.

Expenditure Period for Program Deferrals . Extends the authorized expenditure period of appropriations made for specified K-12 program deferrals in 2001-02, 2002-03, and 2003-04 by one month each-from June 30 to July 31. This

action is meant to conform to existing apportionment deferrals from one fiscal year to the next.

Continuation of Apportionment Deferrals . Defers $715.2 million in payments for second principal (P-2) apportionments by one month, from June 2005 to July 2006, in order to continue budget savings implemented in recent years by scoring expenditures in the following fiscal year. Ongoing K-12 apportionment deferrals include: $5.9 million for Apprenticeship Programs, $85.9 million for Supplemental Instruction (summer school), $37.1 million for ROC/Ps, $50.1 million for Home-to-School Transportation, $4.1 million for Gifted and Talented Education, $95.4 million for Targeted Instructional Improvement Grant Program, $43.0 million for Adult Education, $4.6 million for Community Day Schools, $5.3 million for Categorical Block Grants for Charter Schools, and $36.9 million for School Safety Block Grants.

Revision of Apportionment Deferral Mechanism . Revises the mechanism for deferring P-2 apportionment payments from 2004-05 to 2005-06 in order to match the $715.2 million in estimated deferrals reflected in the 2004-05 budget.

Special Education Funding for Students Residing in Foster Care . Revises the funding formula for students who reside in licensed children's institutions who are eligible for special education in order to allocate funding based upon the number of foster youth, increase funding for eligible foster youth, remove incentives for placing students in non-public schools, and allow school districts to serve students. The formula follows the recommendations of a $1 million study funded by the 2000-01 budget. The 2004-05 budget contains $38.4 million in new funding for the revised funding formula.

State Library

Telephonic Reading Services for the Blind . Specifies that funding for the telephonic reading service of the California State Library comes from the Deaf and Disabled Telecommunications Program Administrative Committee Fund.

Law Library Fee Collection . Extends to 2010 the sunset date for assessing a $65 civil court fee to support the California State Law Library.

Higher Education

Community Colleges Student Fees . Establishes the student fee at the California Community Colleges at $26 per unit, beginning with the fall 2004-05 academic term.

Community College Apportionment Deferrals . Continues to defer $200,000 million of community college expenditures from the 2004-05 fiscal year to the 2005-06 fiscal year.

Community College Foster Parent Training . Deletes 2003-04 funding for the Foster Parent Training Program. Funds are instead appropriated to the program using another funding source.

Community College Equalization . Specifies the allocation methodology for community college equalization funds appropriated in the Budget Act. Defines districts as either large, medium, or small based on the number of credit full-time equivalent students (FTES). Requires the equalization adjustment to be computed based on the funding level of districts at the 90th percentile.

Dual Admissions Process . Establishes a voluntary dual admissions program at the California State University (CSU) and requests the University of California (UC) Board of Regents to establish a like-program. Specifies that student participation in the dual admissions program is voluntary. Outlines a variety of incentives for UC and CSU to offer otherwise eligible first-time freshman to instead attend a local community college before transferring to a UC or CSU campus. Requires the community colleges to waive fees for dual admission students who are also financially-needy. Waives community college fees for dual

admission participants in 2004-05, regardless of financial need.

Student Aid

Ed Fund Expansion . Expands the authority of EdFUND, a nonprofit auxiliary organization of the California Student Aid Commission (Commission), to provide additional financial-aid related services consistent with the general mission of the Commission and federal law. Requires that the Commission provide at least 45 days advance notice, in writing, to the State Department of Finance and the Joint Legislative Budget Committee describing proposed changes to EdFUND's operating agreement with the Commission, including delineating new services or activities EdFUND intends to undertake as a result of its expansion. Further, requires the Commission to report annually on the actions taken,

costs incurred and revenues derived from various activities of EdFUND related to loan origination, distributions, servicing and repayment, as well as secondary market and private lender activities undertaken by EdFUND.

FISCAL EFFECT : Appropriation: Yes Fiscal Com.: Yes Local: Yes

ASSEMBLY FLOOR :
AYES: Aghazarian, Bates, Benoit, Berg, Bermudez, Bogh, Calderon, Campbell, Chan, Chavez, Chu, Cogdill, Cohn, Cox, Daucher, Dutton, Dymally, Firebaugh, Frommer, Garcia, Hancock, Harman, Jerome Horton, Shirley Horton, Houston, Jackson, Keene, Kehoe, Koretz, La Malfa, La Suer, Laird, Leno, Leslie, Levine, Liu, Longville, Lowenthal, Maddox, Maldonado, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nakano, Nation, Oropeza, Pacheco, Plescia, Reyes, Richman, Ridley-Thomas, Runner, Salinas, Samuelian, Simitian, Spitzer, Steinberg, Strickland, Vargas, Wesson, Wiggins, Wolk, Wyland, Yee, Nunez
NOES: Canciamilla, Corbett, Correa, Dutra, Matthews, Parra, Pavley
NO VOTE RECORDED: Diaz, Goldberg, Haynes, Lieber, Negrete McLeod

NC:mel 7/29/04 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

HUNTINGTON PARK REDEVELOPMENT AGENCY, Petitioner,
v.
MICHAEL A. MARTIN, as Secretary, etc., Respondent
L.A. No. 31861.

Supreme Court of California

Feb 28, 1985.

SUMMARY

A redevelopment agency adopted an ordinance imposing a sales and use tax of 1 percent in conformity with Rev. & Tax. Code, § § 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency). The secretary of the redevelopment agency refused to publish the ordinance on the ground that it violated Cal. Const., art. XIII A, § 4, and art. XIII B. The agency filed a petition for a writ of mandate in the Supreme Court to compel the secretary to publish the ordinance. The court issued the writ of mandate as prayed. The court held that a redevelopment agency is not a "special district" within the meaning of art. XIII A, § 4, which requires a two-thirds vote of the electorate for imposition of special taxes by a county, city, or special district, because it does not have the power to levy taxes. Accordingly, the ordinance adopted by the agency did not violate art. XIII A, § 4. The court also held that the ordinance did not violate art. XIII B, which limits appropriations of state and local governments to the past year's level, because there was a transfer of financial responsibility from the city to the redevelopment agency within the meaning of Cal. Const., art. XIII B, § 3, subd. (a), which permits the transferor and transferee agencies to adjust their respective appropriation limits "for the year in which such transfer becomes effective," and Health & Saf. Code, § 33678, which provides that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" under art. XIIIB, § 3, subd. (a). Although the transfer of responsibility for eliminating urban blight took place prior to the enactment of the ordinance, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. Thus, there is a constant transfer of "financial responsibility for providing services." (Opinion by Mosk, J., with Bird, C. J., Kaus, Broussard, Reynoso and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Lucas, J.) ***101**

HEADNOTES

Classified to California Digest of Official Reports

(1) Public Housing and Redevelopment § 5--Urban Renewal Projects-- Redevelopment Agencies.
Redevelopment agencies are governed by the Community Redevelopment Law. (Health & Saf. Code, § 33000 et seq.). As arms of local legislative bodies, they act on the local level to eradicate blighted areas. To accomplish this goal, these agencies utilize tax-increment financing, authorized by Cal. Const., art. XVI, § 16. Under this scheme, the agency borrows funds and issues bonds to finance a project. The intent is that on completion of the project the property values in the area-and hence property tax revenues-will increase. These increased revenues are allocated between the agency and the taxing entity, the agency receiving only those revenues necessary to pay the costs of redevelopment, including repayment on the bonds.

(2) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Two-thirds Vote Requirement for Imposition of Special Taxes.
Although Cal. Const., art. XIII A, § 4, which provides that "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district," appears to be a grant of power allowing local entities to enact special taxes, it actually has the effect of limiting their enactment. While a majority of the voters may favor a proposal, they are likely to be thwarted by the requirement of obtaining a two-thirds vote. The section is part of the interlocking package of sections in art. XIII A, deemed necessary by the initiative's framers to assure effective real property tax relief, and its purpose is to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes.

(3a, 3b) Public Housing and Redevelopment § 5--Urban Renewal Projects-- Sales and Use Tax Enacted by Redevelopment Agency--Validity--Constitutional Property Tax Limitations.

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A redevelopment agency is not a "special district" within the meaning of Cal. Const., art. XIII A, § 4, which requires a two-thirds vote for imposition of special taxes, since it does not have the power to levy taxes. Redevelopment agencies are neither empowered to, nor do they in fact, levy property taxes; the county tax collector collects all such taxes. (Rev. & Tax. Code, § 2606.) The constitutional and statutory scheme for financing redevelopment agencies-tax-increment financing (***102**Cal. Const., art. XVI, § 16, implemented by Health & Saf. Code, § 33670)-clearly establishes that redevelopment agencies passively receive the revenue from taxes levied by other agencies. Accordingly, an ordinance adopted by a redevelopment agency imposing a 1 percent sales and use tax pursuant to Rev. & Tax. Code, § § 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency) did not violate art. XIII A, § 4.

[See **Cal.Jur.3d,** Public Housing, § 37; **Am.Jur.2d,** Housing Laws and Urban Redevelopment, § 27.]

(4a, 4b) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Two-thirds Vote Requirements for Special Taxes--Meaning of Term "Special District."
Under Cal. Const., art. XIII A, § 4, which permits cities, counties, and special districts, by a two-thirds vote, to impose special taxes on such district, a "special district" is one which may levy a tax on real property. For purposes of § 4, the "levying" of a tax must mean just that: the imposition and collection of the tax.

(5a, 5b, 5c) Public Housing and Redevelopment § 5--Urban Renewal Projects--Sales and Use Tax Enacted by Redevelopment Agency--Validity--Constitutional Appropriations Limit.
An ordinance adopted by a redevelopment agency imposing a 1 percent sales and use tax in compliance with Rev. & Tax. Code, § § 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency) did not violate Cal. Const., art. XIII B (limiting appropriations of state and local governments to the past year's level). There was a "transfer of financial responsibility" from the city to the redevelopment agency within the meaning of Cal. Const., art. XIII B, § 3, subd. (a), which permits the transferor and transferee agencies to adjust their respective appropriation limits "for the year in which such transfer becomes effective," and Health & Saf. Code, § 33678, which provides that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" within the meaning of § 3, subd. (a). Although the transfer from the city to the redevelopment agency of responsibility for eliminating urban blight took place prior to the enactment of the ordinance, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. Thus, ***103** there is a constant transfer of "financial responsibility for providing services."

(6) Constitutional Law § 16--Construction of Constitutions--Construction by Legislature.
Where the Legislature has enacted a law in light of a particular constitutional provision, the Legislature's interpretation of uncertain constitutional terms is entitled to great deference by the courts.

(7) Public Housing and Redevelopment § 5--Urban Renewal Projects.
Elimination of urban blight is a governmental function.

(8) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Limitations on Appropriations.
The goals of Proposition 4, which became Cal. Const., art. XIII B, were the protection of taxpayers from excessive taxation, and the imposition of a thoughtfully drafted spending limit on government. The initiative was thus aimed against excessive taxation and government spending.

COUNSEL

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Charles R. Martin for Respondent.

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MOSK, J.

This is a petition for writ of mandate to compel respondent Martin, Secretary of the Huntington Park Redevelopment Agency (the ***104** Agency), to publish an ordinance adopted by the Agency on August 24, 1982. The ordinance would allow the Agency to levy a sales and use tax. Martin refused to publish the ordinance on the ground that it assertedly violates section 4 of article XIII A, and article XIII B, of the California Constitution.

(1) Redevelopment agencies are governed by the Community Redevelopment Law. (Health & Saf. Code, § 33000 et seq.) As arms of local legislative bodies, they act on the local level to eradicate blighted areas. To accomplish this goal, these agencies utilize tax-increment financing, authorized by article XVI, section 16, of the Constitution. Under this scheme, the agency borrows funds and issues bonds to finance a project. The intent is that on completion of the project the property values in the area - and hence property tax revenues - will increase. These increased revenues are allocated between the agency and the taxing entity, the agency receiving only those revenues necessary to pay the costs of redevelopment, including repayment on the bonds. (*Redevelopment Agency v. County of San Bernardino* (1978) 21 Cal.3d 255, 257, 266 [145 Cal.Rptr. 886, 578 P.2d 133].)

In 1981 the Legislature enacted Senate Bill No. 152 (SB 152). (Stats. 1981, ch. 951, p. 3622.) By means of amendments and additions to the Revenue and Taxation Code and the Community Redevelopment Law, SB 152 provides redevelopment agencies with an additional mode of financing. A redevelopment agency may now impose a sales and use tax of 1 percent or less on retail sales and use of personal property, if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency. (Rev. & Tax. Code, § § 7202.5, 7202.6.) Thus the burden on taxpayers will not increase, because they will obtain a dollar-for-dollar credit against their city taxes for any sums paid to such an agency. An agency is authorized to issue bonds to be paid off from the proceeds of this sales and use tax. (Health & Saf. Code, § 33641, subd. (d).)

On August 24, 1982, the Agency adopted an ordinance (the Ordinance) imposing a sales and use tax of 1 percent in conformity with SB 152. On the same day, the City of Huntington Park (the City) amended its municipal code to provide a tax credit against its sales and use taxes for any taxes paid to the Agency under the Ordinance. The tax will not become operative until the Ordinance is published. (Gov. Code, § 36933, subd. (b).) Respondent Martin has refused to publish the Ordinance, although it is his statutory duty to do so. (Rev. & Tax. Code, § 7202.6, subd. (b); Gov. Code, § 36933, subd. (a).)

The issues we confront are two: whether the Ordinance violates section 4 of article XIII A of the Constitution (requiring "special taxes" to be approved ***105** by two-thirds of the electors before they may be imposed); and whether the Ordinance violates article XIII B of the Constitution (limiting appropriations of the state and local governments to the past year's level). We conclude that the Ordinance does not fall within article XIII A because the Agency is not a "special district." Nor does the Ordinance violate article XIII B, as there has been a transfer of "the financial responsibility of providing services" from the City to the Agency, and thus the City and the Agency may adjust their appropriations limit accordingly.

I. *The Challenge Under Article XIII A*

(2) Article XIII A of the Constitution is the product of Proposition 13, a 1978 initiative aimed at reducing property taxes. Section 4 of that article provides that "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district ...." Although this section appears to be a grant of power allowing local entities to enact special taxes, it actually has the effect of limiting their enactment (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 53 [184 Cal.Rptr. 713, 648 P.2d 935]). While a majority of the voters may favor a proposal, they are likely to be thwarted by the requirement of attaining a two-thirds vote. The section is part of the "interlocking ' package"" of sections in article XIII A, "deemed necessary by the initiative's framers to assure effective real property tax relief." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal.Rptr. 239, 583 P.2d 1281].) The purpose of section 4 is to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes. (*Ibid.*)

(3a) The Agency contends that the Ordinance does not violate section 4 even though it was not submitted to the voters for a two-thirds approval. First, the Agency contends it is not "imposing" a tax: because the taxpayers will have no additional tax burden,

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there is merely a transfer of tax revenues from one governmental entity to another. Second, the levy here is not a "special tax," as it is to be used for general redevelopment purposes. (See *City and County of San Francisco v. Farrell, supra*, 32 Cal.3d at p. 57.) Third, the Agency is not a "special district," as it does not have the power to levy a property tax. (See *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 205 [182 Cal.Rptr. 324, 643 P.2d 941].) We need consider only the last of these contentions, for as respondent concedes, an adverse holding on any of these grounds is fatal to his reliance on article XIII A. (See 31 Cal.3d at pp. 201-202: "if that term ["special district"] does not encompass [petitioner], the two-thirds requirement is ***106** inapplicable to the sales tax in issue here even if it is a ' special tax' within the meaning of the section.")

Section 4 applies to special taxes levied by "Cities, Counties and special districts." The Agency is not a city or county, and thus it will fall within section 4 only if it is a special district. (4a) We considered the meaning of the term "special district" in *Richmond*. Reasoning that section 4 was ambiguous, and "[i]n view of the fundamentally undemocratic nature of the requirement for an extraordinary majority," we concluded that "the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote." (*Id.* at p. 205.) We therefore held that a special district for the purpose of section 4 is one "which may levy a tax on real property." (*Ibid.*)

(3b) Redevelopment agencies are not empowered by law to levy property taxes; the tax collector of the county collects all such taxes. (Rev. & Tax. Code, § 2602.) Nor do redevelopment agencies in fact levy property taxes. Tax-increment financing uses taxes levied not by redevelopment agencies, but "levied and collected as other taxes are levied and collected by the respective taxing agencies." (Cal. Const., art. XVI, § 16.) Health and Safety Code section 33670, implementing and echoing the language of the latter provision, defines "taxing agencies" as "the State of California, any city, county, city and county, district, or other public corporation," and discusses allocation of revenues between these agencies on the one hand, and redevelopment agencies on the other. [FN1] Clearly, the scheme establishes ***107** that redevelopment agencies passively receive the revenue from taxes levied by other agencies.

FN1 Section 33670 provides that the taxes levied are to be divided as follows: "(a) *That portion of the taxes which would be produced by the rate upon which the tax is levied* each year by or for each of the taxing agencies upon the total sum of the assessed value of the taxable property in the redevelopment project as shown upon the assessment roll used in connection with the taxation of such property by such taxing agency, last equalized prior to the effective date of such ordinance, *shall be allocated to and when collected shall be paid to the respective taxing agencies* as taxes by or for said taxing agencies on all other property are paid (for the purpose of allocating taxes levied by or for any taxing agency or agencies which did not include the territory in a redevelopment project on the effective date of such ordinance but to which such territory has been annexed or otherwise included after such effective date, the assessment roll of the county last equalized on the effective date of the ordinance shall be used in determining the assessed valuation of the taxable property in the project on the effective date); and
"(b) *That portion of the levied taxes each year in excess of such amount shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency* to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by such redevelopment agency to finance or refinance, in whole or in part, such redevelopment project. Unless and until the total assessed valuation of the taxable property in a redevelopment project exceeds the total assessed value of the taxable property in such project as shown by the last equalized assessment roll referred to in subdivision (a), all of the taxes levied and collected upon the taxable property in such redevelopment project shall be paid to the respective taxing agencies. When such loans, advances, and indebtedness, if any, and interest thereon, have been paid, all moneys thereafter received from taxes upon the taxable property in such redevelopment project shall be paid to the respective taxing agencies as taxes on all other property are paid." (Italics added.)

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Respondent urges a different interpretation. While he acknowledges that a redevelopment agency does not have the power to levy taxes on real property, he contends that the agencies' indirect participation in the taxing process makes them "special districts": Although the agencies do not impose the taxes themselves, they receive a share of the taxes imposed - thus, they indirectly levy.

The argument is untenable. As explained in *Richmond*, we read section 4 narrowly because it impinges on the democratic process. (31 Cal.3d at p. 205.) To conclude that the "levying" of property taxes includes the passive receipt of revenues from such taxes is an expansion of that concept directly at odds with our mandated narrow reading of section 4. (4b) For purposes of section 4, the "levying" of a tax must mean just that: the imposition and collection of the tax. [FN2]

FN2 In addition, section 11 of SB 152 provides that "the State Board of Equalization shall not administer any sales tax imposed by a redevelopment agency pursuant to this act unless and until an appellate court makes a determination which is final on the merits that such a tax is not a ' special tax' within the meaning of Section 4 of Article XIII A of the California Constitution." Because we hold the Agency not to be a "special district," and thus not within the scope of section 4, such a determination need not be made in this case.

II. *The Challenge Under Article XIII B*

Article XIII B of the Constitution was the result of Proposition 4, a 1979 initiative. Section 1 of that article provides that "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year ...." Section 8, subdivision (b), defines "appropriations subject to limitation" of an entity of local government as "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity ...." Subdivision (c) of the same section defines "proceeds of taxes" to include revenues from licence and user fees in excess of the costs of regulation, investment of tax revenues, and subventions received by the local government from the state. Thus, a governmental entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year. ***108**

The Agency asserts, and respondent concedes, that it does not have an annual appropriations limit, because the revenues from tax-increment financing are not "proceeds of taxes" for the purposes of article XIII B. [FN3] The Agency concedes that the revenues raised by the Ordinance are the "proceeds of taxes." Since the Agency has no appropriations limit, any spending of the revenues it receives through the Ordinance could be in violation of article XIII B.

FN3 Health and Safety Code section 33678, subdivision (a), declares the proceeds received from tax-increment financing to be outside article XIII B. We need not decide the validity of this section, as tax-increment financing is not at issue here, and we find there is a "transfer of financial responsibility" within the meaning of section 33678 and article XIII B, section 3, subdivision (a), discussed below. For the same reasons, we find it unnecessary to consider whether article XIII B applies to redevelopment agencies.

(5a) Section 3, subdivision (a), of article XIII B provides that if "the financial responsibility of providing services is transferred ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount." The Agency urges us to hold that such a transfer has taken place in the present case. Respondent concedes that if such a transfer has taken place article XIII B will not be violated, but insists that nothing has been transferred here but the power to tax.

(6) "Where the Legislature has enacted a law in light of a particular constitutional provision, a settled rule of construction is that the Legislature's interpretation of uncertain constitutional terms is entitled to great deference by the courts." (*Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 [166 Cal.Rptr. 674].) (5b) Health and Safety Code section 33678 was enacted in the first legislative session following the adoption of article XIII B. It provides in part that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" within the meaning of section 3, subdivision (a). SB 152, section 3, subdivision (c), provides that the taxing power it creates in redevelopment agencies is such a

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transfer. [FN4]

FN4 Section 3, subdivision (c), was repealed effective January 1, 1984, before the Ordinance was enacted. (Stats. 1981, ch. 951, § 9, p. 3629.)

That this transfer is consistent with article XIII B, section 3, subdivision (a), is easily demonstrated. (7) It is well recognized that elimination of urban blight is a governmental function. (***109***Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 969 [142 Cal.Rptr. 584]; Health & Saf. Code, § 33750.) (5c) In California, the Community Redevelopment Law recites specifically that it is a state policy to cure blighted areas. (*Id.*, § 33037.) Redevelopment agencies are created to fulfill this governmental function. (*Id.*, § 33703.) Thus, there is a transfer, in Huntington Park as elsewhere, from the City to the Agency of the City's responsibility for providing the service of eradicating urban blight.

Article XIII B, section 3, subdivision (a), allows a shifting of appropriations limits for the year in which the transfer becomes effective. It is true that the transfer here took place prior to the enactment of the Ordinance. However, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. A city may create a redevelopment agency to perform the service of eradicating blight (Health & Saf. Code, § 33101), it may retain the power itself (*id.*, § 33200), or it may have a combination of both working together (*id.*, § 33210). The city has continuing control over the existence of the agency: the city must create the agency (*id.*, § 33101), may dissolve the agency (*id.*, § 33141), and must approve of the agency's plans (*id.*, § 33360). The agency partially funds the redevelopment. For example, Health and Safety Code section 33750 provides that "it is necessary and essential that redevelopment agencies be authorized to make long-term, low-interest loans through qualified mortgage lenders to finance residential construction in order to encourage investment and upgrade redevelopment project areas and increase the supply of housing. Unless redevelopment agencies intervene to generate mortgage funds and to provide some form of assistance to finance residential construction, many redevelopment areas will stagnate and deteriorate because owners and investors are not able to obtain loans from private sources. [¶] The Legislature further finds and declares that financing of rehabilitation ... serves an essential public purpose for the economic renewal of our cities." Thus, there is a constant transfer of "financial responsibility for providing services." Here SB 152, and the Ordinance passed in conformity therewith, facilitate the flow of responsibility from the City to the Agency. The City may therefore pass a portion of its appropriations limit to the Agency in accordance with article XIII B, section 3, subdivision (a).

(8) This conclusion is further supported by analysis of the Ordinance in light of the purposes of article XIII B. Proposition 4, which became article XIII B, was billed by its supporters as the "Spirit of 13" (referring to Prop. 13, which had been adopted a year earlier as art. XIII A). Its goals were the "protection for taxpayers from excessive taxation," and the imposition of a "thoughtfully drafted spending limit" on government. (Ballot Pamp., ***110** Proposed Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) The initiative was thus aimed against excessive taxation and government spending. (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232].)

But neither of these concerns is implicated here. A person will not pay increased sales and use taxes under an ordinance enacted pursuant to SB 152, as an agency may adopt such an ordinance only if the city in which it operates provides a dollar-for-dollar credit against its own sales and use tax. And government spending will not increase, as the city must adjust its appropriations limit downward in proportion to the agency's upward adjustment under article XIII B, section 3, subdivision (a).

Let the writ of mandate issue as prayed.

Bird, C. J., Kaus, J., Broussard, J., Reynoso, J., and Grodin, J., concurred.

LUCAS, J.,

Concurring and Dissenting.

I concur with part I of the majority opinion. I do so reluctantly under compulsion of our holding in *Los Angeles County Transportation Com.* v. *Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]. That case, in my view, was wrongly decided; I agree with Justice Richardson's dissent. (See *Richmond* at p. 209.)

I dissent from part II of the majority opinion and from the judgment. When one governmental entity

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shifts to another the financial responsibility for providing services, the California Constitution permits an apportionment of the transferor's appropriations limit. This apportionment attaches "for the year in which such transfer becomes effective." (Cal. Const., art. XIII B, § 3, subd. (a).) The obvious triggering event for shifting the appropriations limit is the transfer of financial responsibility. It is just as obvious that where there has been no shift in financial responsibility, no apportionment of appropriations limit is allowed.

The majority finds that these strictures are satisfied because the financial responsibility for ending urban blight is constantly transferred to the agency. (*Ante*, p. 109.) I cannot agree. As the majority notes, the financial responsibility for eradicating blight was first transferred from the City of Huntington Park to the agency long ago. (*Ante*, p. 109.) Neither Senate Bill No. 152 (Stats. 1981, ch. 951) nor the city's ordinance shifts any new financial responsibility to the agency. ***111**

All that Senate Bill No. 152 and the city's ordinance have effected is an alternative means of financing services for which the agency *already* has financial responsibility. In my opinion, that is insufficient under the plain language of our Constitution to allow the city to shift part of its appropriations limit to the agency.

Accordingly, I would find that Senate Bill No. 152 and the ordinance improperly allow the agency to exceed its "total annual appropriations subject to limitation" under article XIII B, section 1, of the California Constitution and are thus unconstitutional.

I would deny the writ. ***112**

Cal.,1985.

Huntington Park Redevelopment Agency v. Martin

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United States Court of Appeals,
Ninth Circuit.
The STATE OF NEVADA, Plaintiff-Appellant,
v.
Samuel K. SKINNER [FN*] Secretary of Transportation for the United States;
and A.J. Horner, Chief of the Nevada Division of the Federal Highway
Administration, Defendants-Appellees.

FN* Samuel K. Skinner, Secretary of Transportation, has been substituted for his predecessors, Elizabeth Dole and James M. Burnley II, in accordance with Federal Rule of Appellate Procedure 43(c)(1).

No. 88-2486.

Argued and Submitted June 29, 1989.
Decided Aug. 31, 1989.

State brought action challenging constitutionality of national speed limit. The United States District Court for the District of Nevada, Bruce R. Thompson, Senior District Judge, entered summary judgment in favor of United States, and State appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) even if "coercion theory" of limitation on Congress' spending power remained viable, it was inapplicable because Congress could establish speed limit under authority of commerce clause, and (2) establishment of national speed limit did not violate Tenth Amendment.

Affirmed.

West Headnotes

[1] United States 82(2)
393k82(2) Most Cited Cases
Constitutional spending power empowers Congress to condition receipt of funds, by states or others, on compliance with federal directives; however, exercise of such power must be in pursuit of general welfare, conditions on receipt of federal funds must be reasonably related to articulated goal, Congress' intent to condition funds on particular action must be authoritative and unambiguous, and independent constitutional provision should not bar congressional action. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[2] United States 82(2)
393k82(2) Most Cited Cases
Even if there is viable "coercion theory" of limitation on Congress' constitutional spending power--federal Government may not, in certain circumstances, condition receipt of funds in such a way as to leave state with no practical alternative but to comply with federal restrictions--it is inapplicable if Congress has authority under enumerated power other than spending power to compel states through direct regulation to change their practices. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] Commerce 5
83k5 Most Cited Cases
Congressional finding that activity affects interstate commerce must be afforded controlling deference if there is rational basis for that judgment. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Commerce 3
83k3 Most Cited Cases
Commerce clause forms broadest base of congressional power. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Commerce 82.35
83k82.35 Most Cited Cases
Congress had authority under commerce clause to establish national speed limit, which was rationally related both to securing safe and efficient passage over the roads and conserving fuel in light of foreign embargo so as to revitalize commerce and protect national defense. 23 U.S.C.A. § 101 et seq.; U.S.C.A. Const. Art. 1, § 8, cl. 3.

[6] States 4.16(2)
360k4.16(2) Most Cited Cases
(Formerly 360k4.17)
Tenth Amendment did not bar Congress' valid exercise of its authority under commerce clause to establish national speed limit, notwithstanding State's contention that federal regulations implementing speed limit effectively "commandeered" its regulatory power and required it to enforce unwillingly national speed limit with state personnel and local resources. 23 U.S.C.A. § 101 et seq.; U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10.

***446** Brian McKay, Atty. Gen. of Nevada, Carson City, Nev., Brooke A. Nielsen, Chief Deputy Atty.

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Gen., Nevada Dept. of Transp., Carson City, Nev., for plaintiff-appellant.

Shirley Smith, U.S. Attys. Office, Reno, Nev., Sandra M. Schraibman, Leonard Schaitman, and Robert V. Zener, Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Nevada.

Before TANG, REINHARDT and WIGGINS, Circuit Judges.

REINHARDT, Circuit Judge:

This case raises the first challenge to the constitutionality of the national speed limit. The constitutional question is a fundamental one involving the distribution of powers between the federal government and the states. After fully considering the relevant issues, we decide in favor of the federal government and uphold the national speed limit.

In 1916, Congress enacted the Federal Aid Highway Act ("the Highway Act"). Under the Highway Act, the Federal Government provides funds directly to the States for maintenance of their highways. In 1973, Congress passed the Emergency Highway Energy Conservation Act which was permanently codified as a part of the Highway Act. It required the States as a precondition to receiving federal funds to post a maximum speed limit of 55 miles per hour (mph) on all highways, including secondary roads that were not directly part of the interstate network. While Congress did not order the States to conform their speed limits to the new national standard, it imposed a draconian consequence for noncompliance, denial of all future federal highway grants.

The events giving rise to the current controversy began in June of 1985. In that month, the Nevada state legislature passed legislation increasing the speed limit on Nevada highways. *See* 1985 Nev.Stats. 678 § 3, *codified at* Nev.Rev.Stats. § 484.369 (1985). The new statute, *inter alia,* permitted the Nevada Department of Transportation (Nevada DOT) to post a limit of 70 mph. Because of the state's concern over the reaction of the federal government, the statute contained a self-executing sunset provision. It required the 70 mph limit to be lowered to the national speed limit if and when federal officials threatened to cut off state highway aid.

Section 484.369 went into effect on July 1, 1986. Acting pursuant to their statutory authority, officials of the Nevada DOT established a 70 mph speed limit on a thirty-three mile stretch of Interstate Highway 80 (I-80) between the East Farley Interchange and the I-80 junction with I-95 west of Lovelock, Nevada at 7:30 a.m. on July 1. The federal government responded with alacrity. Approximately sixty seconds after the state's action, appellee A.J. Horner, Chief of the Nevada Division of the Federal Highway Administration, formally advised the Nevada DOT that all future federal funds for state highways would be withheld unless the state reduced the I-80 speed limit so as to comply with the national speed limit. Concurrent with this notice, the 70 mph limit expired by its own terms. [FN1]

> FN1. In 1987, after the fears of oil consumption that fueled the 1973 amendment receded to a degree, Congress again amended the Act. This time, it permitted the States to post a speed limit of 65 mph in low population density areas. Nevada argues that the change in the law does not affect the suit because the revised 55/65 mph limit would still conflict with the 70 mph state enactment. The United States has expressed no disagreement with appellant on this point.

Nevada sued in United States District Court for injunctive and declaratory relief against enforcement of 23 U.S.C. § 154. The state contended that because the Highway Act threatened withholding of approximately 95% of all of Nevada's highway funds, it had no real choice but to comply with the national speed limit provisions. Consequently, Nevada argued, the national limit violated the "coercion" limitation on the Federal Government's Spending Power. The district court rejected this argument and ordered summary judgment for the ***447** United States. Nevada appealed, and we affirm.

1. The Coercion Test in the Abstract

[1] Article 1 specifically grants the Spending and Taxing Powers to Congress. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. 1, § 8, cl. 1. Pursuant to this authority, Congress may condition the receipt of funds, by states or others, on compliance with federal

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directives. The Supreme Court has clearly, and repeatedly, declared that "Congress may further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.)). Moreover, Congress frequently, and with an almost unblemished record of success, [FN2] has under its spending authority promulgated legislation in pursuit of the general welfare that reaches beyond its other enumerated Constitutional powers. *See South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987) (collecting cases).

FN2. Almost all the reservations about the permissible scope of the federal spending authority have come not from courts but from commentators. In fact, the parties have cited to us only one case--the generally discredited Supreme Court opinion in *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936) which overturned part of President Roosevelt's New Deal--which declined to interpret expansively the congressional spending power. Commentators, however, have expressed greater doubts about the propriety and wisdom of conditioning federal largesse on compliance with federal policy. For some good general discussions, *see* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan.L.Rev. 1103 (1987); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum.L.Rev. 847 (1979); Lacovara, *How Far Can the Federal Camel Slip Its Nose Under the Academic Tent?*, 4 J.Coll. & U.L. 223 (1977).

There are, however, limits upon the scope of the Spending Power. The Supreme Court has articulated at least four such restrictions. First, the exercise of the spending power must be in pursuit of the general welfare. *See Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); *Helvering v. Davis*, 301 U.S. 619, 640, 57 S.Ct. 904, 908, 81 L.Ed. 1307 (1937). Second, the conditions on receipt of federal funds must be reasonably related to the articulated goal. *South Dakota v. Dole*, 107 S.Ct. at 2796. Third, Congress' intent to condition funds on a particular action must be authoritative and unambiguous, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981). Fourth, the federal legislation may be invalid if an independent constitutional provision bars Congressional actions. The independent constitutional bar rule "stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 107 S.Ct. at 2798.

[2] Nevada does not seriously rely on any of these restrictions. [FN3] Instead, it bases its claim on the indistinct coercion limitation first articulated in *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 893, 81 L.Ed. 1279 (1937) and most recently mentioned in *South Dakota v. Dole*, 107 S.Ct. at 2798. "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.* (quoting ***448***Steward Machine*, 301 U.S. at 590, 57 S.Ct. at 892). *But cf. New Hampshire Department of Employment Security v. Marshall*, 616 F.2d 240, 246 (1st Cir.1980) ("the carrot has [not] become a club because rewards for conforming have increased"). According to the coercion theory, the federal government may not, at least in certain circumstances, condition the receipt of funds in such a way as to leave the state with no practical alternative but to comply with federal restrictions.

FN3. In its brief, Nevada contends that the Highway Act is not reasonably related to any principles of general welfare. We think it clear that the legislation is reasonably designed to serve the general welfare, especially since the "concept of welfare or the opposite is shaped by Congress...." *South Dakota v. Dole*, 107 S.Ct. at 2797 (quoting *Helvering v. Davis*, 301 U.S. at 645, 57 S.Ct. at 910). Our analysis of the relationship between the Highway Act and the Commerce Clause confirms our conviction. *See infra* § III.

Appellant argues that the threatened loss of 95% of its highway funds deprives it of any real choice; practically, it is forced, it says, to adhere to the national speed limit. [FN4] Ultimately, Nevada argues, the federal government's legislation would deprive the state of its sovereignty and violate principles of federalism.

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FN4. Nevada specifically contrasts this case with the situation in *South Dakota v. Dole*, where the punishment for not adhering to the national drinking age was the loss of only 5% of the funding from certain specified federal highway programs. 107 S.Ct. at 2798.

The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party. *See Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C.Cir.1981) ("although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition"). Certainly, one reason for the federal courts' lack of enthusiasm for the theory is its elusiveness. Nevada, while baldly stating that withholding 95% of highway funds constitutes "coercion," has not given us any principled definition of the word. We can hardly fault appellant, however, because our own inquiry has left us with only a series of unanswered questions. Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available? There are other interesting and more fundamental questions. For example, should the fact that Nevada, unlike most states, fails to impose a state income tax on its residents play a part in our analysis? Or, to put the question more basically, can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds--or is the state merely presented with hard political choices? [FN5] The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments. [FN6]

FN5. Nevada is, of course, free to raise tax funds in the manner of its own choosing. At present, the people of Nevada have decided, through their elected representatives, not to impose an income tax. However, such restrictions--whether they be in the form of state statutory or constitutional legislation or merely a failure to act--are entirely self-imposed, and the state, as a sovereign entity, is free to change its method of generating public income whenever the people wish to do so.

FN6. As Professor Tribe has noted, the distinction between unlawful coercion and lawful pressure outlined in *Butler* "proved unworkable, and since its decision upholding the Social Security Administration, the Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power." L. Tribe, *American Constitutional Law* 249 (footnotes omitted).

Moreover, we would seriously question the vitality of the coercion test in light of the Supreme Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). *See infra* § III. The purpose of the coercion test is to protect state sovereignty from federal incursions. If this sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise. *See Oklahoma v. Schweiker*, 655 F.2d at 414.

Fortunately, under the facts of this case, we need not decide whether the coercion theory survives both its own doctrinal failings ***449** and recent changes in constitutional theory adopted by the Court. We hold, instead, that (1) if Congress has the authority under an enumerated power (other than the Spending Power) to compel the States through direct regulation to change its practices, then it may also achieve that result through the more gentle commands of the Spending Power, and (2) in this case, Congress could have relied on its authority under the Commerce Clause to establish a national speed limit.

II. The Coercion Test and the Commerce Clause

We first explain why the provisions relating to the national speed limit must be upheld if Congress could impose those limits under an enumerated power, other than the Spending Power. [FN7] The central debate of the Spending Power cases has always been whether Congress may exercise authority *beyond* the strict limitations imposed by the other enumerated powers specified in the Constitution. *See Butler*, 297 U.S. at 66, 56 S.Ct. at 319. *See generally* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan.L.Rev. 1103 (1987). No one has yet questioned the right of the federal government to act, under the Spending Power, [FN8] within the ambit of

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those other enumerated powers. Certainly, Congress may use its Spending Power to encourage states to participate in cooperative and voluntary ventures within the parameters of the Commerce Clause. "The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the [Minority Business Enterprise] program, then it may do so under the Spending Power." *Fullilove v. Klutznick*, 448 U.S. 448, 475, 100 S.Ct. 2758, 2773, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.).

FN7. This argument was offered by the United States to the Supreme Court in *South Dakota v. Dole*. The federal government argued that the Twenty-First "Amendment ... would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-First Amendment." 107 S.Ct. at 2795. The Court, however, expressly declined to reach the issue. *Id.* at 2795-96.

FN8. We have accepted, for the purposes of this opinion, the decision of the parties to frame the Highway Act as an exercise of the Spending Power. However, Congress has noted that the Highway Act serves "local and interstate commerce ... national and civil defense," and there is substantial doubt that the Highway Act can be accurately portrayed only as an exercise of one enumerated power. We, however, do not think that mining history for evidence of legislative intent is useful exercise. Congress is not required to identify the precise source of its authority when it enacts legislation. It is the duty of Congress to promulgate legislation, and it is the function of the courts to determine whether Congress has acted within the bounds of federal power.

Nevada, however, argues that the federal government cannot engage in coercive conduct in the exercise of its Spending Power, even when the particular exercise is within the limitations of the Commerce Clause. We see two overriding arguments for rejecting appellant's theory, aside from the dubious vitality of the coercion test. First, if Congress has the authority under the Commerce Clause to order a state *directly* to comply with a particular standard such as a 55-mile-per-hour speed law, we see no reason why Congress should be prohibited from reaching that same result *indirectly* by withholding funds if the state fails to comply with that standard. Withholding funds is simply a lesser form of coercion than enacting a flat Congressional mandate with which a state is obligated to comply. A contrary view would elevate the form of the legislation over its function.

Second, we think appellant's claim can be answered by reference to the purpose of the coercion test. The coercion test flows from a fear that the federal government could wield its Spending Power to infringe upon integral state functions. The test serves, in theory, as a protection of the federalist system. However, if the congressional action passes muster under the Commerce Clause (or some other non-Spending power) and the restraints of the ***450** Tenth Amendment, *see infra* § § III and IV, there can be no reason to fear that the federal government is unconstitutionally intruding into areas of uniquely state concern. Since, as we explain below, no federalism concerns are implicated, the presence or absence of coercion is wholly irrelevant.

In short, if the Highway Act can be sustained under the Commerce Clause, the coercion test is simply inapplicable, whether or not that test applies in Spending Power cases not involving actions within the scope of the other enumerated powers.

III. The National Speed Limit and the Commerce Clause

[3] The Commerce Clause [FN9] forms the broadest base of Congressional power. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat 1, 196, 6 L.Ed. 23 (1824). Not only does Congress have authority over the instrumentalities of and products in interstate channels, it may regulate activities "affecting commerce," even if, by themselves, the activity is purely intrastate in character. *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct. 1357, 1359, 28 L.Ed.2d 686 (1971). *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 90-91, 87 L.Ed. 122 (1942). [FN10]

FN9. The Commerce Clause empowers

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Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

FN10. *Wickard v. Filburn* is, of course, the quintessential example of the broad scope of the Congressional power over commerce. In *Wickard,* Congress sought to regulate wheat production that was solely for home consumption. The Supreme Court upheld the direct regulation on the theory that the tyranny of small decisions about inclusion or exclusion of home production from the national market could affect national price and supply.

[4] In determining whether Congress has exceeded its plenary authority under the Commerce Clause, our inquiry is a narrow one. A congressional finding that an activity affects interstate commerce must be afforded controlling deference if there is a rational basis for that judgment. *See Katzenbach v. McClung,* 379 U.S. 294, 303-04, 85 S.Ct. 377, 383-84, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258 (1964). [FN11] Here, where Congress has determined that there is a concrete link both between highways and interstate commerce and between the national speed limit and economic development, [FN12] we start with a strong presumption that the collective wisdom of the legislature is correct.

FN11. In this case, Congress made explicit findings about the interrelationship between interstate highways, speed limits, and commerce. *See* 1956 U.S.Code Cong. & Admin.News 2822.

FN12. The Supreme Court long ago abandoned the traditional distinction between commerce and other forms of economic interactions. In the place of this rigid dichotomy, the Court has adopted a theory that recognizes the interdependence between commerce and other types of economic relationships. *Compare United States v. E.C. Knight Co.,* 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895) ("Commerce succeeds to manufacture and is not part of it") with *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (integration of labor relationships and commerce).

[5] Applying the Commerce Clause test to this case, we can easily see the links between the national speed limit and interstate commerce. First, the interstate highways, [FN13] and the feeder roads that serve them, are the arteries of national commerce. *See Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). It takes only a glance at our interstate highways to realize that a substantial portion of this country's trade passes over them. The mere fact that control of traffic on these roads may significantly affect our economy would justify the federal government's exercise of plenary authority in devising ways to preserve ***451** that commerce. Even when Congress has not preempted the field and the Commerce Clause lies dormant, state regulations that adversely infringe upon the movement of goods and services along these key paths may violate the Constitution. *Id.* In light of these facts, we can hardly say that when Congress acts to secure safe and efficient passage over the roads that it is acting outside the boundaries of its authority. [FN14]

FN13. We are primarily concerned with the interstate highway system here because Nevada chose to post the 70 mph speed limit on a strech of I-80 that is part of the Interstate Highway System.

FN14. The legislative history of the Emergency Highway Energy Conservation Act, which was ultimately codified within the Federal Aid Highway Act, shows that it was initially conceived of primarily but not exclusively as an energy saving device. However, as concerns over energy shortfalls dwindled over time, the legislation has become increasingly viewed as a safety measure. Consequently, we address both aspects of the 55/65 mph speed limit.

Even when Congress seeks to achieve a goal within the purview of the Commerce Clause, its methods of implementation must be rationally related to meeting that goal. *See Heart of Atlanta Motel,* 379 U.S. at 262, 85 S.Ct. at 360. Nevada suggests that Congress could not have been acting rationally in aid of the Commerce Clause because the lower national speed limit would inhibit rather than promote rapid commercial intercourse. This argument is clearly without merit; Congress is entitled to determine that a lower speed limit--as well as a uniform one--facilitates the safe passage of commerce through the several states. Certainly, no one could quibble with

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the judgment that commerce that proceeds safely is more efficient than commerce slowed by accident or injuries.

Second, the principal motivating force behind the national speed limit was the fears generated by the Arab Oil Embargo of the early 1970s. The petroleum embargo sponsored by the Organization of Petroleum Exporting Countries (OPEC) damaged the economies of the Western powers, leading to one of the worst recessions of this century. *See generally* Danielson, *The Evolution of OPEC,* 201-33 (1982) (discussing impact of energy crisis on economies of developed countries). *See also* FERC v. Mississippi, 456 U.S. 742, 757, 102 S.Ct. 2126, 2136, 72 L.Ed.2d 532 (1982). Part of the Congressional reaction was to impose a lower national speed limit in order to conserve fuel and, thereby, revitalize commerce and protect the national defense. *See* 1973 U.S.Code Cong. & Admin.News 3344. [FN15] In light of the dramatic influence the energy crisis has had on the shape of American and international commerce, the 55 mph speed limit was a reasoned response on the part of Congress to the many serious problems posed by the crisis. [FN16]

FN15. The Emergency Highway Energy Conservation Act of 1973 was only one of many bills passed by Congress that year in an attempt to control the adverse effects of the energy crisis. *See, e.g.* the Trans-Alaskan Pipeline Act and the Emergency Petroleum Allocation Act.

FN16. We need not consider here Congress' authority to act under its national defense powers.

Nevada virtually concedes that Congress had the authority to change the speed limit in response to international economic developments. However, appellant argues that the fact that Congress chose to raise the speed limit in 1987 to 65 mph on some roads signaled the end of the energy crisis and its impact on interstate commerce. Although the emphasis of the national speed limit has shifted somewhat over time, it is the function of Congress, and not the courts, to determine whether and when the national economic crisis provoked by the oil embargo and the resulting market dislocation has ended. Moreover, Congress may certainly conclude that, even if there is no present emergency, there exists a long-term relationship between energy conservation and commercial development. The mere fact that Congress has chosen to alter in limited respects the speed limit suggests only that shifts in energy policy, and advances in energy technology, now permit a different balance between conservation, safety, and quicker travel. Congress has made its legislative determinations, and we are in no position to second-guess them.

We conclude that the 55/65 mph limit is rationally related to the Congressional goals that underlie the Highway Act and that those goals fall within the purview of the Commerce Clause. Thus, absent a Tenth Amendment bar, Congress had the ***452** power, under that clause, to adopt the national speed limit.

IV. The National Speed Limit and the Tenth Amendment

[6] Even if the national speed limit falls within the broad ambit of the Commerce Clause, there may remain limitations on the exercise of federal power *within* this zone of authority. *See generally* L. Tribe, *American Constitutional Law* 378-88 (2d ed. 1988). Appellant argues that the Tenth Amendment [FN17] carves out a sphere of state influence upon which even the Commerce power may not intrude. We disagree.

FN17. We use the Tenth Amendment "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker,* 485 U.S. 505, 108 S.Ct. 1355, 1360 n. 4, 99 L.Ed.2d 592 (1988). *See also* Note, *Does the Tenth Amendment Pose Any Judicial Limit in the Commerce Clause After Garcia v. San Antonio Metropolitan Transit Authority and South Carolina v. Baker,* 1989 B.Y.U.L.Rev. 231 (1989).

The Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) answers appellant's concerns. In *Garcia,* the Court rejected the theory articulated in *National League of Cities v. Usery,* 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976) that the federal government was powerless to enforce legislation against the States in "areas of traditional government functions." It replaced the state functions test of *Usery* with a process-based analysis of Tenth Amendment limitations. "[T]he principal and basic

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limit on the federal commerce power is that inherent in all congressional action--the built-in restraints that our system provides through state participation in federal government action." *Garcia*, 469 U.S. at 556, 105 S.Ct. at 1020. [FN18] Since the representatives of the States and local interests comprise the constituent parts of the federal government, "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* Consequently, absent any "extraordinary defect" in the national political process, Nevada's forum for raising a claim of infringed sovereignty lies with the legislature, not the judiciary. *See South Carolina v. Baker*, 108 S.Ct. at 1360 (plurality opinion). Although the contours of the "extraordinary defect" test remains fuzzy, suffice it to say that Nevada has not alleged that it was excluded from the national political process or that it was "singled out in a way that left it politically isolated and powerless." *Id.* at 1361 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938)).

FN18. The theory in *Garcia* flowed from a seminal law review article which argued that the principal method of protecting federalism rested in the make-up of the federal government itself. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum.L.Rev. 543 (1954).

Moreover, even if we were to apply the traditional government test of *Usery*, we do not believe that the national speed limit would infringe upon any integral state function. While the federal courts have, on occasion, given "lip service" to the notion of state control over roads, it has most frequently done so in the context of striking down state legislation as a burden on interstate commerce. *See, e.g., Navajo Freight Lines*, 359 U.S. at 523, 79 S.Ct. at 964 (striking down Illinois mud-flap regulation despite States "broad and pervasive" authority over highways). Nor is the federal government a newcomer to this field. Congress first promulgated the Federal Aid Highway Act in the first years of this century, and the task of building the Interstate Highway System has been an endeavor spanning four decades. Thus, the control of roads and highways has not traditionally fallen under plenary state control but under the cooperative agreement of state, local, and federal officials. Even during the brief ascendancy of the *National League of Cities* doctrines, courts frequently upheld federal regulation of state highways. *See, e.g., Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir.1977) ("[t]he regulation of traffic on roads and ***453** highways, with its strong regional and interstate character ... has long been considered to be a cooperative effort between City, State and federal authorities, with no single entity being able to provide or impose a comprehensive traffic system, *and with federal power, where necessary, taking precedence* ") (emphasis added). [FN19] *Cf. United Trans. Union v. Long Island R.R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (upholding federal regulation of railroads).

FN19. The Second Circuit, in *Friends of the Earth*, noted that the Supreme Court in *Usery* had specifically reaffirmed its decision in *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936) (railroads within scope of Commerce Clause power). The *Usery* Court distinguished the *California* case on the ground that the interstate character of the railroad system proved that it was not regarded as an integral part of the state's governmental activities.

Finally, appellant argues that the federal regulations in force here effectively "commandeered" its regulatory power and required it to enforce unwillingly the national speed limit with state personnel and local resources. This, it argues, violates the Tenth Amendment rule laid out in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). [FN20] As a preliminary matter, we express substantial doubt as to whether *FERC* has survived the Supreme Court's decision in *Garcia*. "The extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia* is far from clear." *South Carolina v. Baker*, 108 S.Ct. at 1361 (plurality opinion). The *FERC* Tenth Amendment claim rested on the same pillar of interference with state sovereignty as the theory rejected in *Garcia*, and there is, therefore, no apparent reason to think that the answer to that claim would now be any different than the answer given by the Supreme Court in *Garcia*. As that opinion teaches, Nevada's complaints regarding cooption of state resources must be resolved in the legislative process; it is that process which protects the fundamental interests of the states.

FN20. *See also Maryland v. EPA*, 530 F.2d 215 (4th Cir.1975), *vacated and remanded on grounds of mootness sub nom.* 431 U.S.

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SENATE RULES COMMITTEE SB 376
Office of Senate Floor Analyses
1020 N Street, Suite 524
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CONFERENCE COMPLETED

Bill No: SB 376
Author: Alpert (D)
Amended: Conference Report No. 1, 9/11/97
Vote: 27 - Urgency

All Prior Votes Not Relevant

SUBJECT : Academic assessment and performance standards

SOURCE : Author

DIGEST : This bill implements the new state testing program. It establishes the Standardized Testing and Reporting Program, to be known as the STAR Program.

Conference Committee Amendments delete prior version which recast and re-enacted provisions of law relative to the Commission on School District Consolidation and Reorganization.

ANALYSIS : This bill creates the Standardized Testing and Reporting Program (STAR), which replaces the Pupil Testing Incentive Program (PTIP). STAR has the following elements:

1. Expands the grades tested to produce individual scores from grades 2-10 (under the PTIP) to grades 2-11.

1. Eliminates the option for districts to choose from among different tests and, instead, requires one statewide test starting in 1998. Authorizes districts that have signed contracts with publishers to administer tests under PTIP,

to use their former tests, and to be reimbursed by the

state for the cost of their administration (up to $5 per pupil).

3. Requires districts to test English learners with the statewide test in English and a test in the students' primary languages (if a test is available in the language), during their first year of enrollment. Thereafter, requires districts to test English learners in English and permits districts to test them in their primary languages (if test is available).

4. Requires school districts to report test scores by grade level, school and district to local district governing boards. Requires districts to report test scores to the state by school and district. Requires that compiled scores be available on the Internet.

5. Reimburses districts for the cost of administering the statewide test at $8 per pupil per test.

6. Changes the final date by which the State Board of Education (SBE) must adopt standards in history-social science and science, from January 1, 1998, to November 1, 1998. (Does not change date for reading, writing, and mathematics.)

7. Expands the scope of SBE advisory board to include responsibilities related to the new STAR program, and requires that two members be from a list approved by the Superintendent of Public Instruction.

NOTE: See attachment for a side-by-side comparison of current law and this bill.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: Yes

Unknown.

CONFERENCE COMMITTEE VOTE : 4-2, 9/11/97
AYES: Senators Alpert, McPherson; Assemblymembers Mazzoni, Pacheco
NOES: Senator Greene; Assemblymember Strom-Martin

TO CURRENT PROGRAM

	Current Pupil Testing Program (56 approved tests)	SB 376 Proposal (1 test)

Test Scores	Tests produce individual scores to grades 2-10.	Test produces individual scores in grades 2-11.
Local Effect	Allows districts to choose from among broad range of tests (56). Continuity of data prior year to current year. Will require some changes when tests are aligned to state standards.	No local choice, requires one test statewide starting in 1998. In most districts, no continuity of data prior year to current year. However, districts with signed contracts could use local test next year and would be reimbursed for cost (at up to $5 per pupil. Will require some changes when test is aligned to state standards.
National Comparison	Allows for national comparison, but requires tests to be adjusted to state standards.	Allows for national comparison, but requires test to be adjusted to state standards.
Link to Statewide Standards	No current link to statewide standards, tests to be adjusted once standards are adopted.	No initial link to statewide standards, test to be adjusted once standards are adopted.
Primary Language	Test in English for all students except exemption for LEP students a) if in district for less than 6 months or b) for 2 1/2 years if no test in primary language exists. Alternative test for LEP pupils up to 30 months if available. (4 of the 56 approved tests are in Spanish.)	Limited English pupils shall be tested in English and primary language (if test is available) during their first year of enrollment. After first year, LEP students shall be tested in English, may be tested in primary language (if available). State to reimburse costs

		for up to $8 per pupil tested on each test.
	Current Pupil Testing Program (56 approved tests)	SB 376 Proposal (1 test)
Reporting Requirements	Districts required to report school & district scores to local governing boards (no classroom reporting). State reports on school test results. No Internet requirement.	District required to report scores by grade level, school and district to local governing boards (no classroom reporting). State reports on school & district results. Available on Internet.
English Assessment	N/A	Agreement on assessment of English for English learners.
Matrix Test	To be developed in grades 4, 5, 8 & 10 after adoption of state standards.	Same
Funding	Incentive program, funded at $5 per pupil.	Mandated, funded up to $8 per pupil
Standards	Board adopts standards in reading, writing, mathematics, history-social science, and science by January 1, 1998.	Board adopts standards in reading, writing, mathematics by January 1, 1998 and history-social science, and science by November 1, 1998.
Role of SPI and SBE	SPI operates program and recommends tests, but State Board of Education (SBE) can adopt any test.	Same

NC:ctl 9/12/97 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
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May 12, 2004

Fred Risser
State Capitol 123S
Madison, WI 53707

Dear Senator Risser:

Thank you for your recent letter requesting my "constitutional analysis of Wisconsin's obligations to implement without full federal funding the 2002 revisions to the Elementary and Secondary Education Act ("the ESEA")." As you noted in your request, "[t]he general goals of the federal legislation are laudable. Indeed, no one in this state can quarrel with those goals because no state values education more than Wisconsin." Yet this legislation raises profound practical, fiscal and legal issues that warrant the attention of both the legislative and executive branches of state government.

This federal law mandates qualitative educational standards, directing their implementation by state and local governments. That, in itself, raises constitutional questions. Beyond the legal issues, however, lies a stark reality: the ESEA leaves at least some of those mandates unfunded or, more precisely, leaves the bill for them to state taxpayers. In addition, as you noted, the sanction for failing to comply with the ESEA's provisions is severe: withdrawal of all federal funding even if the failure is due to the federal government's refusal to fully fund the law and its requirements. This letter, because of the significance of the issues for public education, addresses a number of the ESEA provisions involving the state-federal relationship.

The ESEA is unusual compared with other congressional enactments that contemplate States and their subdivisions undertaking programs and policies in exchange for federal funding. Section 7907 of the ESEA contains a provision that expressly restricts what federal agencies and officials may require of States and their subdivisions:

> **§ 7907 Prohibitions on Federal government and use of Federal Funds**
> **(a) General Prohibition.** Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

20 U.S.C. § 7907(a).[1] The language seems clear and compelling: the federal government cannot compel the States to develop or pay for specific educational programs.

Interpretations of Similar Statutory Language

No court, to my knowledge, has construed the meaning of this provision in the context of the ESEA. This type of language has appeared in only two other federal statutes, both involving education and enacted in 1994. One was repealed in 1999 (20 U.S.C. § 5898) while the other remains in effect (20 U.S.C. § 6234). The only court to have considered this language in any context did so only in passing, and indirectly, as to the now repealed statute, 20 U.S.C. § 5898, by noting a statutory interpretation in a letter from the Secretary of the United States Department of Education:

> On July 31, 1996, Byrne wrote United States Secretary of Education Richard Riley, asking, among other things, if the Federal Government could mandate, direct, or control Alabama's curriculum if Alabama applied for and received the Goals 2000 funds. In a letter dated August 2, 1996, the Secretary responded by stating that § 318 of the Goals 2000 Act[2] expressly prohibits the Federal Government from mandating, directing, or controlling any state's curriculum or program of instruction or allocation of state or local resources.

State Bd. of Educ. v. McClain, 810 So. 2d 763, 766 (Ala. Civ. App. 2000), *reh. denied, rev'd on other grds., Ex parte Alabama State Bd. of Educ.*, 810 So. 2d 773 (Ala. 2001). Though the same language addressed in *McClain* appears in 20 U.S.C. § 7907(a), your inquiry, as you noted, focuses on the specific and pointed language in 20 U.S.C. § 7907(a) regarding costs:

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to ... mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

While no court has considered the type of question you posed, the Nebraska Attorney General was asked a similar question regarding 20 U.S.C. § 5898 (now repealed) and 20 U.S.C. § 6234:

> **Does the State have to use its own funds to comply with GOALS 2000? With the School-To-Work Opportunities Act?**

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[1] There is similar language in 20 U.S.C. §6575: "Nothing in this title shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."

[2] Now codified at 20 U.S.C. § 5898.

> "Nothing in [the Goals 2000 statutes] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or a school's curriculum, program of instruction, or allocation of State or local resources or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this [Act]." 20 U.S.C. § 5898. An identical provision is included in the STW Act. See 20 U.S.C. § 6234. Under the STW Act, however, a state may apply for either a one-time "development" grant, not to exceed $1,000,000, or a one-time "implementation" grant, ... the payment of which shall not exceed 5 federal fiscal years. See 20 U.S.C. § 6121 - § 6127 (STW Act development grants); 20 U.S.C. § 6141-§ 6148 (STW Act implementation grants). Unless further authorized by Congress, the STW Act will terminate, or sunset, on October 1, 2001. 20 U.S.C. § 6251. Thus, if a participating state desired to continue a school-to-work program beyond that date, then no federal funds are currently guaranteed for such purpose.

Neb. Op. Att'y Gen. No. 98047, 1998 WL 796717, at *3. Although the point is not stated explicitly, the Nebraska Attorney General appeared to view the language in these federal statutes as calling for States and their subdivisions to be free of any federally-imposed obligations not actually paid for with federal funds. *Id.* Regardless, the guidance provided by *McClain* and this Nebraska AG opinion is thin at best.

General Statutory Construction Principles

Absent any definitive authority construing the statutory language, it is appropriate to turn to general statutory construction principles. Just a few weeks ago, the Supreme Court confirmed again that, when attempting to ascertain the meaning of a federal statutory provision, "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 124 S. Ct. 1587, 1593 (2004). If the relevant inquiry can be answered by the plain meaning of the statutory language, then, except in rare circumstances where that plain meaning calls for absurd results, the plain meaning controls and legislative history should not be consulted at all. *E.g., Lamie v. United States Trustee*, 124 S. Ct. 1023, 1030 (2004) ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms" (citation omitted)); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, ... 'judicial inquiry is complete'" (citation omitted)). In determining whether the language relevant to the inquiry is unambiguous or not, it does not matter if the language is "awkward" or "ungrammatical" so long as the meaning is plain. *Lamie*, 124 S.Ct. at 1030.

The language in 20 U.S.C. § 7907(a), on which your inquiry turns, seems to bear only one reasonable interpretation: federal agencies and officials lack authority to require any State, or State subdivision, to take any action under the ESEA that is not fully funded by federal monies. Could the language instead mean that a State, or a State subdivision, which has accepted federal funding in exchange for a promise to comply with requirements imposed by the ESEA, nevertheless can be required by the U.S. Department of Education or its officials to engage in activities that are not fully funded by federal monies? The express language chosen by Congress is contrary to such an interpretation: "Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate ... a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a). That language can only reasonably be read as tying the program standards and obligations of a federal funding recipient under the ESEA directly to whether federal monies are available to discharge those obligations.

That plain meaning prevails, and no legislative history need be consulted, unless the plain meaning requires absurd results. *Lamie*, 124 S. Ct. at 1030.[3] No absurd results are apparent in the interpretation noted above. The states are entitled to take Congress at its word that it did not intend to require state and local governments to expend their own funds to comply with the detailed and proscriptive federal mandates in the ESEA. In my view, the plain language of 20 U.S.C. § 7907(a) means that the United States Department of Education and its officials cannot require any State, or subdivision of a State, to engage in actions under the ESEA, with its threat of losing federal funding, if taking those actions would require the State or subdivision to draw

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[3] While legislative history, if it could be consulted, could open a lively debate, I note just one piece of legislative history that underscores the plain meaning of 20 U.S.C. § 7907(a). The ESEA passed the Senate, as a conference committee bill, on December 18, 2001. 147 Cong. Rec. S13365-07, * S13421-S13422, 2001 WL 1613966 (Dec. 18, 2001). During debates over that bill the prior day, and immediately after a chief co-sponsor Senator Edward Kennedy had spoken, Senator Larry Craig stated his intent to vote for the bill, which he did (*id.*), because, unlike prior "Federal mandates" imposed by Congress, the ESEA was "fully funded" and States and their subdivisions could not be required to expend any of their own resources. 147 Cong. Rec. S13322-03, * S13337-S13338, 2001 WL 1602196 (Dec. 17, 2001). Senator Craig observed that:

> This demand for demonstrable results is indeed-and some have charged-a Federal mandate. I have been in this Chamber more than once before speaking against Federal mandates. But this one Federal mandate replaces numerous other mandates which are eliminated throughout the bill. This mandate is also unlike most of the other Federal mandates that are incorporated in current law today; it is fully funded. In fact, the bill requires full funding for the cost of the tests which will be developed due to its mandates. And if we do not fund those costs, the States do not have to implement the tests. That is a fairly reasonable and appropriate formula. If we do not own up to our promise and our commitment under the law, then the States do not have to follow suit.

Id. Since legislative history should not be consulted, however, I refrain from undertaking that level of analysis.

upon its own monetary resources. Whether this is actually occurring in Wisconsin is a question that the Wisconsin Department of Public Instruction (DPI) or Wisconsin school districts would have to answer. DPI, most particularly, would be in a position to develop the detailed information that would demonstrate the extent to which federal officials are requiring Wisconsin, or Wisconsin school districts, to take actions under the ESEA for which full federal funds are unavailable. Although not specific to Wisconsin, however, several general fiscal analyses strongly suggest that the ESEA's mandates are not fully funded.

The Unfunded Costs of the ESEA

Over the next decade, under the ESEA, public schools[4] must make annual yearly progress (AYP) in raising student test performance to levels of proficiency on standardized reading and mathematics tests. Virtually all students in the state (95% of whom must be tested), including disabled students and those with limited English skills as well as those who simply might be unmotivated or poor test takers, must perform at least "proficient[ly]" on the standardized tests. The failure of any one of the groups listed[5] to reach that year's benchmark for standardized test performance (or the failure of the school to administer the tests to 95% of students in each of those groups) results in the school being graded as failing. A school that fails to make AYP two or more years in a row is subject to sanctions, 20 U.S.C. § 6316(b), including, ultimately, complete restructuring of the school. The issue is not about the importance of educational progress, proficiency and testing; the critical question, is whether the ESEA pays for them.

The unfunded costs of the ESEA fall into three major areas: the costs of developing, administering and reporting on the significantly greater testing required by the federal government; the costs of implementing the required sanctions against schools that fail to make AYP; and the cost of providing sufficient funding to permit virtually every student in every school to reach "proficiency" levels on standardized tests.[6] The latter two cost areas may overlap to some degree.

The unfunded costs associated with testing are the easiest to calculate and should be easily accessible by DPI. The General Accounting Office has estimated that the nationwide cost of simply developing and administering (at the state level) the required additional tests will be

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[4] Private schools, even those receiving students from "sanctioned schools," are largely exempt from regulation.

[5] The four general subgroups are low-income, racial and ethnic minority, disabled, and limited English proficiency students. In Wisconsin, ethnicity is defined in sub groups of American Indian/Alaskan Native: Asian/Pacific Islander; Black, not of Hispanic Origin; Hispanic; and White, not of Hispanic Origin.

[6] Notably, the costs of reaching proficiency arguably encompass the costs of complying with the ESEA mandates requiring schools and school district to ensure that teachers and certain paraprofessionals obtain certain specified credentials. *See* 20 U.S.C. § 6319. Although it is difficult to estimate the costs associated with this mandate, they could be significant, especially in rural or lower paying school districts.

between $1.9 - $5.3 billion between fiscal years 2002-2008. *Title I: Characteristics of Tests Will Influence Expenses; Information Sharing May Help States Realize Efficiencies*, GAO-03-389 (May 8, 2003), available at www.gao.gov/new.items/d03389.pdf. The GAO study, however, did not provide any estimate of the costs of test administration at the district level or the significant lost opportunity cost of the ESEA testing mandates, which require schools and districts to devote school days to test preparation and administration rather than to instruction.

The cost of implementing the ESEA's sanctions against schools that fail to meet AYP over a specified period is more difficult to calculate because it involves projecting the number of schools that will fail to meet their AYP requirements and the scope of the resulting sanctions. The potential costs of the mandated sanctions could be substantial. One requirement in particular could be especially costly. Schools that fail to meet AYP two years in a row must offer students the choice of attending at least two other district schools that have met AYP. They must offer that choice, moreover, regardless of the capacity of the receiving school. *See* 20 C.F.R. § 200.44. This means that "non-failing" schools may be required to substantially expand, regardless of the cost. Obviously, the mandated expansion costs that follow for states and localities, for which the ESEA contains no funding, could collide with Wisconsin's strict revenue limits and trigger significant constitutional questions about whether federal courts can order districts to increase their mill rates and their property tax bills, regardless of voter action or a school district's autonomy.

But perhaps the largest cost to the state and its taxpayers is the cost of meeting the proficiency mandate. The Institute for Wisconsin's Future has developed a model to determine the cost to provide Wisconsin students with an education that meets certain recognized standards (e.g., smaller class sizes and remedial assistance for certain students). *See* Jack Norman, *Funding Our Future: An Adequacy Model for Wisconsin School Finance* at ix, 19-26, 55 (June 2002), available at www.wisconsinsfuture.org/reports/Adequacy_report6_02.pdf, and testimony before the Governor's Educational Task Force. The Institute concluded that to provide such an education, which would not necessarily ensure that students tested at the levels required by the ESEA, would require, on average, an additional $2,880 per pupil or an aggregate $2.5 billion in total expenditures.

Currently, Wisconsin receives approximately $152 million in additional federal aid to comply with Title I of the ESEA (which imposes all of the mandates described above). Wisconsin already has 68 schools and 12 school districts that have failed to meet AYP two years in a row and an additional 58 schools and 21 districts that failed to meet AYP last year. Schools probably already are implementing changes to meet AYP. Thus, it is likely that the State of Wisconsin and many school districts already are spending more funds than the federal government provides, and this amount could grow dramatically over the next few years.

That conclusion is consistent with the more detailed cost analyses done for other states. Minnesota and Wisconsin schools are frequently compared. A Minnesota audit has concluded that, even assuming that in each year over the next ten years Minnesota students consistently will post high gains in standardized test performance, by 2013-14 fully 82 percent of its schools will be deemed "failing" under the ESEA. Legislative Auditor, *Evaluation Report—No Child Left Behind* at 40-44 (March 2004), available at www.auditor.leg.state.mn.us/Ped/pedrep/0404all.pdf. A study for the State of Ohio estimated that, by 2009-10, the annual cost to comply with the proficiency mandate alone would be $1.4 billion, with an immediate outlay of $450 million required. *See* W. Driscoll & H. Fleeter, *Projected Costs of Implementing NCLB* at 51 (Jan. 21, 2004), available at www.ode.state.oh.us/legislator/COST_OF_NCLB/COSTOFIMPLEMENTINGNCLB-012104.pdf. The Journal of State Governments (Spring 2004) reports, based on 18 different state studies that, on average, complying with the proficiency mandate will require unfunded increases in educational spending of 27.7 percent.

DPI and other state agencies will need to conduct a detailed analysis to determine the precise amount of state funds that currently are being used to defray the ESEA mandates. The only real question, however, appears to be just how much additional state funding already has been required and how quickly that amount will increase.[7]

Constitutional Analysis

If a federal agency is requiring Wisconsin or its subdivisions to expend their own resources to comply with the ESEA, that would violate 20 U.S.C. § 7907(a) and exceed the agency's authority granted by Congress. Agencies are not "free to ignore plain limitations on [their] authority." *Peters v. Hobby*, 349 U.S. 331, 345 (1955). The acts of a federal agent are invalid if they exceed the scope of the agent's authority, even if "the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

You asked, in your letter, for a constitutional analysis of the ESEA's mandates and full funding requirements. At the outset, there is simply "no place in our constitutional system for the exercise of arbitrary power, and, if [a federal agent] has exceeded the authority conferred upon [the agent] by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield v. United States,* 211 U.S. 249, 262 (1908). "The power of an administrative officer or board to administer a federal statute ... is not the power to make law—for no such power can be delegated by Congress—but the power ... to

[7] The Commentary in a recent *Education Week* analyzed the debate surrounding the direct and indirect costs of implementing the ESEA. Its conclusion: the ESEA only can be construed as "fully funded" under a series of highly artificial and politically unrealistic assumptions. *Education Week*, April 21, 2004, at 48.

carry into effect the will of Congress as expressed by the statute." *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936), *reh'g denied*, 297 U.S. 728 (1936).

If a federal agency is requiring Wisconsin or its subdivisions to expend their own resources to comply with the ESEA, that would implicate numerous constitutional questions. Congress, in enacting the ESEA, was essentially making a contractual offer, pursuant to its Spending Clause power (U.S. Const., art. I, § 8, cl. 1), to States and their subdivisions. *E.g., Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 286 (1998) (when Congress enacts a law that imposes conditions on federal fund recipients, and a recipient accepts funds on that basis, that "amounts essentially to a contract between the Government and the recipient of funds"). *Gebser*, addressing when a recipient—which was not, like States, entitled to sovereign immunity—could be subjected to court claims for alleged noncompliance with conditions set forth in the federal statute, held that such claims are "examine[d] closely" by courts to assure that the recipient had "notice" of the condition and its consequences. 524 U.S. at 286-87. Particularly when Congress offers federal funds to States in exchange for certain conditions, those conditions must be expressed so authoritatively and unambiguously, through statutory language, that States "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *see Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) ("Congress should make its intention 'clear and manifest' ... if it intends to impose a condition on the grant of federal moneys" to States); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously").

The language in 20 U.S.C. § 7907(a) certainly did not expressly and unambiguously notify the States and their subdivisions that they would have to expend any of their own financial resources to perform activities contemplated under the ESEA. To the contrary, the plain meaning of 20 U.S.C. § 7907(a) conveys precisely the opposite message. When Congress, using its Spending Clause authority, clearly requires federal fund recipients, as a condition of receipt, to also expend their own resources to perform activities called for by the relevant statute, then the recipient, in accepting the funds, has to have notice of that requirement. *E.g., Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 892-94 (1984); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 68 (1999). Courts will "assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 U.S. at 16-17.

To the extent that congressional intrusions into the field of education are not authorized by its Spending Clause powers, those intrusions also collide with other constitutional constraints. For example, Congress' Commerce Clause "authority, though broad, does not include the authority to regulate each and every aspect of local schools." *United States v. Lopez*, 514 U.S. 549, 566 (1995). As one commentator noted, *Lopez* confirmed that "a federal statute may be

invalidated because it is beyond the scope of authority granted to Congress under the Commerce Clause, even if it is not unlawful as an unfunded federal mandate." Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 Vand. L. Rev. 1137, 1202 n.301 (1997). As you note in your letter, education is primarily the responsibility of the States. *E.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968). The non-fiscal issues, therefore, also are of constitutional concern.

Many educators fear that the ESEA testing mandates may force states to alter radically their educational curriculum and programs to focus almost exclusively on improving test scores of underperforming students. Wisconsin has long prided itself on its high rank in ACT scores and other measures of educational excellence. Requiring such significant changes in a state's educational system and "values" also may be beyond Congress's legislative powers, regardless of whether adequate funds are provided, or even whether such changes, in the federal government's view, are desirable.

Potential Wisconsin Involvement

Beyond whether the concerns you raised are legally sound, and the analysis above indicates that they are, you also asked how Wisconsin should consider becoming involved, if at all, in litigation regarding the ESEA. First, it is important to clarify that Tenth Amendment arguments would likely be premature, regardless of how, if at all, Wisconsin might become involved in litigation.[8] To the extent that a federal agency, such as the Department of Education, may actually sanction a State or subdivision for refusing to pay itself for activities not financed by federal funds under the ESEA, that could raise serious Tenth Amendment concerns. *E.g., West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 292-94 (4th Cir. 2002). Anticipating that sanctions might be imposed, however, is generally too speculative to meet the "coercion" test that is applicable in Tenth Amendment settings. *Id.*

Any litigation likely would center on the factors noted earlier in this letter, namely the express language, and plain meaning, of 20 U.S.C. § 7907(a) and the lack of authority for any federal agent to require Wisconsin or its subdivisions to engage in any activities under the ESEA not fully funded by federal dollars. The most likely setting would be a declaratory judgment action filed in federal court seeking a declaration about the meaning and effect of 20 U.S.C. § 7907(a). It can be anticipated that any such legal challenge would be confronted with a series of arguments by the U.S. Department of Education represented by the U.S. Department of Justice—for example, that the controversy is not yet "ripe" and that, regardless, all administrative avenues should be exhausted before any court proceedings may be commenced.

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[8] The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The viability of any such "ripeness" arguments would depend heavily on what is actually occurring in Wisconsin. As noted earlier, DPI and Wisconsin school districts are in far better positions than I, at least initially, to marshal the evidence that would overcome "ripeness" arguments. Essentially, federal courts are restricted from addressing hypothetical disputes that may never come to fruition. *E.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). If the educational experts at DPI and elsewhere develop evidence that genuine and current harms are being inflicted through Department of Education requirements unauthorized by 20 U.S.C. § 7907(a), then it is likely that the court would, after balancing "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," determine that the claims are ripe. Although a court could wait for specific sanctions against a specific school, the delay would cause only additional harm to our students. The need by school districts to prepare budgets and curriculum, it seems to me, may well be sufficient to determine that the claims are ripe.

Exhaustion of administrative avenues likely would present a separate hurdle, and one that could prove challenging. Nonetheless, the language and meaning of 20 U.S.C. § 7907(a) are so clear that—assuming DPI and others can marshal the needed evidence—a federal court might recognize that it should not await administrative reviews of individual appeals within a Department of Education process. Courts may resolve challenges to an agency's authority in situations in which the agency's assertion of jurisdiction "would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory or constitutional directive." *Hunt v. Commodity Futures Trading Comm'n*, 591 F.2d 1234, 1236 (7th Cir. 1979), *citing Leedom v. Kyne*, 358 U.S. 184 (1958).

Counter-arguments regarding "ripeness" or exhaustion, as well as other challenges the Department of Education and its officials might assert, would be more comprehensive than the abbreviated comments above. Litigation is always uncertain. I do not, however, presently perceive insurmountable hurdles to a court reaching the merits of an action seeking a declaration about the meaning, and effect, of 20 U.S.C. § 7907(a). The importance of the issue, and of public education, warrant a concerted effort to resolve these questions before harm occurs.

State law gives the Attorney General and Department of Justice broad discretion and significant authority to represent the people of Wisconsin. We generally are not, however, parties or litigants. The legal doctrine of standing requires that any litigation over the ESEA be brought or joined by a party with a real and direct interest in the controversy—a school district or state agency, for example.

The effect of the ESEA and the educational and fiscal obligations it imposes on Wisconsin and its schools should not be underestimated. Each school district, individually, will have to determine the financial impact of the ESEA and whether complying with the ESEA requires it to expend monies not provided under the law. The largest impact is likely to fall on

the shoulders of Wisconsin's largest and smallest school districts, or those most affected by the state's revenue controls. Accordingly, I am sending a copy of this letter to the Governor, the Secretary of the Department of Administration, the State Superintendent of Public Instruction, the Wisconsin Association of School Boards for their information and any appropriate action.

Please let me know if you have any questions

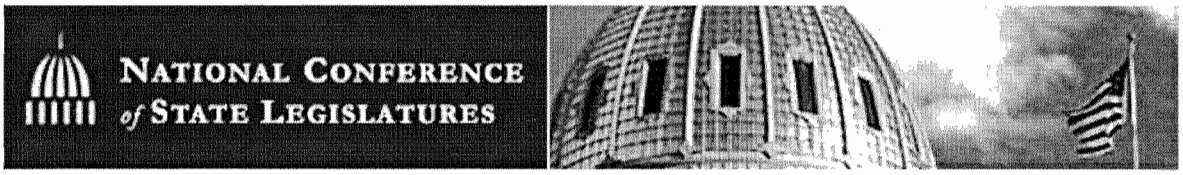
Very truly yours,

Peggy A. Lautenschlager
Attorney General

PAL:hah

cc: Governor James Doyle
Superintendent of Public Instruction Elizabeth Burmaster
Wisconsin Association of School Boards

bcc: Wisconsin Education Association Council
American Federation of Teachers



NCSL BACKGROUNDER

No Child Left Behind

July 2004

This NCSL Backgrounder covers the federal No Child Left Behind Act. It begins with the history of the Act, then discusses requirements and sanctions for schools that don't meet their goals. It examines the changing state/federal education relationship that NCLB is bringing about, delves into NCLB's affect on states, and ends with the latest regulatory changes and state actions. In the right column, you'll find contacts, other resources including links to NCSL magazine articles, press releases and reports, and "Alphabet Soup," a dictionary of acronyms.

History

Congress passed the No Child Left Behind Act of 2001 (NCLB) on January 8, 2002. The law is President George Bush's reauthorization of the 1964 Elementary and Secondary Education Act (ESEA). It incorporates many of the features introduced under President Bill Clinton's reauthorization in 1994, dubbed the Improving America's Schools Act (IASA). IASA required states to establish standards, assessments and accountability plans that would increase student performance. However, IASA included no consequences for states that failed to comply. No Child Left Behind builds on the accountability features of IASA by increasing the testing requirements and placing new mandates on states in the areas of teacher quality and data collection. It also focuses on certain subgroups of students and places profound consequences on schools, districts and states that fail to meet program goals.

Requirements

Testing-Schools must annually test students in grades 3-8 and once during high school in reading and math by the 2005-2006 school year. Science tests must be administered once in grades 3-5, 6-9 and 10-12 by the 2007-2008 school year.

- **Adequate Yearly Progress**-Each year an increased percentage of students must score "proficient" on the state tests. The goal is for states to make annual improvements in student performance, or adequate yearly progress (AYP), so that all students are proficient by the 2013-2014 school year. States set these annual goals themselves.
- **Subgroups**-Students with disabilities, with limited English proficiency (LEP), from economically-disadvantaged homes or certain racial backgrounds must reach the AYP benchmarks as a subgroup. For these students, teachers may make accommodations including allowing them more time and presenting tests orally. If any of the subgroups, or the overall student population, fail to meet the requirements of NCLB, the entire school is placed on a "watch list" with more severe consequences each consecutive year it fails to make adequate yearly progress.
- **Participation Rate**-Not less than 95 percent of the entire school and each

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More Resources

- NCSL No Child Left Behind Resources Page
- The Challenges of No Child Lef Behind, a State Legislatures magazine article, December 2003 *(Legislators and Staff Only. Reporters may obtain a free copy by contacting the Public Affairs staff.)*
- Mandate Monitor, an NCSL publication detailing mandates the federal government imposes on states without complete funding
- NCSL Forms Task Force to Examine No Child Left Behind, a press release, April 2004
- NCSL Press Room
- NCSL Archived News Releases

Alphabet Soup

NCLB
No Child Left Behind: A federal education act that requires primarily that all students improve their score on state tests until all

subgroup must participate in the state tests. Not more than 1 percent of the entire student population may take alternate tests due to severe cognitive disorders-about the equivalent of 10 percent of the special education population.

Teacher Qualifications-All teachers must be "highly qualified" by the 2005-2006 school year. States are allowed to determine their own definitions of "highly qualified," but at a minimum, teachers that qualify must:

- Have a bachelor's degree,
- Be state certified or pass a state licensing exam (includes alternate routes to certification),
- Not be teaching on temporary or provisional waivers, and
- Prove content knowledge in each subject that they teach.

Most teachers hired after the enactment of NCLB must meet these requirements immediately. Most teachers already teaching before the enactment must meet them by the beginning of the 2005-2006 school year.

Proving Content Knowledge-Elementary teachers can prove content knowledge by passing a rigorous state test on elementary curriculum.

Middle school and secondary school teachers must show competency in each of the "core academic subjects" they teach. Teachers can prove subject knowledge through a rigorous state subject test, or by completing coursework equivalent to an undergraduate degree for each subject they teach. Veteran teachers can pass a "highly objective and uniform state standard of evaluation," also known as HOUSSE programs. HOUSSE programs differ quite drastically between states. Generally, they award teachers points for experience, student test results and other honors or publications.

Sanctions for Schools that Don't Meet Goals

Year One - School is added to state "watch list".

Year Two - School is labeled "in need of improvement", must be provided technical assistance from the state and school district, and must offer students intra-district school choice, to every extent possible. Originating districts must pay the costs of transportation for students requesting transfers. If choice can not be provided, schools can offer supplemental education services a year earlier.

Year Three - School must offer eligible students tutoring services at the cost to the district. Eligibility is based on lowest income, lowest performing children first.

Year Four - School is labeled in need of "corrective action" and must take at least one of the following actions: Replace school staff, implement new curriculum (including additional professional development), decrease management authority, appoint an outside expert to advise the school, extend the school day or year, restructure the internal organization of the school.

Year Five - School must restructure by becoming a charter school, replacing all staff, entering into a contract with a private management

students score proficient by 2014. States that agree to these goals receive federal funding.

ESEA
Elementary and Secondary Education Act: The 1964 law that No Child Left Behind reauthorized.

IASA
Improving America's Schools Act: Former President Bill Clinton's reauthorization of the Elementary and Seconda Education Act.

AYP
Adequate Yearly Progress: Schools that make AYP in a given year have met their goals for test score improvement.

LEP
Limited English Proficiency: Students with Limited Englisl Proficiency are part of a subgroups that must meet Adequate Yearly Progress benchmarks in order for the school not to be placed on a watch list.

HOUSSE
Highly Objective and Uniforn State Standards of Evaluatio. State programs under which veteran teachers can becom "Highly Qualified."

IDEA
Individuals with Disabilities Education Act: The federal la dealing with special educatio

This NCSL Backgrounder was written by NCSL Education Policy Specialist Scott Young and NCSL Media and Policy Associate Nicole Moore.

company, or turning over operations to the state department of education.

A Changing State/Federal Education Relationship

No Child Left Behind changes the complexion of state policymaking in education. Prior federal involvement in education was focused primarily around specific categorical programs, like in assisting students with disabilities (IDEA). But by and large, education was the responsibility of state legislatures and state school boards. Though the federal government has drastically increased its funding to states for education since NCLB's enactment, federal revenue still only comprises about 9 percent of a state's overall education budget.

The provisions of No Child Left Behind affect all students, not just those in categorical programs. This raises questions as to the appropriate role of the federal government in public education. Many states feel that education has always been a state responsibility, and if the federal government is going to pass laws that affect the entire student population, it should shoulder more then 9 percent of the associated costs.

What NCLB Means for States

NCLB is a conditional contract. By accepting federal funds for elementary and secondary education, states agree to meet the requirements of the law. A state can elect not to participate in NCLB and forego federal funding for elementary and secondary education (not including funding related to IDEA or HEA). Few, if any, states can afford to not to participate, although several have considered opting out in recent legislative sessions. Despite that states would be hard-pressed to pay for education without the federal help they've been receiving for decades, states are finding it costly, as well, to comply with the provisions of No Child Left Behind.

The National Conference of State Legislatures has been at the forefront of the NCLB issue since its enactment. The organization was one of the first to publicly state concerns about the law in its current form. In 2002, NCSL members approved a policy asking for technical amendments to the law. NCSL has recently organized a task force to recommend changes to this law that would help states comply without undue fiscal burdens.

NCSL's response to the law reflects the concerns of our members. Legislators support the goals of the law and want to find ways to implement it and use it to improve education. However, legislators have policy, fiscal and implementation issues that need to be discussed and addressed. An NCSL study released in March, 2004 identified a nearly $10 billion gap between the amount of NCLB funding Congress appropriated to states and the amount it was authorized to give. The gap between the amount of funding states are receiving and the true cost of the program has been estimated to be billions and billions of dollars larger.

The Latest Developments

Regulatory Changes - The administration has made several regulatory changes to the law in recent months. These are:

Schools can elect not to count students with limited English proficiency in testing results during the English learner's first year in the a U.S. public school. And students who learn English can be counted as part of the limited English proficiency subgroup for two more years. (Previously, once they learned English, they were no longer

considered part of the subgroup, making it hard to see the extent of progress in this subgroup.)

Teachers in eligible rural districts who are highly qualified in one subject now have three more years to become highly qualified in the additional subjects they teach; newly hired teachers have until their third year of teaching. States can determine their own certification standards for science teachers. The process for veteran teachers to become "highly qualified" has been streamlined.

The most severely cognitively disabled students can be counted as proficient based on the standards other than their grade level or the school's AYP benchmark. This category of students cannot exceed 1 percent of all students tested.

State Action - Since the law's enactment, 31 states have considered measures to either ask for more federal funding or flexibility, or to opt out of NCLB. The National Conference of State Legislatures has organized a bipartisan task force that will examine the law and recommend changes that would help states meet the law's laudable goals without an unnecessary fiscal burden.

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Spellings warns Utah in battle over federal act

By George Archibald
THE WASHINGTON TIMES

Education Secretary Margaret Spellings sent a surprise letter denouncing Utah legislation to put state education goals ahead of the federal No Child Left Behind Act on the eve of a special session of the state's Legislature, which convened yesterday.

In the letter, sent Monday through Sen. Orrin G. Hatch, Utah Republican, Mrs. Spellings warned that $76 million in federal funds might be cut off this year if the legislation passed and questioned motives of the bill's sponsors.

Utah legislators yesterday rebuffed the threat, with the House voting 66-7 to pass the bill. The Senate then approved the legislation 25-3.

Mrs. Spellings wrote that "several principles of the bill are troublesome, and appear to be designed to provoke non-compliance with federal law and needless confrontation."

The letter — which warned that "the consequences of enacting and implementing this bill would be so detrimental to students in Utah" — circulated through Salt Lake City by fax and e-mail Monday, building a wave of resentment among legislators, state officials said.

"I find it odd the threat of sanction would take away funds from the poorest schools," state Senate President John L. Valentine said before the final vote.

State Sen. Thomas Hatch, the bill's Republican sponsor in the Senate, emphasized during floor debate, "Nowhere in this legislation does it say we are opting out of NCLB. I don't think we're going to jeopardize federal funding. We're simply going to try to negotiate the best possible situation we can [with the federal government] and maintain control [of state education]."

Mrs. Spellings' implied threat of a funding cutoff propelled a backlash as the special legislative session convened.

"This is an extraordinarily worded letter," said state Rep. Margaret Dayton, a Republican and primary sponsor of the bill.

She said denunciation of Utah legislation by a federal official was an "unwarranted intrusion" on state autonomy, especially because local school districts and state taxpayers shoulder 100 percent of the responsibility and about 90 percent of the cost of Utah's 803 public schools.

The Education Department refused to comment.

Mrs. Dayton noted in House debate yesterday afternoon that Mrs. Spellings' letter stated in the first paragraph that passage of the Utah bill "does not guarantee non-compliance with the No Child Left Behind Act," thus federal funds would not be withdrawn.

"While the enactment of the bill itself does not guarantee non-compliance with NCLB, the implementation of a number of its provisions is likely to cause conflicts and trigger the consequences" of funding cutoff, Mrs. Spellings wrote.

"Utah provided binding assurances that it would comply with all NCLB requirements," so conflicts between Utah and the federal government on any issues could cause funding cutoff, she wrote. In the letter's 25-line third paragraph, Mrs. Spellings warned that the department probably would cut off at least $76 million in federal funds this year for low-income school districts and teacher training in Utah under the Elementary and Secondary Education Act (ESEA) if the Legislature passed the bill.

In the Legislature's regular session last month, Mrs. Dayton's bill was unanimously adopted by the 73-member House, but Republican Gov. Jon Huntsman Jr., who is expected to sign the measure today, requested the state Senate to delay action and allow time for negotiations between Utah and Washington.

The discussions stalled over federal officials' insistence that Utah implement annual achievement standards mandated in the federal law in all the state's public schools, including an estimated 600 that do not receive federal ESEA funds.

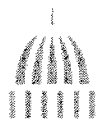
In her letter, Mrs. Spellings criticized Utah's failure to close the achievement gap between white and minority students.

She pointed to a disparity in reported math achievement in 2003 under the state's standardized test and the National Assessment of Educational Progress (NAEP) required under No Child Left Behind. Under the state test, 74 percent of white eighth-graders and 47 percent of Hispanics were reported "proficient or advanced" in math, while just 34 percent of white and 7 percent of Hispanic eighth-graders were "proficient or advanced" on the NAEP math test.

Mrs. Dayton said yesterday that greater progress in closing the gap was prevented because the state's own education reforms were "not totally implemented. All our efforts were put on hold to implement NCLB."

TASK FORCE ON NO CHILD LEFT BEHIND

FINAL REPORT



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Concern 5: Cost of Not Participating

Under the strict and technical definition in the Unfunded Mandates Reform Act (UMRA), NCLB is not a mandate. Neither is the Individuals with Disabilities Education Act, (IDEA) which is exempt because of its civil rights provisions.[69] Under NCLB, states have the right to reject funding if they do not wish to comply with the conditions of the statute. In reviewing the conditions of spending clause programs such as NCLB, the Task Force has identified two conditions that are not being met to legitimatize the exchange between the federal government and the states (see Section I). The first is that the conditions are not stated unambiguously—states do not have full knowledge of the requirements and consequences of the law and the amendment process, because the inconsistent manner in which amendments are approved provides neither notice nor reliable precedent. Second, there can be no coercive actions on the part of the federal government to force compliance with the statute. The second condition is the focus of this section.

On February 6, 2004, the deputy secretary of education, in response to a request from Utah Superintendent Steven Laing, outlined the consequences to the state of Utah of refusing the allocation of its Title I funds–the quid that holds the quo of the contract between NCLB and the states. "The rejection of state Title I money would result in serious consequences to other programs." The letter went on to specify that such unrelated programs as technology, safe and drug-free schools, after school programs, literacy programs for parents, and comprehensive school reform "would be negatively affected." The net effect of Utah's interest in trying to maintain the integrity of its accountability and standards system would be to lose $43 million in Title I funds and to forfeit nearly twice that amount in other formula and categorical funds. Title I is based on a specific funding formula. Conceptually, not participating in the Title I program results in states not having a formula to serve as the basis for programs tied to the Title I formula. Thus, the U.S. Department of Education contends that states would lose all funding that uses the Title I formula as the basis for additional financial allocations.

Prior to NCLB, the penalty for nonparticipation—turning down federal education funds—was to be excluded from the specific program requirements. That was the end of it. In an analysis of the Utah decision, the Council of Chief State School Officers (CCSSO) offered the following: "This broad reading of NCLB's integrated requirements is questionable, and ED likely could have reached other reasonable interpretations that would be more supportive of state opt-out authority."[70] By significantly raising the stakes for nonparticipation, NCLB is transformed into a one-way partnership that functions as an all-or-nothing federal mandate.

If addressing the achievement gap of poor and minority students is the ultimate goal of NCLB, and if participation is fully voluntary, the Task Force envisions that states be given a graduated system of participation, ranging from full compliance with all the provisions of the law to not participating at all.

For those states that have a long-term commitment to their existing standards and accountability system, an intermediate option would be a multi-year commitment to show a reduction in the achievement gap and a statistically significant progression toward proficiency. It is the goal of NCLB that should concern the federal government, not the

Briefs and Other Related Documents

Supreme Court of the United States
PENNHURST STATE SCHOOL AND HOSPITAL et al., Petitioners,
v.
Terri Lee HALDERMAN et al.
MAYOR OF CITY OF PHILADELPHIA et al., Petitioners,
v.
Terri Lee HALDERMAN et al.
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al., Petitioners,
v.
PENNHURST STATE SCHOOL AND HOSPITAL et al.
COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATORS FOR BUCKS COUNTY et al., Petitioners,
v.
Terri Lee HALDERMAN et al.
PENNHURST PARENTS-STAFF ASSOCIATION, Petitioner,
v.
Terri Lee HALDERMAN et al.
Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489.

Argued Dec. 8, 1980.
Decided April 20, 1981.

Retarded resident of Pennsylvania hospital for the care and treatment of the mentally retarded brought suit challenging conditions of confinement. The United States District Court for the Eastern District of Pennsylvania, 446 F.Supp. 1295, rendered judgment for the resident and ordered the hospital closed. The United States Court of Appeals for the Third Circuit, 612 F.2d 84, substantially affirmed, but reversed the order of closure. Certiorari was granted. The Supreme Court, Justice Rehnquist, held that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act did not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment.

Reversed and remanded.

Justice Blackmun filed an opinion concurring in part and concurring in the judgment.

Justice White filed an opinion dissenting in part, in which Justice Brennan and Justice Marshall joined.

West Headnotes

[1] States 4.16(1)
360k4.16(1) Most Cited Cases
(Formerly 360k4.16)
Because legislation to enforce guarantees of Fourteenth Amendment imposes congressional policy on state involuntarily, and because it often intrudes on traditional state authority, court should not quickly attribute to Congress an unstated intent to act under its authority to enforce Fourteenth Amendment; case for inferring intent is at its weakest where rights asserted impose affirmative obligations on states to fund certain services, since it may be assumed the Congress will not implicitly attempt to impose massive financial obligations on states. U.S.C.A.Const. Amend. 14, § 5.

[2] United States 82(2)
393k82(2) Most Cited Cases
Legislation enacted pursuant to spending power is much in nature of contract; in return for federal funds, states agree to comply with federally imposed conditions and legitimacy of Congress' power to litigate under spending power thus rests on whether state voluntarily and knowingly accepts terms of "contract." U.S.C.A.Const. Art. 1, § 8, cl. 1.

[3] United States 82(2)
393k82(2) Most Cited Cases
If Congress intends to impose condition on grant of federal monies pursuant to spending power, it must do so unambiguously, especially where state's potential obligations are largely indeterminate. U.S.C.A.Const. Art. 1, § 8, cl. 1.

[4] Mental Health 51.5
257Ak51.5 Most Cited Cases
(Formerly 257Ak51)

[4] United States 82(2)
393k82(2) Most Cited Cases
"Bill of rights" provision of Developmentally Disabled Assistance and Bill and Rights Act did not create in favor of mentally retarded any substantive

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rights to "appropriate treatment" in the "least restrictive" environment; Congress did not impose such obligation pursuant to its power to enforce Fourteenth Amendment, nor did it act pursuant to spending power to condition states' receipt of monies under the Act on such right to treatment. U.S.C.A.Const. Art. 1, § 8, cl. 1; Amend. 14, § 5; Developmental Disabilities Assistance and Bill of Rights Act, § 111 as amended 42 U.S.C.A. § 6010.

***1532** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 288, 50 L.Ed. 499.

***1** The Developmentally Disabled Assistance and Bill of Rights Act (Act) established a federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled. The Act is voluntary, and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. The "bill if rights" provision of the Act, 42 U.S.C. § § 6010(1) and (2), states that mentally retarded persons "have a right to appropriate treatment, services, and habilitation" in "the setting that is least restrictive of ... personal liberty." Pennsylvania, a participating State, owns and operates Pennhurst State School and Hospital, a facility for the care, and treatment of the mentally retarded. Respondent ***2** Halderman, a retarded resident of Pennhurst, brought a class action in Federal District Court on behalf of herself and all other Pennhurst residents against Pennhurst and various officials responsible for its operation. It was alleged, *inter alia*, that conditions at Pennhurst were unsanitary, inhumane, and dangerous, and that such conditions denied the class members various specified constitutional and statutory rights, including rights under the Act, and, in addition to seeking injunctive and monetary relief, it was urged that Pennhurst be closed and that "community living arrangements" be established for its residents. The District Court found that certain of the claimed rights were violated, and granted the relief sought. The Court of Appeals substantially affirmed, but avoided the constitutional claims and instead held that § 6010 created substantive rights in favor of the mentally retarded, that mentally retarded persons have an implied cause of action to enforce those rights, and that the conditions at Pennhurst violated those rights. The court further found that Congress enacted the Act pursuant to both § 5 of the Fourteenth Amendment and the spending power.

Held: Section 6010 does not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. Pp. 1536-1547.

(a) The case for inferring congressional intent to create, pursuant to Congress' enacting power under § 5 of the Fourteenth Amendment, enforceable rights and obligations is at its weakest where, as here, the rights asserted imposed *affirmative* obligations on the States to fund certain services, since it may be assumed that Congress will not implicitly attempt to impose massive financial obligations on the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract," but if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Pp. 1538-1540.

****1533** (b) applying the above principles to these cases, This court fInds nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing "appropriate treatment" in the "least restrictive" environment to their mentally retarded citizens. There is virtually no support for the Court of Appeals' conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose, but to the contrary the ***3** Act's language and structure demonstrate that it is a mere federal-state funding statute. Section 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects. Pp. 1540-1542.

(c) There is no merit to the contention that Congress, acting pursuant to its spending power, conditioned the grant of federal funds on the State's agreeing to

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underwrite the obligations the Court of Appeals read into § 6010. As noted, the "findings" of § 6010, when viewed in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties. Moreover, the "plain language" of § 6010, as well as the administrative interpretation of the provision, also refutes such contention. Section 6010, in contrast to other provisions of the Act that clearly impose conditions, in no way suggests that the grant of federal funds is "conditioned" on a State's funding the rights described therein. Pp. 1542-1543.

(d) The rule of statutory construction that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds, applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. The crucial inquiry here is not whether a State would knowingly undertake the obligation to provide "appropriate treatment" in the "least restrictive" setting, but whether Congress spoke so clearly that it can fairly be said that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that by accepting funds under the Act they would be obligated to comply with § 6010. Pp. 1543-1544.

(e) A comparison of the general language of § 6010 with the conditions Congress explicitly imposed on the States under the Act demonstrates that Congress did not intend to place either absolute or conditional obligations on the States under § 6010. Pp. 1543-1545.

(f) Questions not addressed by the Court of Appeals--as to whether individual mentally retarded persons may bring suit to compel compliance with those conditions that *are* contained in the Act, the federal constitutional claims, and claims under another federal statute--and issues as to whether state law imposed an obligation on Pennsylvania to provide treatment, are remanded for consideration or reconsideration, respectively, in light of the instant decision. Pp. 1544-1547. 612 F.2d 84, reversed and remanded.

***4** Allen C. Warshaw, Harrisburg, Pa., for petitioners in No. 79-1404.

Thomas M. Kittredge, Philadelphia, Pa., for petitioners in Nos. 79-1408 and 79-1415.

Joel I. Klein, Washington, D. C., for petitioners in No. 79-1489.

David Ferleger, Philadelphia, Pa., for respondents Halderman et al.

Drew S. Days, III, Washington, D. C., for respondent United States.

Thomas K. Gilhool, Philadelphia, Pa., for respondent Pennsylvania Association for Retarded Citizens.

***5 **1534** Justice REHNQUIST delivered the opinion of the Court.

At issue in these cases is the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, is amended, 42 U.S.C. § 6000 *et seq.* (1976 ed. and Supp.III). The Court of Appeals for the Third Circuit held that the Act created substantive rights in favor of the mentally retarded, that those rights were judicially enforceable, and that conditions at the Pennhurst State School and Hospital (Pennhurst), a facility for the care and treatment of the mentally retarded, violated those rights. For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cases for further proceedings.

I

The Commonwealth of Pennsylvania owns and operates Pennhurst. Pennhurst is a large institution, housing approximately 1,200 residents. Seventy-five percent of the residents are either "severely" or "profoundly" retarded--that is, with an IQ of less than 35--and a number of the residents***6** are also physically handicapped. About half of its residents were committed there by court order and half by a parent or other guardian.

In 1974, respondent Terri Lee Halderman, a minor retarded resident of Pennhurst, filed suit in the District Court for the Eastern District of Pennsylvania on behalf of herself and all other Pennhurst residents against Pennhurst, its superintendent, and various officials of the Commonwealth of Pennsylvania responsible for the operation of Pennhurst (hereafter petitioners). The additional respondents (hereinafter with respondent Halderman, referred to as respondents) in these cases--other mentally retarded persons, the United States, and the Pennsylvania Association for Retarded Citizens (PARC)--subsequently intervened as plaintiffs. PARC added several surrounding counties as defendants, alleging that they were responsible for the commitment of

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persons to Pennhurst.

As amended in 1975, the complaint alleged, *inter alia*, that conditions at Pennhurst were unsanitary, inhumane, and dangerous. Specifically, the complaint averred that these conditions denied the class members due process and equal protection of the law in violation of the Fourteenth Amendment, inflicted on them cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, and denied them certain rights conferred by the Rehabilitation Act of 1973, 87 Stat. 355, as amended, 29 U.S.C. § 701 *et seq.* (1976 ed. and Supp.III), the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § § 6001 *et seq.* (1976 ed. and Supp.III), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa.Stat.Ann., Tit. 50, § § 4101-4704 (Purdon 1969). In addition to seeking injunctive and monetary relief, the complaint urged that Pennhurst be closed and that "community living arrangements" [FN1] be established for its residents.

FN1. "Community living arrangements" are smaller, less isolated residences where retarded persons are treated as much as possible like nonretarded persons.

***7** The District Court certified a class consisting of all persons who have been or may become residents of Pennhurst. After a 32 day trial, it issued an opinion, reported at 446 F.Supp. 1295 (1977), making findings of fact and conclusions of law with respect to the conditions at Pennhurst. Its findings of fact are undisputed: Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the "habilitation" of the retarded. [FN2] Indeed, the court found that the physical, intellectual, and emotional skills of some residents have ****1535** deteriorated at Pennhurst. *Id.*, at 1308-1310.

FN2. There is a technical difference between "treatment," which applies to curable mental illness, and "habilitation," which consists of education and training for those, such as the mentally retarded, who are not ill. This opinion, like the opinions of the courts below, will use the terms interchangeably.

The District Court went on to hold that the mentally retarded have a federal constitutional right to be provided with "minimally adequate habilitation" in the "least restrictive environment," regardless of whether they were voluntarily or involuntarily committed. *Id.*, at 1314-1320. The court also held that there existed a constitutional right to "be free from harm" under the Eighth Amendment, and to be provided with "nondiscriminatory habilitation" under the Equal Protection Clause, *Id.*, at 1320-1322. In addition, it found that § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and § 201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa.Stat.Ann., Tit. 50, § 4201 (Purdon 1969), provided a right to minimally adequate habilitation in the least restrictive environment.

Each of these rights was found to have been violated by the conditions existing at Pennhurst. Indeed, the court held that a large institution such as Pennhurst could not provide adequate habilitation. 446 F.Supp., at 1318. It thus ordered ***8** that Pennhurst eventually be closed, that suitable "community living arrangements" be provided for all Pennhurst residents, that plans for the removal of residents from Pennhurst be submitted to the court, that individual treatment plans be developed for each resident with the participation of his or her family, and that conditions at Pennhurst be improved in the interim. The court appointed a Special Master to supervise the implementation of this order. *Id.*, at 1326-1329.

The Court of Appeals for the Third Circuit substantially affirmed the District Court's remedial order. 612 F.2d 84 (1979) (en banc). Unlike the District Court, however, the Court of Appeals sought to avoid the constitutional claims raised by respondents and instead rested its order on a construction of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (1976 ed. and Supp.III). [FN3] It found that § § 111(1) and (2) of the Act, the 89 Stat. 502, 42 U.S.C. § § 6010(1) and (2), "bill of rights" provision, grant to mentally retarded persons a right to "appropriate treatment, services, and habilitation" in "the setting that is least restrictive of ... personal liberty." The ***9** court further held that under the test articulated in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), mentally retarded persons have an implied cause of action to enforce that right. 612 F.2d, at 97. Because the court found that Congress enacted the statute pursuant to both § 5 of the Fourteenth Amendment [FN4] and the spending power, [FN5] it declined to consider whether a statute enacted pursuant to the spending power alone "could ever provide the predicate for private substantive rights." *Id.*, at 98. As an alternative ground, the court ****1536** affirmed the District Court's holding that Pennhurst residents have

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a state statutory right to adequate "habilitation."

FN3. As originally enacted in 1975, the definition of "developmentally disabled" included mental retardation. § 6001(7)(A)(i). As amended in 1978, however, a mentally retarded individual is considered developmentally disabled only if he satisfies various criteria set forth in the Act.
It is perhaps suggestive of the novelty of the Court of Appeals' decision that none of the respondents briefed the Act before the District Court, nor raised it in the Court of Appeals. Rather, the court itself suggested the applicability of the Act and requested supplemental briefs on the issue for the purpose of rehearing en banc. Even then the United States, which raised only constitutional claims before the District Court, contended merely that the "most significant implication of the Developmentally Disabled Act is the important light which it sheds upon congressional intent about the nature of the rights of institutionalized mentally retarded persons, and the guidance which it may give in discerning a violation of Section 504 [of the Rehabilitation Act]." Supplemental Brief for United States in No. 78-1490 (CA3), p. 2.

FN4. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

FN5. The spending power is encompassed in Art. I, § 8, cl. 1, of the Constitution, which states that "Congress shall have the Power To ... provide for the ... general Welfare of the United States."

The court concluded that the conditions at Pennhurst violated these federal and state statutory rights. As to relief, it affirmed the order of the District Court except insofar as it ordered Pennhurst to be closed. Although the court concluded that "deinstitutionalization is the favored approach to habilitation" in the least restrictive environment, it did not construe the Act to require the closing of large institutions like Pennhurst. *Id.*, at 115. The court thus remanded the case to the District Court for "individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient" and instructed the District Court or the Master to "engage in a presumption in favor of placing individuals in [community living arrangements]." *Id.*, at 114-115. [FN6]

FN6. The decisions below are somewhat unclear concerning to whom petitioners owe this right of treatment. The District Court certified a class of all persons who *may* become residents of Pennhurst, and the Court of Appeals directed relief for all *plaintiffs* in the case, including those on Pennhurst's waiting list. Thus, the decisions arguably entitle even those mentally retarded citizens who are not institutionalized or currently receiving services to a "right to treatment."

***10** Three judges dissented. Although they assumed that the majority was correct in holding that Pennhurst residents have a right to treatment under the Act and an implied cause of action under the Act to enforce that right, they disagreed that the Act imposed a duty on the defendants to provide the "least restrictive treatment" possible. The dissent stated that "the language and structure of the Act, the relevant regulations, and the legislative history all indicate that the States may consider their own resources in providing less restrictive treatment." *Id.*, at 119. It did not believe that the general findings and declarations contained in a funding statute designed to encourage a course of conduct could be used by the federal courts to create absolute obligations on the States. [FN7]

FN7. The dissent went on to conclude that neither the Federal Constitution, § 504 of the Rehabilitation Act of 1973, nor state law required a State to provide treatment in the "least restrictive setting." The dissent would have thus reversed those portions of the District Court's order that contemplated a court order closing Pennhurst and the creation of new less restrictive facilities. It would also have remanded the case to the District Court for it to decide "how best to bring Pennhurst in compliance with statutory and constitutional requirements" and left open "the possibility that certain individuals in the future may be able to show that their particular mode of treatment is not rationally related to the State's purpose in confining them." 612 F.2d, at 131.

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We granted certiorari to consider petitioners' several challenges to the decision below. 447 U.S. 904, 100 S.Ct. 2984, 64 L.Ed.2d 853. Petitioners first contend that 42 U.S.C. § 6010 does not create in favor of the mentally retarded any substantive rights to "appropriate treatment" in the "least restrictive" environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or § 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. ***11** Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual habilitation plans for the mentally retarded. Because we agree with petitioners' first contention--that § 6010 simply does not create substantive rights--we find it unnecessary to address the remaining issues.

II

We turn first to a brief review of the general structure of the Act. It is a federal-state grant program whereby the Federal ****1537** Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled. Like other federal-state cooperative programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. See generally *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). The Commonwealth of Pennsylvania has elected to participate in the program. The Secretary of the Department of Health and Human Services (HHS), the agency responsible for administering the Act, has approved Pennsylvania's state plan and in 1976 disbursed to Pennsylvania approximately $1.6 million. Pennhurst itself receives no federal funds from Pennsylvania's allotment under the Act, though it does receive approximately $6 million per year in Medicaid funds.

The Act begins with an exhaustive statement of purposes. 42 U.S.C. § 6000(b)(1) (1976 ed., Supp.III). The "overall purpose" of the Act, as amended in 1978 is:

"*[T]o assist* the states to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their ***12** maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities." (Emphasis supplied.)

As set forth in the margin, the "specific purposes" of the Act are to "assist" and financially "support" various activities necessary to the provision of comprehensive services to the developmentally disabled. § 6000(b)(2) (1976 ed., Supp.III). [FN8]

FN8. Section 6000(b)(2) provides:
"The specific purposes of this chapter are--
"(A) to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education for All Handicapped Children Act, the Rehabilitation Act of 1973 ..., or other health, education, or welfare programs;
"(B) to assist States in appropriate planning activities;
"(C) to make grants to States and public and private, nonprofit agencies to establish model programs, to demonstrate innovative habilitation techniques, and to train professional and paraprofessional personnel with respect to providing services to persons with developmental disabilities;
"(D) to make grants to university affiliated facilities to assist them in administering and operating demonstration facilities for the provision of services to persons with developmental disabilities, and interdisciplinary training programs for personnel needed to provide specialized services for these persons; and
"(E) to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities."

The Act next lists a variety of conditions for the receipt of federal funds. Under § 6005, for example, the Secretary "as a condition of providing assistance" shall require that "each recipient of such assistance take affirmative action" to hire qualified handicapped individuals. Each State, in turn, shall "as a condition" of receiving assistance submit to the Secretary a plan to evaluate the services provided

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under the Act. § 6009. Each State shall also "as a condition" of receiving assistance "provide the Secretary satisfactory assurances ***13** that each program ... which receives funds from the State's allotment ... has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan." § 6011(a) (1976 ed., Supp.III). And § 6012(a) (1976 ed., Supp.III) conditions aid on a State's promise to "have in effect a system to protect and advocate the rights of persons with developmental disabilities."

At issue here, of course, is § 6010, the "bill of rights" provision. It states in relevant part:

> "Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> ****1538** "(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 personal liberty.
>
> "(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutio[n] ... that--(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such person; or (B) does not meet the following minimum standards ...."

Noticeably absent from § 6010 is any language suggesting that § 6010 is a "condition" for the receipt of federal funding under the Act. Section 6010 thus stands in sharp contrast to § § 6005, 6009, 6011, and 6012.

The enabling parts of the Act are the funding sections. 42 U.S.C. § § 6061-6063 (1976 ed. and Supp.III). [FN9] Those sections describe how funds are to be allotted to the States, require ***14** that any State desiring financial assistance submit an overall plan satisfactory to the Secretary of HHS, and require that funds disbursed under the Act be used in accordance with the approved state plan. To be approved by the Secretary, the state plan must comply with several specific conditions set forth in § 6063. It, *inter alia*, must provide for the establishment of a State Planning Council, § 6063(b)(1), and set out specific objectives to be achieved under the plan, § 6063(b)(2)(A) (1976 ed., Supp.III). Services furnished under the plan must be consistent with standards prescribed by the Secretary, § 6063(b)(5)(A)(i) (1976 ed., Supp.III), and be provided in an individual manner consistent with § 6011, § 6063(b)(5)(B) (1976 ed., Supp.III). The plan must also be supported by assurances that any program receiving assistance is protecting the human rights of the disabled consistent with § 6010, § 6063(b)(5)(C) (1976 ed., Supp.III). [FN10] Each State must also require its State Planning Council to serve as an advocate of persons with developmental disabilities. § 6067 (1976 ed., Supp.III).

> FN9. Sections 6031-6043 authorize separate funding to university-affiliated facilities for the operation of demonstration and training programs and are not pertinent here.

> FN10. The provisions of § 6063 were reworded and recodified in 1978. Section 6063(b)(5)(C) (1976 ed., Supp.III) replaced § 133(b)(24) of the Act, as added and renumbered, 89 Stat. 491, 506, 42 U.S.C. § 6063(b)(24), which required a somewhat similar "assurance." The only significant difference between the two provisions is that § 6063(b)(5)(C) contains a specific reference to § 6010.

The Act further provides procedures and sanctions to ensure state compliance with its requirements. The Secretary may, of course, disapprove a state plan, § 6063(c). If a State fails to satisfy the requirements of § 6063, the Secretary may terminate or reduce the federal grant. § 6065 (1976 ed., Supp.III). Any State dissatisfied with the Secretary's disapproval of the plan, or his decision to terminate funding, may appeal to the federal courts of appeals. § 6068. No other cause of action is recognized in the Act.

***15** III

As support for its broad remedial order, the Court of Appeals found that 42 U.S.C. § 6010 created substantive rights in favor of the disabled and imposed an obligation on the States to provide, at their own expense, certain kinds of treatment. The initial question before us, then, is one of statutory construction: Did Congress intend in § 6010 to create enforceable rights and obligations?

A

In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth ****1539** Amendment and its power under the Spending Clause to place conditions on the grant of federal funds. Although the court below held that

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Congress acted under both powers, the respondents themselves disagree on this point. The Halderman respondents argue that § 6010 was enacted pursuant to § 5 of the Fourteenth Amendment. Accordingly, they assert that § 6010 is mandatory on the States, regardless of their receipt of federal funds. The Solicitor General, in contrast, concedes that Congress acted pursuant to its spending power alone. Tr. of Oral Arg. 54. Thus, in his view, § 6010 only applies to those States which accept federal funds. [FN11]

FN11. The PARC respondents take a somewhat different view. Although they argue that Congress enacted § 6010 under both § 5 and the spending power, they suggest that § 6010 applies only to programs which receive federal money. The PARC respondents are also cross-petitioners in this litigation, arguing that the Act requires Pennhurst to be closed. In their view, the individual placement decisions required by the court below are not authorized by the Act and, in any event, are an improper exercise of judicial authority.

[1] Although this Court has previously addressed issues going to Congress' power to secure the guarantees of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724, 16 L.Ed.2d 828 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); ***16***Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1975), [FN12] we have had little occasion to consider the appropriate test for determining when Congress intends to enforce those guarantees. Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5. See *Katzenbach v. Morgan, supra* (intent expressly stated in the Voting Rights Act of 1965); *Oregon v. Mitchell, supra* (intent expressly stated in the Voting Rights Act Amendments of 1970); *Fitzpatrick v. Bitzer, supra* (intent expressly stated in both the House and Senate Reports of the 1972 Amendments to the Civil Rights Act of 1964); cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (intent to enforce the Fifteenth Amendment expressly stated in the Voting Rights Act of 1965). Those cases, moreover, involved statutes which simply prohibited certain kinds of state conduct. The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain ***17** services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

FN12. There is of course a question whether Congress would have the power to create the rights and obligations found by the court below. Although the court below held that "section 6010 does not go beyond what has been judicially declared to be the limits of the [F]ourteenth [A]mendment," 612 F.2d, at 98, this Court has never found that the involuntarily committed have a constitutional "right to treatment," much less the voluntarily committed. See *Sanchez v. New Mexico*, 396 U.S. 276, 90 S.Ct. 588, 24 L.Ed.2d 469 (1970), dismissing for want of substantial federal question, 80 N.M. 438, 457 P.2d 370 (1968); *O'Connor v. Donaldson*, 422 U.S. 563, 587-589, 95 S.Ct. 2486, 2499-2500, 45 L.Ed.2d 396 (1975) (BURGER, C. J., concurring). Thus, the Pennhurst petitioners and several *amici* argue that legislation which purports to create against the States not only a right to treatment, but one in the least restrictive setting, is not "appropriate" legislation within the meaning of § 5. Because we conclude that § 6010 creates no rights whatsoever, we find it unnecessary to consider that question.

[2][3] Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. See, *e. g., Oklahoma v. CSC*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); ****1540***Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598, 57 S.Ct. 883, 890-896, 81 L.Ed.2d 1279 (1937); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65

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L.Ed.2d 784 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [FN13] Cf. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

FN13. There are limits on the power of Congress to impose conditions on the States pursuant to its spending power, *Steward Machine Co. v. Davis*, 301 U.S., at 585, 57 S.Ct., at 890; *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (BURGER, C. J.); see *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Even the Halderman respondents, like the court below, recognize the "constitutional difficulties" with imposing affirmative obligations on the States pursuant to the spending power, Tr. of Oral Arg. 45. That issue, however, is not now before us.

Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving ***18** federal funds, it has proved capable of saying so explicitly. See, *e. g., King v. Smith, supra*, at 333, 88 S.Ct., at 2141 (Social Security Act creates a "federally imposed obligation [on the States] to furnish 'aid to families with dependent children ... with reasonable promptness to all eligible individuals'," quoting the Act). We must carefully inquire, then, whether Congress in § 6010 imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms.

B

[4] Applying those principles to these cases, we find nothing in the Act or its legislative history to suggest that Congress intended to require the States to assume the high cost of providing "appropriate treatment" in the "least restrictive environment" to their mentally retarded citizens.

There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstrate that it is a mere federal-state funding statute. The explicit purposes of the Act are simply "to assist" the States through the use of federal grants to improve the care and treatment of the mentally retarded. § 6000(b) (1976 ed., Supp.III). Nothing in either the "overall" or "specific" purposes of the Act reveals an intent to require the States to fund new, substantive rights. Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States.

Respondents nonetheless insist that the fact that § 6010 speaks in terms of "rights" supports their view. Their reliance is misplaced. " 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975), ***19** quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 12 L.Ed. 1009 (1849). See ****1541***District of Columbia v. Carter*, 409 U.S. 418, 420, 93 S.Ct. 602, 604, 34 L.Ed.2d 613 (1973). Contrary to respondents' assertion, the specific language and the legislative history of § 6010 are ambiguous. We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. It is simply a general statement of "findings" and, as such, is too thin a reed to support the rights and obligations read into it by the court below. The closest one can come in giving § 6010 meaning is that it justifies and supports Congress' appropriation of money under the Act and guides the Secretary in his review of state applications for federal funds. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). [FN14] As this Court recognized in *Rosado v. Wyman, supra*, at 413, 90 S.Ct., at 1218, "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions." This is such a case.

FN14. Respondents also contend that the title of the Act as passed, rather than as codified, reveals an intent to create rights in

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favor of the disabled. Pub.L. 94-103, 89 Stat. 486. As passed, the Act contained three Titles. Title I provided for services and facilities to the developmentally disabled and Title II, entitled "The Establishment and Protection of the Rights of Persons with Developmental Disabilities," contained § 6010. Respondents' reliance on this title is misplaced. It has long been established that the title of an Act "cannot enlarge or confer powers." *United States v. Oregon & California R. Co.*, 164 U.S. 526, 541, 17 S.Ct. 165, 170, 41 L.Ed. 541 (1896); *Cornell v. Coyne*, 192 U.S. 418, 430, 24 S.Ct. 383, 385-386, 48 L.Ed. 504 (1904). See *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805); *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 73, 33 L.Ed. 302 (1889). In addition, the location of § 6010 in the Act as passed confirms § 6010's limited meaning. Section 6010 was the preamble of Title II followed by provisions later codified as § § 6009, 6011, 6012. The congressional findings in § 6010 thus seem to have been designed simply to serve as the rationale for the conditions imposed in the remaining sections of Title II.

***20** The legislative history buttresses our conclusion that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled. The House Committee believed the purpose of the Act was simply to continue an existing federal grant program, designed to promote "effective planning by the states of their programs, initiation of new, needed programs, and filling of gaps among existing efforts." H.R.Rep.No.94-58, pp. 6, 8-9 (1975), U.S.Code Cong. & Admin.News, 1975, pp. 919, 924. Indeed, as passed by the House, the Act contained no "bill of rights" provision whatsoever. The Committee instead merely "applauded" the efforts of others to secure rights for the developmentally disabled. *Id.*, at 7.

Respondents, however, argue vigorously that the legislative history of the bill as passed by the Senate evinces Congress' intent to impose absolute obligations on the States to fund certain levels of treatment. Respondents rely most heavily on Title II of the Senate bill which adopted a "Bill of Rights" for the mentally retarded and contained over 400 pages of detailed standards "designed to assist in the protection of the human rights guaranteed under the Constitution." S.Rep.No.94-160, p. 34 (1975). The Report also noted that the "Federal Government has a responsibility to provide equal protection under the law to all citizens." *Id.*, at 32. And Senator Stafford stated on the Senate floor that "Title II was added to the bill to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization." 121 Cong.Rec. 16516 (1975).

Respondents read too much into these scattered bits of legislative history. In the first place, it is by no means clear that even the Senate bill created new substantive rights in favor of the disabled. [FN15] Despite ****1542** the general discussion of ***21** equal protection guarantees in the Senate Report, the Committee's view of the Act was quite modest. It explained that the purpose of Title II was simply "to stimulate the States to develop alternative programs of care for mentally retarded." S.Rep.No.94-160, *supra*, at 1. It viewed Title II as satisfying the "need for a clear exposition of the purposes for which support should be provided under the authorities of the Act." *Id.*, at 3. Nor are the remarks of various Senators to the contrary. Senator Stafford spoke merely in terms of "assisting" the States. Senator Randolph, in introducing the bill on the floor of the Senate, confirmed the Senate's limited purpose. He said:

FN15. As originally passed by the Senate, for example, the bill provided that a State which failed to comply with the detailed standards of care enumerated in Title II would lose all federal funding, including that provided under such programs as Medicaid. S. 462, Tit. II, § 206. See S.Rep.No.94-160, p. 35 (1975). The fact that the Senate would include a *funding* sanction is, of course, wholly inconsistent with respondents' argument that Congress was acting pursuant to § 5 of the Fourteenth Amendment.

"[W]e have developed a bill whose thrust, like the 1970 act, is *to assist* States in developing a comprehensive plan to bring together available resources in a coordinated way so developmentally disabled individuals are appropriately served. Our goal is more thorough and careful planning and more effective evaluation." 121 Cong.Rec. 16514 (1975) (emphasis supplied).

Even Senator Javits, the principal proponent of Title II, did not read the Act as establishing new

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substantive rights to enforce those guaranteed by the Constitution. He explained that Title II, "represents a *reaffirmation* of the basic human and civil rights of all citizens. It offers the *direction* to provide a valid and realistic *framework* for improving the overall situation of his country's mentally retarded and other developmentally disabled individuals." *Id.*, at 16519 (emphasis supplied).

In any event, whatever the Senate's view of its bill, Congress declined to adopt it. The Conference Committee rejected the explicit standards of Title II and instead compromised ***22** on the more general statement of "findings" in what later became § 6010. H.R.Conf.Rep.No.94-473, pp. 41, 43 (1975). As Senator Javits noted with respect to the compromise, "Title II of the Conference agreement establishes a *clear Federal policy* that the mentally retarded have a right to appropriate treatment, services, and habilitation." 121 Cong.Rec. 29820 (1975) (emphasis supplied).

In sum, nothing suggests that Congress intended the Act to be something other than a typical funding statute. [FN16] Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects. Much like the Medicaid statute considered in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), the Act at issue here "was designed as a cooperative program of shared responsibilit[ies], not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." *Id.*, at 309, 100 S.Ct., at 2684.

FN16. Nor is the contrary proved by a 1978 amendment to § 6010 which provides:
"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." 92 Stat. 3007.
This provision, adopted in Conference Committee without any legislative history, merely expresses Congress' view that persons with developmental disabilities have rights in addition to those generally available to "all persons." The section recognizes that Congress only "described" rights, not created them. Nothing in the language supports an inference of substantive duties from a statement of congressional policy.

There remains the contention of the Solicitor General that Congress, acting pursuant to its spending power, conditioned the grant of federal money on the State's agreeing to underwrite the obligations the Court of Appeals read into § 6010. We find that contention wholly without merit. As amply demonstrated above, the "findings" in § 6010, when viewed ***23** in the context of ****1543** the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties.

The "plain language" of § 6010 also refutes the Solicitor General's contention. When Congress intended to impose conditions on the grant of federal funds, as in § § 6005, 6009, 6011, 6012, 6063, and 6067, it proved capable of doing so in clear terms. Section 6010, in marked contrast, in no way suggests that the grant of federal funds is "conditioned" on a State's funding the rights described therein. The existence of explicit conditions throughout the Act, and the absence of conditional language in § 6010, manifest the limited meaning of § 6010.

Equally telling is the fact that the Secretary has specifically rejected the position of the Solicitor General. The purpose of the Act, according to the Secretary, is merely "to improve and coordinate the provision of services to persons with developmental disabilities." 45 CFR § 1385.1 (1979). The Secretary acknowledges that "[n]o authority was included in [the 1975] Act to allow the Department to withhold funds from States on the basis of failure to meet the findings [of § 6010]." 45 Fed.Reg. 31006 (1980). If funds cannot be terminated for a State's failure to comply with § 6010, § 6010 can hardly be considered a "condition" of the grant of federal funds. [FN17] The Secretary's interpretation of § 6010, moreover, is well supported by the legislative history. In reaching ***24** the compromise on § 6010, the Conference Committee rejected the Senate's proposal to terminate federal funding of States which failed to comply with the standards enumerated in Title II of the Senate's bill, see n. 15, *supra*. By eliminating that sanction, Congress made clear that the provisions of § 6010 were intended to be hortatory, not mandatory. [FN18]

FN17. To be sure, the Secretary has read the 1978 recodification of § 6063(b)(5)(C) (1976 ed., Supp.III) to require a participating State to assure the Secretary that services in funded programs are being provided consistent with § 6010. 45

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Fed.Reg. 31006 (1980). But, as will be discussed *infra*, even if the Secretary's interpretation of the 1978 recodification is correct, a participating State's obligations under § 6063(b)(5)(C) are far more modest than the obligations read into § 6010 by the court below and urged by the Solicitor General here. It is also important to note that the Secretary, despite his apparent authority to do so, has not terminated funds to Pennsylvania for noncompliance with § 6063(b)(5)(C).

FN18. The Solicitor General also relies heavily on § 6010(3), quoted *supra*, at 13. He apparently contends that Congress in § 6010(3) conditioned the grant of all federal funds, including Medicaid, on the participating State's agreement to provide adequate treatment to individuals. Although § 6010(3), unlike § § 6010(1) and (2), at least speaks in terms of "obligations," we find the Solicitor General's argument ultimately without merit. First, like the other "findings" in § 6010, § 6010(3) is merely an expression of federal *policy*. As even the Secretary concedes, Congress did not give the Secretary authority to withdraw federal funds on the basis of a State's failure to comply with § 6010(3). Second, by its terms, § 6010(3) states that both the Federal Government and the States should not spend public money for substandard *institutions*. Nothing reveals an intent to condition the grant of federal funds under the Act on the State's promise to provide appropriate habilitation to *individuals*.

The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. *Harris v. McRae, supra*. It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States.

Our conclusion is also buttressed by the rule of statutory construction established above, that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds. That canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. It is difficult to know what ***25 **1544** is meant bY providing "appropriate treatment" in the "least restrictive" setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment. The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010. Not only does § 6010 lack conditional language, but is strains credulity to argue that participating States should have known of their "obligations" under § 6010 when the Secretary of HHS, the governmental agency responsible for the administration of the Act and the agency with which the participating States have the most contact, has never understood § 6010 to impose conditions on participating States. Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or "retroactive" conditions.

Finally, a brief comparison of the general language of § 6010 with the conditions Congress explicitly imposed on the States demonstrates that Congress did not intend to place either absolute or conditional obligations on the States. The Court of Appeals, for example, read § 6010 to impose an obligation to provide habilitation plans for all developmentally disabled persons. But Congress required habilitation plans under § 6011 "only when the Federal assistance under the Act contributes a portion of the cost of the habilitation services to the developmentally disabled person." H.R.Conf.Rep.No. 94-473, p. 43, U.S.Code Cong. & Admin.News 1975, p. 963 (1975). If the Court of Appeals were correct, of course, there would be no purpose for Congress to have required habilitation plans at all, or to have limited the requirement to certain programs, since such plans automatically would have been mandated in all programs by the more inclusive requirements of § 6010.

***26** Second, the specific condition imposed in § 6063(b)(5)(C) (1976 ed., Supp.III) requires each state plan to

"contain or be supported by assurances satisfactory

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to the Secretary that the human rights of all persons with developmental disabilities ... who are receiving treatment, services, or habilitation, under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled)."

Once again, these limitations--both as to programs assisted under the Act and as to affording protection in a manner that is "consistent with § 6010"-- would be unnecessary if, as the court below ruled, all state programs were required to fund the rights described in § 6010.

And third, the court below held that § 6010 mandated deinstitutionalization for most, if not all, mentally retarded persons. As originally enacted in 1975, however, the Act required only that each State use not less than 30 percent of its allotment "for the purpose of assisting it in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities." § 6062(a)(4). [FN19] Three years later, Congress relieved the States of even that modest duty. Instead of requiring the States to use a certain portion of their allotment to support deinstitutionalization, Congress required the States to concentrate their efforts in at least one of four areas, only one of which was "community living arrangements." § 6063(b)(4)(A)(ii) (1976 ed., Supp.III). Had § 6010 created a right to deinstitutionalization, the policy choices contemplated ***27** by both the 1975 and 1978 provisions would be meaningless.

FN19. The House Report, for example, explained that States were required only to plan "for as much deinstitutionalization as is feasible," recognizing that this requirement would "prompt some movement of patients from State institutions back into their communities." H.R.Rep.No. 94- 58, p. 10 (1975), U.S.Code Cong. & Admin.News 1975, p. 928.

****1545** In sum, the court below failed to recognize the well-settled distinction between congressional "encouragement" of state programs and the imposition of binding obligations on the States. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Relying on that distinction, this Court insoutheastern community coLlege v. dAvis, 442 u.s. 397, 99 S.CT. 2361, 60 L.Ed.2d 980 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that "state agencies such as Southeastern are only 'encourage[d] ... to adopt and implement such policies and procedures.' " *Id.*, at 410, 99 S.Ct. at 2369 (quoting the Act), we stressed that "Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411, 99 S.Ct., at 2369. Likewise in this case, Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.

IV

Respondents also suggest that they may bring suit to compel compliance with those conditions which *are* contained in the Act. Of particular relevance to these cases are § 6011(a) (1976 ed., Supp.III) and § 6063(b)(5)(C) (1976 ed., Supp.III), which are quoted *supra*, at 1537, 1544. [FN20]

FN20. The Court of Appeals was apparently aware of these conditions since it referred expressly to § 6063(b)(5)(C) in concluding that § 6010 creates a right to treatment. Its error was in bypassing these specific conditions and resting its decision on the more general language of § 6010.

That claim raises several issues. First, it must be determined whether respondents have a private cause of action ***28** to compel state compliance with those conditions. [FN21] In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State. See § 6065 (1976 ed., Supp.III). Just last Term, however, in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), we held that 42 U.S.C. § 1983 provides a cause of action for state deprivations of "rights secured" by "the laws" of the United States. See 448 U.S., at 4, 100 S.Ct. at 2504. Whether *Thiboutot* controls these cases depends on two factors. First, respondents here, unlike the plaintiffs in *Thiboutot*, who alleged that state law prevented him from receiving federal funds to which he was entitled, can only claim that the state plan has not provided adequate "assurances" to the Secretary. It is at least an open question whether an individual's interest in having a State

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provide those "assurances" is a "right secured" by the laws of the United States within the meaning of § 1983. Second, Justice POWELL in dissent in *Thiboutot* suggested that § 1983 would not be available where the "governing statute provides an exclusive remedy for violations of its terms." *Id.*, at 22, n. 11, 100 S.Ct., at 2513. It is unclear whether the express remedy contained in this Act is exclusive.

FN21. Because we conclude that § 6010 confers no substantive rights, we need not reach the question whether there is a private cause of action under that section or under 42 U.S.C. § 1983 to enforce those rights. See *Southeastern Community College v. Davis*, 442 U.S. 397, 404, n. 5, 99 S.Ct. 2361, 2366, n. 5, 60 L.Ed.2d 980 (1979).

Second, it is not at all clear that the Pennhurst petitioners have violated § 6011 and § 6063(b)(5)(C) (1976 ed. and Supp.III). Those sections, by their terms, only refer to "programs assisted" under the Act. Because Pennhurst does not receive federal funds under the Act, it is arguably not a "program assisted." Thus, there may be no obligation on the State under § 6011 to assure the Secretary that each resident of ****1546** Pennhurst have a habilitation plan, or assure the Secretary ***29** under § 6063(b)(5)(C) that Pennhurst residents are being provided services consistent with § 6010. [FN22]

FN22. Justice WHITE concedes that Pennsylvania may not have violated § 6011, since Pennhurst may not be a "program assisted" under the Act. *Post,* at 1552. Curiously, however, he simultaneously assumes that § 6063(b)(5)(C) applies to Pennhurst. *Post*, at 1551-1552. Because both § 6011 and § 6063(b)(5)(C) apply only to "programs assisted," I do not understand why § 6063(b)(5)(C), but not § 6011, is applicable.

Third, there is the question of remedy. Respondents' relief may well be limited to enjoining the Federal Government from providing funds to the Commonwealth. As we stated in *Rosado v. Wyman*, 397 U.S., at 420, 90 S.Ct., at 1222, welfare claimants were "entitled to declaratory relief and an appropriate injunction by the District Court against the payment of *federal* monies ... should the State not develop a conforming plan within a reasonable period of time." (Emphasis in original.) There, we rejected the suggestion that the courts could require the State to pay the additional sums demanded by compliance with federal standards. Relying on *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), we explained that "the State had alternative choices of assuming the additional cost" of complying with the federal standard "or not using federal funds." 397 U.S., at 420-421, 90 S.Ct., at 1222. Accordingly, we remanded the case so that the State could exercise that choice.

In other instances, however, we have implicitly departed from that rule and have affirmed lower court decisions enjoining a State from enforcing any provisions which conflict with federal law in violation of the Supremacy Clause, *e. g., Carleson v. Remillard*, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972). In still other cases, we have struck down state laws without addressing the form of relief, *e. g., Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971). In no case, however, have we required a State to provide money to plaintiffs much less required a State to take on such open-ended and potentially burdensome obligations as providing "appropriate" treatment in the "least restrictive" environment. And because this is a suit in federal court, anything ***30** but prospective relief would pose serious questions under the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). [FN23]

FN23. We do not significantly differ with our Brother WHITE on the remedy for failure to comply with federally imposed conditions. Relying on *Rosado v. Wyman*, he argues that Pennsylvania should be given the option of rejecting federal funds under the Act or complying with § 6010. If we agreed that § 6010 was a condition on the grant of federal funds, we would have little difficulty subscribing to that view. We differ only in that he believes that § 6010 imposes conditions on participating States while we believe that the relevant conditions to these cases are § § 6011 and 6063(b)(5)(C). If the court on remand determines that there has been a violation of those conditions, it may well be appropriate to apply the principles announced in *Rosado*, as Justice WHITE suggests.

These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here.

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V

After finding that federal law imposed an obligation on the States to provide treatment, the court below examined state law and found that it too imposed such a requirement. 612 F.2d, at 100-103. The court looked to § 4201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, which provides in pertinent part:

"The department of [Public Welfare] shall have power, and its duty shall be:

"(1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, national origin, settlement, residence, or economic or social status." Pa.Stat.Ann., Tit. 50, § 4201 (Purdon 1969).

****1547** Respondents contend that, even if we conclude that relief is unavailable under federal law, state law adequately supports the relief ordered by the Court of Appeals. There are, ***31** however, two difficulties with that argument. First, the lower court's finding that state law provides a right to treatment may well have been colored by its holding with respect to § 6010. Second, the court held only that there is a right to "treatment," not that there is a state right to treatment in the "least restrictive" environment. As such, it is unclear whether state law provides an independent and adequate ground which can support the court's remedial order. Accordingly, we remand the state-law issue for reconsideration in light of our decision here. [FN24]

FN24. Respondents have submitted to the Court 10 photocopies of a recent decision of the Pennsylvania Supreme Court which they characterize as holding that Pennsylvania state law provides a right to "state-funded individualized habilitation services." *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981). The late submission not only fails to comply with Supreme Court Rule 35.5, it does not affect our decision here. On remand following our reversal, the Court of Appeals will be in a position to consider the state-law issues in light of the Pennsylvania's Supreme Court's recent decision.

For similar reasons, we also remand to the Court of Appeals those issues it did not address, namely, respondents' federal constitutional claims and their claims under § 504 of the Rehabilitation Act.

VI

Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded. [FN25] The Developmentally Disabled Assistance and Bill of Rights Act is one such law. It establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the States to do so. But the Act does no more than that. We would be attributing ***32** far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment. Accordingly, we reverse the principal holding of the Court of Appeals and remand for further proceedings consistent with this opinion.

FN25. *E. g.*, The Rehabilitation Act of 1973, as amended in 1974 and 1978, 29 U.S.C. § 701 *et seq.* (1976 ed. and Supp.III); The Education for All Handicapped Children Act of 1975, 20 U.S.C. § § 1401-1420; Social Security Amendments of 1974, 42 U.S.C. § § 1396d(d) and 1397; Community Mental Health Centers Act, 42 U.S.C. § 2689 *et seq.*

Reversed and remanded.

Justice BLACKMUN, concurring in part and concurring in the judgment.

Although I agree that the judgment of the Court of Appeals must be reversed, and although I am in accord with much of what the Court says about the meaning of this confused and confusing legislation, see *ante*, at 1536-1545, I do not join the Court's advisory discussion in Part IV of its opinion. In that Part, the Court properly and correctly notes, *ante*, at 1546, that it leaves open for consideration on remand whether, and in what form, § § 6011 and 6063 create rights that are enforceable by private parties like those that make up these plaintiff classes. The Court, however, seems to me strongly to intimate that it will not view kindly any future positive holding in that direction. I agree that this specific question was not presented and is not today decided, but I decline to join what appears to be a negative attitude on the part of the Court to what is a possible construction of the Act.

It seems plain to me that Congress, in enacting § 6010, intended to do more than merely set out politically self-serving but essentially meaningless language about what the developmentally disabled deserve at the hands of state and federal authorities. A perfectly reasonable judicial interpretation of §

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6010, which would avoid the odd and perhaps dangerous precedent of ascribing no meaning to a congressional enactment, would observe and give effect to the linkage between § 6010 and § 6063. As **1548 the Court points out, *ante*, at 1537, a State that accepts funds under the Act becomes legally obligated to submit a state plan containing "assurancessatisfactory *33 to the Secretary that the human rights of all persons with developmental disabilities ... who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 ...." 42 U.S.C. § 6063(b)(5)(C) (1976 ed., Supp. III).

That private parties, the intended beneficiaries of the Act, should have the power to enforce the modest legal content of § 6063 would not be an unusual application of our precedents, even for a legislative scheme that involves federal regulatory supervision of state operations. *See, e. g., Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). See also *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

Finally, I have difficulty with the Court's suggestion, *ante*, at 1545-1546, that Pennhurst should be free of the Act's requirements because it does not directly receive funds under the Act. The Commonwealth's program for the institutionalized developmentally disabled is unified in one administration. To restrict the definition of "program assisted" in § 6063 to specific institutions within a unified program would allow a State to insulate substandard institutions from federal requirements merely by allocating federal funds to acceptable premises and state funds to substandard ones.

Justice WHITE, with whom Justice BRENNAN and Justice MARSHALL join, dissenting in part.

Pennhurst is a residential institution for the retarded operated by the Commonwealth of Pennsylvania and serving a five county area. Roughly half of its 1,200 residents were admitted upon application of their parents or guardians while the remainder were committed pursuant to court order. After extensive discovery and a lengthy trial, the District Court held that the conditions of confinement at Pennhurst violated the rights of its residents under the Eighth and Fourteenth Amendments of the United States Constitution, state *34 law, [FN1] and the Rehabilitation Act of 1973, 29 U.S.C. § 794, and entered a detailed remedial order requiring the eventual closing of Pennhurst in favor of community living arrangements for Pennhurst's displaced residents. 446 F.Supp. 1295 (ED Pa.1978). On appeal, the Court of Appeals for the Third Circuit determined that the result reached by the District Court was proper under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (1976 ed. and Supp.III) (Act), although relief under that statute had not initially been raised in that court. 612 F.2d 84 (1979) (en banc). The Court of Appeals determined that the Act created judicially cognizable rights to treatment and to receipt of care in the least restrictive environment, and that the right to treatment was also supported by state law. The court essentially affirmed the remedial order entered by the District Court with one significant exception. [FN2] Finding that the legislative history did not require the abandonment of large institutional facilities, the Court of Appeals held that the District Court erred in ordering Pennhurst to be closed. Rather, the Court of Appeals required that each resident of Pennhurst be afforded an individual hearing before a Special Master to determine the appropriate level of institutionalization with a presumption established that community-based living arrangements were proper.

FN1. See Pa.Stat.Ann., Tit. 50, § 4201 *et seq.* (Purdon 1969).

FN2. The Court of Appeals also overturned the District Court's decision to require the State to find suitable alternative employment for those Pennhurst employees displaced by the order. This order is not an issue before this Court.

In essence, the Court concludes that the so-called "Bill of Rights" section of the Act, **1549 42 U.S.C. § 6010, merely serves to establish guidelines which States should endeavor to fulfill, but which have no real effect except to the extent that the Secretary of Health and Human Services chooses to use the criteria established by § 6010 in determining funding under the Act. In my view, this reading misconceives the important *35 purposes Congress intended § 6010 to serve. That section, as confirmed by its legislative history, was intended by Congress to establish requirements which participating States had to meet in providing care to the developmentally disabled. The fact that Congress spoke in generalized terms rather than the language of regulatory minutia cannot make nugatory actions so carefully undertaken.

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I

As an initial matter, I agree that § 6010 was enacted pursuant to Congress' spending power, and not pursuant to its power under § 5 of the Fourteenth Amendment. Accordingly, I agree that the Act was not intended to place duties on States independent of their participation in the program established by the Act. The Court of Appeals, in the section of its opinion concerning the exercise of a private cause of action, determined that § 6010 was passed pursuant to § 5, reasoning that since the Fourteenth Amendment included a right " 'to be free from, and to obtain judicial relief for, unjustified intrusions on personal security,' " 612 F.2d, at 98, quoting *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977), congressional passage of § 6010 indicated its desire to enforce this interest. [FN3] Congressional action under the Enforcement Clause of the Fourteenth Amendment, however, has very significant consequences, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), and given these ramifications, it should not be lightly assumed that Congress acted pursuant to its power under § 5 in passing the Act.

FN3. Respondents Halderman and PARC suggest a number of other Fourteenth Amendment "interests" allegedly served by § 6010. See, *e. g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (right to receive something more than no education); *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) (right to be institutionalized only when the nature and duration of such treatment bears a reasonable relation to its purpose); *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) (right of nondangerous persons capable of living without institutionalization to be free).

***36** Here, there is no conclusive basis for determining that Congress acted pursuant to § 5. Nothing in the statutory language refers to the Fourteenth Amendment. Section 6010 was but one part of a bill whose underlying purpose was to extend and modify an existing federal-state grant program. The initial program was unquestionably passed pursuant to Congress' spending power. Moreover, § 6010(3) is by its express terms a limitation on federal and state spending. The rights articulated in § 6010 are also cross-referenced in § 6063 (1976 ed. and Supp.III), which details the operation of the grant program. [FN4] Thus, all objective considerations connected with § 6010 and its operation suggest that Congress enacted it pursuant to its Spending Clause powers.

FN4. The Act as passed in 1975 required that the state plan "contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities ... be protected." § 6063(b)(24). This measure was amended in 1978 to make it explicit that a State's plan must provide assurances of its compliance with § 6010. See text, *infra*.

Of course, resolution of the § 5 issue does not determine the issue whether § 6010 was intended by Congress to have substantive consequences as part of a statute enacted under Art. I, § 8, cl. 1, and in my view, the majority makes far too much of the fact that § 6010 was not passed pursuant to the Fourteenth Amendment. While this conclusion has significant ramifications for the appropriate remedy for violations of the Act, it does not follow that § 6010 was to have no impact or effect besides the mere "encouragement" of state action and created ****1550** no obligations on participating States and no rights in those being served by programs maintained by a State in cooperation with the Federal Government.

II

The language and scheme of the Act make it plain enough to me that Congress intended § 6010, although couched in ***37** terms of rights, to serve as requirements that the participating States must observe in receiving federal funds under the provisions of the Act. That Congress was deadly serious in stating that the developmentally disabled had entitlements which a State must respect if it were to participate in a program can hardly be doubted.

Federal involvement in state provision of health care to those persons with developmental disabilities began in 1963 with the passage of the Mental Retardation Facilities Construction Act, Pub.L. 88-164, 77 Stat. 282. That statute provided funds for the construction of health care facilities and specifically encouraged the development of community-based programs. [FN5] The Developmentally Disabled Act, technically an amendment to the Mental Retardation and Facilities Construction Act, was passed in light of Congress' continued concern about the quality of health care being provided to the developmentally disabled and that federal support for improved care should be increased. A central expression of this concern was § 6010, which declares by way of four

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congressional "findings" that:

FN5. An amendment was passed in 1967 which added a program to train professionals in community programs, as well as providing funds to support institutions, Pub.L. 90-170, 81 Stat. 527. In 1970, Congress passed a second amendment adopting a formula grant system essentially similar to the present system. The 1970 amendment also broadened the number of potential beneficiaries to include persons afflicted with various disabilities not previously covered. Pub.L. 91-517, 84 Stat. 1316.

1. Persons with developmental disabilities have a "right to appropriate treatment, services, and habilitation."

2. Treatment should be designed to maximize an individual's potential and should be provided "in the setting that is least restrictive of the person's personal liberty."

3. The State and Federal Governments have an obligation to assure that public funds are not provided to institutions or programs that do not provide "appropriate treatment, ***38** services and habilitation" or do not meet minimum standards of care in six specific respects such as diet, dental care, and the use of force or chemical restraints.

4. Rehabilitative programs should meet standards designed to assure the most favorable possible outcome for patients, and these standards should be appropriate to the needs of those being served, depending on the type of institution involved. [FN6]

FN6. The pertinent text of § 6010 provides:
"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 personal liberty.
"(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that--
"(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or
"(B) does not meet the following minimum standards:
"(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.
"(ii) Provision to such persons of appropriate and sufficient medical and dental services.
"(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.
"(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.
"(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.
"(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.
"(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and--
"(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary ... as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;
"(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such

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facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

"(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs."

Section 6010 was amended in 1978 to add the following concluding paragraph:

"The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." Pub.L. 95-602, § 507, 92 Stat. 3007.

***39 **1551** As clearly as words can, § 6010(1) declares that the developmentally disabled have the right to appropriate treatment, services, and habilitation. The ensuing parts of § 6010 implement this basic declaration. Section 6010(3), for example, *obligates* the Federal and State Governments not to spend the public funds on programs that do not carry out the basic requirement of § 6010(1) and, more specifically, do not meet minimum standards with respect to certain aspects of treatment and custody. Sections 6010(2) and (4) are phrased in less mandatory terms, but the former unmistakably states a preference for treatment in the least restrictive environment and the latter for establishing standards for assuring the appropriate care of the developmentally disabled in relation to the type of institution involved. Both sections, by delineating in some respects the meaning of "appropriate" ***40** treatment, services, and habilitation, implement the basic rights that the developmentally disabled must be afforded for the purpose of the programs envisioned by the Act. Hence, neither section could be ignored by the Secretary in carrying out his duties under the statute.

Standing on its own bottom, therefore, § 6010 cannot be treated as only wishful thinking on the part of Congress or as playing some fanciful role in the implementation of the Act. The section clearly states rights which the developmentally disabled are to be provided as against a participating State. But § 6010 does not stand in isolation. Other provisions of the Act confirm the view that participating States must take account of § 6010 and that the section is an integral part of an Act cast in the pattern of extending aid conditioned on state compliance with specified conditions. Section 6063(a) requires that for a State to take advantage of the Act, it must have a "plan submitted to and approved by the Secretary...." Section 6063(b) (1976 ed., Supp.III), which is entitled "Conditions for Approval," states that "[i]n order to be approved by the Secretary under this section, a State plan for the provision of services and facilities for persons with developmental disabilities must" be filed; and in its original form, § 6063 required the plan to satisfy the conditions stated in some 30 numbered paragraphs. The 24th specification was that the plan must "contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities ... who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected." Any doubts that the human rights referred to in § 6063(b)(24) corresponded to those specified in § 6010 were removed in 1978 when ****1552** § 6063(b) WAS amended to restate the conditions which a plan must satisfy. Section 6063(b)(5)(C) (1976 ed., Supp.III) now provides:

"The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of ***41** all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to the rights of the developmentally disabled)."

Pennsylvania has submitted a plan under § 6063, that is, a plan providing services for the developmentally disabled in Pennsylvania. The Court states that the plan has been approved and that funds have been allocated to the State. These funds will necessarily be supporting Pennsylvania's "programs" for providing treatment, services, or habilitation within the meaning of § 6063(b)(5)(C); and under the express terms of that section, Pennsylvania is required to respect the § 6010 rights of the developmentally disabled in its state institutions, including Pennhurst, and to give the Secretary adequate assurances in this respect. This is true whether or not Pennhurst itself directly receives any share of the State's allocation. It should also be noted that § 6063(b)(3)(A) (1976 ed., Supp.III) provides that "the funds paid to the state under § 6062 of this title will be used to make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State." Thus, funds received under the Act were intended to result in the improvement of care at

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institutions like Pennhurst. [FN7]

FN7. There is nothing "curious" as the Court suggests about coming to a different conclusion about the applicability of § 6011 to Pennhurst. Section 6063(b)(5)(B) requires that the plan must provide that services are provided in an individualized manner consistent with the requirements of § 6011 relating to habilitation plans. Section 6011 requires that when any specific program in a State, including any program of an agency, facility or project, receives funds from the State's allotment, it will have in effect individualized plans for habilitation for each individual receiving services under that program. The section goes on to specify in detail how such individualized plans shall be formulated and how they are to be carried out and monitored. The Court asserts that Pennhurst has not been receiving federal funds under the Act, which means, I take it, that Pennhurst has not received funds from the State's allocation under the Act. In that event, I would not think that § 6011 would apply to Pennhurst residents. But Pennhurst is part of the State's overall program, and the State has presented a plan and received federal funds to support its developmentally disabled program throughout the State. It must, therefore, observe the § 6010 rights of the developmentally disabled in state institutions, including Pennhurst.

***42** III

The legislative history of § 6010 confirms the view that Congress intended § 6010 to have substantive significance. Both the initial House of Representatives and Senate versions of the Act contained provisions indicating congressional concern with the character and quality of care for the developmentally disabled. The House bill, H.R. 4005, 94th Cong., 1st Sess. (1975), did not have a bill of rights section akin to § 6010. It did, however, have a provision that required States to spend at least 10% of their respective allotments "for the purpose of assisting ... in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities." § 5(b)(4). Debate in the House of Representatives indicated that the spending restriction was designed to promote community-based facilities to counteract the unfortunate practice of widespread institutionalization of developmentally disabled persons. [FN8]

FN8. See, *e. g.*, 121 Cong.Rec. 9976 (1975) (remarks of Cong. Rogers) (percentage requirement would assist in overcoming misuse of facilities caused by tendency of States to resort to institutionalization); *ibid.* (remarks of Cong. Carter) (treatment "should be conducted in that person's community without unnecessarily institutionalizing him").
It is clear that the House was concerned with many of the same factors which informed the Senate's detailed provision which ultimately lead to the genesis of § 6010. The Court's narrow reading of the House bill is not convincing. To the extent that the House bill did not have an analogue to § 6010, comments on the bill are necessarily irrelevant to the question of the intended effect of § 6010.

***43 **1553** The Senate version of the Act, S. 462, 94th Cong., 1st Sess. (1975), contained a separate Title II, called the "Bill of Rights for Mentally Retarded and Other Persons with Developmental Disabilities," setting forth in extensive detail specific standards which state programs and facilities were required to meet. The impetus behind the Senate's "Bill of Rights" was the recognition by several Senators of the tragic conditions of confinement faced by many residents of large institutions. [FN9] An often repeated purpose of the Bill of Rights was to foster the development of community-based facilities as well as to encourage overall better care and treatment for the mentally disabled. [FN10] At the same time, there was the realization ***44** that institutions still had a significant role to play in the treatment of the mentally disabled. [FN11]

FN9. See, *e. g.*, 121 Cong.Rec. 16518 (1975) (remarks of Sen. Javits) ("The shocking conditions at Willowbrook in New York, and many other institutions for the mentally retarded throughout the Nation which inspired the bill of rights have not ended"); *id.*, at 16521 (remarks of Sen. Schweiker) ("The last 5 years have seen a dramatic increase in public awareness of the needs of institutionalized mentally retarded and developmentally disabled persons. This has been highlighted by scandals in many institutions, by court cases, and by the efforts of the communications media"); *id.*, at 16516 (remarks of Sen. Williams) ("Over the past few years, the horrifying conditions

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which exist in most of the public residential institutions for the mentally retarded ... have provided shocking testimony to the inhuman way we care for such persons. The conditions at ... [the] institutions have shown beyond a shadow of a doubt that the treatment of these individuals is worse then (*sic*) all of us would like to admit").

FN10. For example, Senator Javits stated that the Bill of Rights section, an integral part of the legislation, would "establish minimum standards for residential and community facilities and agencies for the protection of the rights of those individuals needing services, while at the same time, encouraging deinstitutionalization and normalization." *Id.*, at 16518. In conclusion, Senator Javits identified a number of concerns shared by many of the legislators speaking on the Senate bill:
"Progress toward recognition of the basic human and civil rights of the mentally retarded and other developmentally disabled persons has been slow. The Federal Government has largely abrogated its responsibility in this regard and recently the greatest initiatives have come from our courts....
"Congress should reaffirm its belief in equal rights for all citizens-- including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded. The bill of rights of S. 462 represents this new direction, and begins this reaffirmation." *Id.*, at 16519.
See *id.*, at 16520 (remarks of Sen. Cranston) (Senate bill enunciated basic goal of moving away from "long-term institutionalization of individuals with developmental disabilities to the development of community-based programs utilizing all community resources related to treatment or habilitation of such individuals to provide comprehensive services in the home community").

FN11. See, *e. g.*, *id.*, at 16522 (remarks of Sen. Schweiker) ("It is now time to provide alternatives to locking persons up in institutions"); *id.*, at 16520 (remarks of Sen. Cranston) ("[I]n encouraging the movement to community-based programs, I recognize that the need for some long-term residential programs will remain. The bill specifically provides that where institutional programs are appropriate, adequate support should be planned for them so that necessary treatment and habilitation programs can be given residential patients to develop their full potential"); *id.*, at 16516 (remarks of Sen. Stafford) (the Bill of Rights will "assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization ...").

The Senate's version of Title II provided two methods for the States to comply with the requirements of the Act. First, a State wishing to participate could opt to follow guidelines to be established by the Secretary under Part B of Title II, § 210(a). Alternatively, a State could decide to meet the extensive standards specified in Parts C and D relating to residential and community facilities respectively. Under the Senate bill, it was clear that the standards encompassed ****1554** by the alternative procedures were not merely hortatory. That bill provided that within one year after the enactment, a State desiring funding must provide assurances to the Secretary that "each such facility or agency has established a plan for achieving compliance no later than 5 years after the date of enactment ...." § 203(a). After the 5- ***45** year period, "no residential facility or program of community care for individuals with developmental disabilities shall be eligible to receive payments either directly or indirectly under any Federal law, unless such residential facility meets the standards promulgated under parts C or D of this title or has demonstrated to the Secretary for a reasonable period of time that it has actively implemented the requirements of part B." § 206(a).

Following Senate and House passage, the different bills came to a Conference Committee. The resulting compromise kept the House 10% spending restriction which the Conference Report noted was "designed to eliminate inappropriate placement in institutions of persons with developmental disabilities ...." H.R.Conf.Rep.No.94-473, p. 33 (1975), U.S.Code Cong. & Admin.News 1975, p. 952. The Senate's detailed Bill of Rights was replaced by § 6010, a comparatively brief statement of the developmentally disabled's rights expressed in general terms. The specific mechanism of alternative compliance standards was omitted. The Conference Report set forth the following as the statement of purpose of the Conference version of the

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Senate's Title II.

"The conference substitute contains a compromise which enumerates Congressional findings respecting the rights of persons with developmental disabilities. These include findings that the developmentally disabled have a right to appropriate treatment, services and habilitation; that such treatment, services and habilitation should be designed to maximize the developmental potential of the person and be provided in the setting that is least restrictive to his personal liberty; that the Federal government and the States have an obligation to assure that public funds are not provided in programs which do not provide appropriate treatment, services and habilitation or do not meet minimum standards respecting diet, medical and dental services, use of restraints, visiting hours and compliance with fire and safety codes; ***46** and that programs for the developmentally disabled should meet appropriate standards including standards adjusted for the size of the institutions ....

"These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts." H.R.Conf.Rep.No.94-473, *supra*, at 41-42 U.S.Code Cong. & Admin.News 1975, p. 961.

Following the Conference Report, the Act was passed with minimal debate. [FN12]

FN12. Prior to final passage, Congressman Rogers stated that the revised Title II included a "brief statement of the rights of the developmentally disabled to appropriate treatment and care," which constituted "modest *requirements.*" *Id.*, at 29309 (emphasis added). Senator Javits was more dramatic in announcing the purpose of Title II as creating a clear federal policy in favor of a right to treatment. "This 'Bill of Rights' explicitly recognizes that the Federal Government and the States have an obligation to assure that public funds are not provided to institutions or other residential programs" that do not provide adequate treatment. *Id.*, at 29820. See also *id.*, at 29818 (remarks of Sen. Randolph) (compromise reorganized title II of the Senate bill "in order to reflect the essential elements which are necessary for continued improvement in the quality of care and habilitation of developmentally disabled persons in residential and community facilities"); *id.*, at 29821 (remarks of Sen. Williams) (the compromise establishes for the first time in federal law a "basic statement" of the rights of the developmentally disabled and the Act "will assure that funds under the act will be used by the States to assist them in the deinstitutionalization process").

****1555** The Senate's version of the Bill of Rights was hundreds of pages long and constituted an attempt to define the standards and conditions of state participation with precision and in great detail. The Conference Report makes clear that the detailed version was rejected, not to substitute a merely advisory section for an extended statement of conditions, but ***47** rather to substitute a generalized statement of entitlements that a participating State must respect and that would adequately meet congressional concerns without encountering the inflexibility of legislatively prescribed conditions of treatment and care. There is no basis for considering the shortened statement as intended to play a qualitatively lesser role in the scheme of the Act. Rather, the compromise is best understood as a rejection of either the need or the ability of Congress to specify the required standards in a manner resembling administrative regulations. [FN13]

FN13. The Act also required the Secretary to review and evaluate the quality standards under various statutes and to report to the Congress on any proposed changes. See Pub.L. 94-103, § 204, 89 Stat. 504. When the Secretary's recommendations were presented, the House took no steps to enact them into law, again demonstrating legislative unwillingness to adopt detailed uniform standards. See Developmental Disabilities Act Amendments of 1978: Hearings on H.R. 11764 before the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 471-475 (1978). Congress did determine, however, to amend § 6063 to expressly require a State to provide assurance to the Secretary of its plan to comply with § 6010. See 42 U.S.C. § 6063(b)(5)(C) (1976 ed., Supp. III).

IV

As previously stated, § 6010 should be understood

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to require a State receiving funds under the Act to observe the rights established by the provision. None of the concerns expressed by the Court present sufficient reason to avoid or overcome the statutory mandate.

It is true that the terms "treatment, services and habilitation" to which § 6010 declares an entitlement are not self-defining. But it does not follow that the participating States are free to ignore them. Under § 6010(3)(A), as already indicated, the State has an "obligation" not to spend public funds on any institutional or other residential facility that "does not provide treatment, services and habilitation which is appropriate to the needs of such persons." If federal ***48** funds are to be used to support a program, the program must (1) provide for the § 6010 rights to appropriate treatment, services, and habilitation; (2) observe the direction in § 6010(2) that treatment, services, and habilitation be furnished in the least restrictive setting; (3) satisfy the minimum standards referred to in § 6010(3)(B); and (4) follow the provisions of § 6010(4), which offers further guidance for the participating State in furnishing the treatment, services, and habilitation to which the developmentally disabled are entitled.

Furthermore, before approving a state plan, the Secretary must assure himself that the rights identified under § 6010 will be adequately protected by the participating State. Why the language of an express "condition," which § 6010 lacks, should be the only touchstone for identifying a State's obligation is difficult to fathom. [FN14] Indeed, ****1556** identifying "rights" and requiring the participating State to observe them seems a far stronger indicia of congressional intent than a mere statement of "conditions."

FN14. None of the cases cited by the Court suggest, much less hold, that Congress is required to condition its grant of funds with contract-like exactitude. In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), the Court held that there was no evidence in the statute or in *the legislative history*, that Congress intended the States to assume the full costs of funding abortions once the federal funds were withheld under the Hyde Amendment. Here, there is explicit recognition in the statute and in the legislative history that Congress intended the States to provide the developmentally disabled with adequate treatment in the least restrictive environment consistent with their medical needs. The other cases cited by the Court involved situations where the Court held that Congress must indicate that it intended the States to have waived fundamental constitutional rights merely by participating in a federal program. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (Eleventh Amendment sovereign immunity); *Employees v. Department of Public Health*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973) (same). The Eleventh Amendment concerns are not implicated in these cases, and the citation of *Edelman* and *Employees* is thus unpersuasive.

To argue that Congress could not have intended to obligate the States under § 6010 because those obligations would ***49** be large and for the most part unknown is also unpersuasive. Section 6010 calls for appropriate treatment, services, and habilitation; and, as already detailed, the remaining sections spell out, some in more detail than others, the scope of that requirement. Beyond this, however, the content and reach of the federal requirements will, as a practical matter, emerge from the process of preparing a state plan and securing its approval by the Secretary. The state plan must undertake to provide services and facilities pursuant to "standards" prescribed by the Secretary; and, as will become evident, the State's option to terminate its statutory duties must be respected by the courts. In any event, there is no indication in the record before us that the cost of compliance with § 6010 would be "massive." The District Court found that noninstitutional facilities located in the communities would be significantly less expensive to operate than facilities like Pennhurst. 446 F.Supp., at 1312. At best, the cost of compliance with § 6010 is indeterminate.

It is apparently suggested that § 6010 is reduced to a mere statement of hope by the absence of an express provision requiring the Secretary to cut off funds in the event he determines that a State is not observing the rights set out in § 6010. But it is clear that the Secretary may not approve a plan in the first place without being assured that those rights will be protected, and it is difficult to believe that the Secretary must continue to fund a program that is failing to live up to the assurances that the State has given the Secretary.

It is also a matter of substantial moment that § 6012 (1976 ed., Supp. III) expressly conditions the

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approval of a plan on the State's providing "a system to protect and advocate the rights of persons with developmental disabilities," and that the system must "have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of rights of such persons." § 6012(a)(2)(A). Section 6012 goes on to provide federal aid in establishing such systems ***50** and it seems rather plain that the Act contemplates not only ongoing oversight by the Secretary but also enforcement of the rights of persons receiving treatment through judicial action or otherwise.

It is thus not of determinative significance that the Secretary was once of the view that noncompliance with § 6010 did not provide sufficient reason to cut off funds under the Act. As the Court recognizes, the 1978 amendments have convinced him that § 6010 rights must be respected; [FN15] but if the Secretary's original view was correct, and I do not think it was, this would not foreclose judicial remedies ****1557** sought by or on behalf of developmentally disabled persons injured by the State's failure to observe § 6010 rights. Moreover, the Solicitor General, who is the legal representative of the United States, is of the view that the Act does create enforceable rights. In any event, this Court, as it is permitted to do, has disagreed on occasion with the administrative determination of the Secretary. See, *e. g.*, ***51***Philbrook v. Glodgett*, 421 U.S. 707, 715, and n.11, 95 S.Ct. 1893, 1899, and n.11, 44 L.Ed.2d 525 (1975); *Carleson v. Remillard*, 406 U.S. 598, 602, 92 S.Ct. 1932, 1935, 32 L.Ed.2d 352 (1972); *Townsend v. Swank*, 404 U.S. 282, 286, and n.3, 92 S.Ct. 502, 505, and n.3, 30 L.Ed.2d 448 (1971). See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-146, 97 S.Ct. 401, 410-413, 50 L.Ed.2d 343 (1976).

FN15. The Secretary has recently announced the Department's view that the rights enunciated by § 6010 must now be addressed by participating state plans as a result of the 1978 amendments. The explanation of the proposed rulemaking provided as follows:
"No authority was included in that Act to allow the Department to withhold funds from States on the basis of failure to meet the findings. "The 1978 amendments, however, added a requirement to the basic State grant program that the State assure the Secretary that the rights of developmentally disabled people are to be protected consistent with [§ 6010]. The Department has decided to require that all programs authorized under the Act, except for the protection and advocacy systems, comply with [§ 6010] of the Act. The protection and advocacy systems are exempted because they are an extension of the 'Rights' provisions and the systems do not provide services, treatment or habilitation. The Department believes that applying this policy to the other programs is within the intent of Congress. Recipients of funds under the Act are to assure the State and the Commissioner that they will provide services which comply with the requirements of [§ 6010]. Failure to comply with the assurance may result in the loss of Federal funds." 45 Fed.Reg. 31006 (1980).

V

Given my view that Congress intended § 6010 to do more than suggest that the States act in a particular manner, I find it necessary to reach the question whether these rights can be enforced in federal courts in a suit brought by the developmentally disabled. This action was brought under 42 U.S.C. § 1983, and directly under the Developmentally Disabled Act. The Court of Appeals determined that under the factors enunciated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), an implied private cause of action existed under the Act. Subsequently, however, we held that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). It is acknowledged by all parties that it is appropriate to consider the cause-of-action question in light of the intervening decision in *Thiboutot*.

We have often found federal-court jurisdiction to enforce statutory safeguards in grant programs in suits brought by injured recipients. See, *e. g.*, *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Shea v. Vialpando*, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); *Carleson v. Remillard, supra*. In essence, *Thiboutot* creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action. To be sure, Congress may explicitly direct otherwise, such as if the "governing statute provides an exclusive remedy for violations of its terms." *Thiboutot, supra*, at 22, n. 11, 100 S.Ct., at 2513, n. 11 (POWELL, J., dissenting). See generally *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 672, 99 S.Ct. 1905, 1944, 60 L.Ed.2d 508 (1979) (§ 1983

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protections apply to all rights secured by federal statutes "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is ***52** inconsistent with congressional intention") (WHITE, J., concurring in judgment). Thus, in *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), we held that § 1983 did not provide a basis for relief since federal habeas corpus proceedings constituted the sole remedy for challenging the fact or duration of confinement. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, n. 5, 90 S.Ct. 1598, 1604, n. 5, 26 L.Ed.2d 142 (1970). Attempting to fit within the exception, the Pennhurst petitioners suggest that Congress intended the sole remedy for violations of the terms of the Act to be the power of the Secretary to disapprove a State's plan. See 42 U.S.C. § 6063(c). According to these petitioners, imposition of a private remedy would be incompatible with the overall scheme of the Act, especially given the amorphous quality of the asserted rights.

As a general matter, it is clear that the fact that a federal administrative agency has the power to oversee a cooperative state-federal venture does not mean that Congress intended such oversight to be the exclusive remedy for enforcing statutory rights. This Court is "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program[s]" even if the agency has the statutory power to cut off federal funds for noncompliance. *****1558****Rosado v. Wyman, supra,, i, at 420, 90 S.Ct., at 1222.* *In part, this reluctance is founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act. Cf.* Cannon v. University of Chicago, *441 U.S. 677, 708, n. 42, 99 S.Ct. 1946, 1963, n. 42, 60 L.Ed.2d 560 (1979). In this litigation, there is no indication that Congress intended the funds cutoff, which, as the Court notes, the Secretary believed was not within the power of the agency, to be the sole remedy for correcting violations of § 6010. Indeed, § 6012 and the legislative history of the Act reveal that Congress intended judicial enforcement of § 6010. See* supra, *at p. 1554; H.R.Conf.Rep.No.94- 473, p. 42 (1975) (the statutory rights established by § 6010 "should be protected and assured by the Congress and the courts"). Accordingly ,***53** I would hold that jurisdiction under § 1983 was properly invoked in these cases under* Thiboutot.

VI

I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings. This litigation does not involve the exercise of congressional power to enforce the Fourteenth Amendment as the Court of Appeals held, but is an exercise of the spending power. What an appropriate remedy might be where state officials fail to observe the limits of their power under the United States Constitution or fail to perform an ongoing statutory duty imposed by a federal statute enacted under the commerce power or the Fourteenth Amendment is not necessarily the measure of a federal court's authority where it is found that a State has failed to perform its obligations undertaken pursuant to a statute enacted under the spending power. The State's duties in the latter situation do not arise until and unless the State chooses to receive federal funds. Furthermore, the State may terminate such statutory obligations, except those already accrued, by withdrawing from the program and terminating its receipt of federal funds. It is settled that administrative oversight and termination of federal funding in the event of a State's failure to perform its statutory duties is not the sole remedy in Spending Clause cases. "It is ... peculiarly part of the duty of this tribunal, no less in the welfare field that in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Rosado v. Wyman, supra*, 422-423, 90 S.Ct., at 1222-1223. It is equally clear, however, that the courts in such cases must take account of the State's privilege to withdraw and terminate its duties under the federal law. Although the court may enjoin the enforcement of a discrete state statutory provision or regulation or may order state officials prospectively to perform their duties incident to the ***54** receipt of federal funds, the prospective force of such injunctions cannot survive the State's decision to terminate its participation in the program. Furthermore, there are cases in which there is no identifiable statutory provision whose enforcement can be prohibited. *Rosado v. Wyman*, was such a case, and there, after finding that the State was not complying with the provisions of the Social Security Act, we remanded the case to the District Court to "afford [the State] an opportunity to revise its program in accordance with [federal requirements]" as we had construed them to be, but to retain jurisdiction "to review ... any revised program adopted by the State, or, should [the State] choose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies ...." 397 U.S., at 421-422, 90 S.Ct., at 1222-1223; See *Lau v. Nichols*, 414 U.S.

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563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

It is my view that the Court of Appeals should have adopted the *Rosado* approach in these cases. It found the State to be in noncompliance with the federal statute in major respects and proceeded to impose a far-reaching remedy, approving the appointment of a Special Master to decide which of the Pennhurst inmates should remain and which should be moved to community-****1559** based facilities. More properly, the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. If it did not, it should propose a plan for achieving compliance, in which event, if it satisfied the court, a decree incorporating the plan could be entered and if the plan was unsatisfactory, the further use of federal funds could be enjoined. In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed. As we recently recognized in *Parham v. J. R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979): "The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a ***55** child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavorial specialists should be consulted." *Id.*, at 607- 608, 99 S.Ct., at 2506. Cf. *Addington v. Texas*, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1979) (commitment depends "on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists"). In enacting § 6010, Congress eschewed creating any specific guidelines on the proper level of institutionalization, leaving the question to the States to determine in the first instance. A court-appointed Special Master is inconsistent with this approach.

Accordingly, I would vacate the judgment of the Court of Appeals and remand the cases for further proceedings.

451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694

Briefs and Other Related Documents (Back to top)

• 1980 WL 339786 (Appellate Brief) Brief for the Connecticut Association for Retarded Citizens, Inc. the State of Connecticut Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons, et al. Amici Curiae (Oct. 22, 1980)

• 1980 WL 339795 (Appellate Brief) Brief of Amici Curiae, National Association for Retarded Citizens, United Cerebral Palsy Associations and Epilepsy Foundation of America in Support of Affirmance (Oct. 22, 1980)

• 1980 WL 339800 (Appellate Brief) Brief for the National Center for Law and the Handicapped State of Indiana Protection and Advocacy Service Commission for the Developmentally Disabled Ohio Protection and Advocacy Association Amici Curiae (Oct. 21, 1980)

• 1980 WL 339792 (Appellate Brief) Brief for the International League of Societies for the Mentally Handicapped and the Association for the Severely Handicapped, as Amici Curiae (Oct. 20, 1980)

• 1980 WL 339797 (Appellate Brief) Amici Curiae Brief of the National Association of Protection and Advocacy Systems and Forty Five Individual State Developmental Disabilities Protection and Advocacy Systems Under 42 U.S.C. § 6012 from the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Ne (Oct. 20, 1980)

• 1980 WL 339802 (Appellate Brief) Motion for leave to file brief amici curiae and brief for People First International, Inc., People First of California, Inc., Mohawks and Squaws, America Coalition of Citizens with Disabilities, Inc., Center for Independent Living, Inc., Prime Movers , Inc., Center for Independence of the Disabled of New York, Inc., Washington Coalition of Citizens with Disabilities, Community Service Center for the Disabled, Inc., Holistic Approaches to Independent Living, Inc., Access Living of Metropolitan Ch (Oct. 20, 1980)

• 1980 WL 339804 (Appellate Brief) Amici Curiae Brief of the Plaintiffs in Brewster v. Dukakis, (D. Mass.); Connecticut Ass'n for Retarded Citizens v. Thorne (D. Conn.); Kentucky Ass'n for Retarded Citizens v. Conn (W.D. Ky.); Wuori v. Zitnay (D. Me.); Massachusetts Ass'n for Retarded Citizens v. Dukakis (D. Mass.); Michigan Ass'n for Retarded

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Citizens v. Smith (E.D. Mich.); Garrity v. Gallen (D. N.H.); New York State Ass'n for Retarded Children v. Carey (E.D. N.Y.); Isomone v. Garrahy (D. R.I.); Washington Ass'n for Retarded Cit (Oct. Term 1980)

• 1980 WL 339789 (Appellate Brief) Amici Curiae Brief of Illinois, New Hampshire, Louisiana, Ohio, South Dakota, Washington, West Virginia, Nebraska, New Jersey, Tennessee and Minnesota (Aug. 25, 1980)

• 1980 WL 339784 (Appellate Brief) Brief of the State of Connecticut as Amicus Curiae in Support of the Defendant-Appellants (Aug. 21, 1980)

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