ITEM 6

TEST CLAIM

FINAL STAFF ANALYSIS

AND PROPOSED STATEMENT OF DECISION

Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6
Statutes 1977, Chapter 36, Statutes 1978, Chapter 848, Statutes 1980, Chapter 1339, Statutes 1981, Chapter 219, Statutes 1994, Chapter 922
California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, 11517
Register 98, No. 30 (July 24, 1998) pages 75-76, Register 98, No. 33 (Aug. 14, 1998) page 75, Register 99, No. 1 (Jan. 1, 1999) pages 75-76, Register 01, No. 40 (Oct. 5, 2001) pages 77-78.2, Register 03, No. 2 (Jan. 8, 2003) pages 75-76.1
Register 03, No. 16 (April 18, 2003) pages 77-78.2

California English Language Development Test II

03-TC-06
Castro Valley Unified School District, Claimant

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

California Department of Education, "California English Language Development Test – CalEdFacts" (www.cde.ca.gov/ta/tg/el/cefceldt.asp).

California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305. Adopted in Register 1998, No. 30 (July 23, 1998).

California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11303-11308, 11316, page 4. Adopted in Register 2003, No. 2 (Jan. 10, 2003)

California Department of Education, Instructions for the Spring Language Census (Form R30-LC), Reporting Year: 2011 (www.cde.ca.gov/ds/dc/lc/documents/lcinstruc11.doc).

California Department of Education, "Title III FAQs." (http://www.cde.ca.gov/sp/el/t3/title3faq.asp).

California Research Bureau, "Educating California's Immigrant Children, An Overview of Bilingual Education" June 1999. (http://www.library.ca.gov/crb/99/09/99009.pdf).

EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

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COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Claim No. 03-TC-06

Local Agency or School District Submitting Claim

CASTRO VALLEY UNIFIED SCHOOL DISTRICT

Contact Person	Telephone Number
Keith B. Petersen, President SixTen and Associates	Voice: 858-514-8605 Fax: 858-514-8645

Claimant Address

Castro Valley Unified School District
4400 Alma Avenue
Castro Valley, California 94546

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network c/o School Services of California 1121 L Street, Suite 1060 Sacramento, CA 95814	Voice: 916-446-7517 Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

California English Language Development Test - 2

(See Attached)

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

Name and Title of Authorized Representative	Telephone No.
Jerry Macy Deputy Superintendent Castro Valley Unified School District	Voice: (510) 537-3335 Ext. 1223 Fax: (510) 886-7529

Signature of Authorized Representative	Date
X Jerry Macy	September 12, 2003

Attachment to: CSM Form 2 (1/91)
Test Claim Form
Test Claim of Castro Valley Unified School District
Chapter 922, Statutes of 1994
California English Language Development Test -2 (CELDT-2)

Statutes

Chapter 922, Statutes of 1994
Chapter 219, Statutes of 1981
Chapter 1339, Statutes of 1980
Chapter 848, Statutes of 1978
Chapter 36, Statutes of 1977

Code Sections

Education Code Section 48985
Education Code Section 52164
Education Code Section 52164.1
Education Code Section 52164.2
Education Code Section 52164.3
Education Code Section 52164.5
Education Code Section 52164.6

Title 5, California Code of Regulations

Section 11300
Section 11301
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Section 11304
Section 11305
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Section 11316
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Section 11511.5
Section 11512
Section 11512.5
Section 11513
Section 11513.5
Section 11514
Section 11516.5
Section 11517

Claim Prepared By:
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Voice: (858) 514-8605

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	
	No. CSM _____
	Chapter 922, Statutes of 1994
Castro Valley Unified School District,	Chapter 219, Statutes of 1981
	Chapter 1339, Statutes of 1980
	Chapter 848, Statutes of 1978
	Chapter 36, Statutes of 1977
Test Claimant.	
	Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5 and 52164.6
	Title 5, California Code of Regulations
	Sections 11300 through 11316 and Sections 11510 through 11517
	California English Language Development Test - 2 (CELDT 2)
	TEST CLAIM FILING

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for

costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." Castro Valley Unified School District is a "school district" as defined in Government Code section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for school districts and county offices of education to administer the California English Language Development Test (CELDT) pursuant to the provisions of Title 5, California Code of Regulations.

On June 13, 2001, the Commission on State Mandates received the test claim of the Modesto City School District entitled "California English Language Development Test (CELDT) alleging duties and costs mandated by Chapter 71, Statutes of 2000; Chapter 678, Statutes of 1999; Chapter 78, Statutes of 1999; and Chapter 936, Statutes of 1997. The Commission assigned case number CSM 00-TC-16 to this filing.

This test claim (CELDT 2) alleges duties found in Education Code Sections not referenced in test claim 00-TC-16, and both in Title 5, California Code of Regulations (which were not alleged in the Modesto City test claim) and in Title 5, California Code of Regulations, filed since the date of the Modesto City Test Claim.[2]

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[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

[2] Test Claimant takes notice of amendments made to the Statutes cited by Modesto City School District, particularly by Chapters 159, 745 and 891 of the Statutes

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

Prior to January 1, 1975, there were no statutes, codes, executive orders or regulations which specified administrative duties for conducting and implementing the California English Language Development Test.

SECTION 2. LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

Education Code Sections

Chapter 36. Statutes of 1977, Section 476, added Education Code Section 48985[3] which, when 15 percent or more of the pupils enrolled in a public school speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52103, requires that all notices, reports, statements, or records sent to a parent or guardian of any pupil who speaks a single primary language other than English shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

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of 2001, but does not make them part of this test claim.

[3] Education Code Section 48985, added by Chapter 36, Statutes of 1977, Section 476:

"When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52103 by the first day of April in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language."

Chapter 848, Statutes of 1978, Section 2, added Education Code Section 52164[4] which requires each school district to ascertain not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of limited-English-speaking pupils within the district, and shall classify them according to their primary language, age, and grade level. This count shall be known as the "census of limited-English-speaking pupils" and shall consist of a determination of the primary language of each pupil enrolled in the school district and an assessment of the language skills of all pupils whose primary language is other than English.

The census shall be taken by individual, actual count, and not by estimates or samplings. All limited-English-speaking pupils, including migrant and special education

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[4] Education Code Section 52164, added by Chapter 848, Statutes of 1978, Section 2:

"Each school district shall ascertain not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of limited-English-speaking pupils within the district, and shall classify them according to their primary language, age, and grade level. This count shall be known as the "census of limited-English-speaking pupils" and shall consist of a determination of the primary language of each pupil enrolled in the school district and an assessment of the language skills of all pupils whose primary language is other than English.

The census shall be taken by individual, actual count, and not by estimates or samplings. All limited-English-speaking pupils, including migrant and special education pupils, shall be counted. Special language assessment instruments, designated by the superintendent and in compliance with the requirements of subdivision (i) of Section 56301, may be used for special education pupils. The results of this census shall be reported to the Department of Education not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer limited-English-speaking pupils and pupils who no longer attend school in the district, and shall be reported pursuant to Section 52164.1. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year."

pupils, shall be counted. Special language assessment instruments, designated by the superintendent and in compliance with the requirements of subdivision (i) of Section 56301, may be used for special education pupils. The results of this census shall be reported to the Department of Education not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer limited-English-speaking pupils and pupils who no longer attend school in the district, and shall be reported pursuant to Section 52164.1. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year."

Chapter 858, Statutes of 1978, Section 3, added Education Code Section 52164.1[5] which requires school districts to utilize census-taking methods which shall

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[5] Education Code Section 52164.1, added by Chapter 848, Statutes of 1978, Section 3:

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

(a) A determination of the primary language of each pupil enrolled in the school district. The primary language of new pupils shall be determined as they enroll. Once determined, the primary language need not be redetermined unless the parent or guardian claims there is an error. The primary language of each pupil enrolled in each district shall be determined not later than September 15, 1978, and kept current thereafter, as new pupils enroll. Home language determinations resulting from the 1977 home language survey need not be redone.

(b) An assessment of the language skills of al pupils whose primary language is other than English.

(1) The English language proficiency of each previously untested new enrollee, whose primary language is other than English, shall be assessed. This assessment may be conducted pursuant to paragraph (2) of this subdivision, or as set forth in this subdivision. If the district decides not to

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follow the procedures in paragraph (2), each previously untested new enrollee, whose primary language is other than English, shall be evaluated using the instrument designated by the Department of Education. This assessment shall be completed within 30 days after the date of the pupil's enrollment unless the temporary identification prescribed in Section 52164.4 is used. In cases where there is reasonable doubt by school authorities as to whether the pupil is limited English speaking within the meaning of subdivision (d) of Section 52163, or request is made for further assessment pursuant to Section 52164.3, an English language proficiency assessment shall be undertaken to evaluate the pupil's English language skills. The instruments used shall be consistent with state standards as adopted by the State Board of Education. This second level of assessment shall be completed within 60 days after the date of the pupil's enrollment. The assessment of all pupils whose primary language is other than English shall be completed no later than March 1 of each year. Tests, materials, and procedures to determine proficiency in English shall be selected and administered so as not to be racially, culturally, or sexually discriminatory.

The Department of Education shall designate the instruments to be used by school districts, and such instruments shall be available by July 1 of the year preceding the date the census report is due, commencing July 1, 1979, and each year thereafter.

The assessment shall be conducted by persons who speak and understand the primary language of the limited-English-speaking pupils, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are limited-English-speaking pupils, as defined in subdivision (d) of Section 52163. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

(2) Any district may elect to follow federal requirements regarding the census so long as the language skills described in subdivision (d) of Section 52163 are assessed. So long as such a federally approved census procedure is followed on a districtwide basis and is consistent with Section 52164, the district shall be

include, but need not be limited to, the following:

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

(b) An assessment of the language skills of all pupils whose primary language is other than English.

(1) The English language proficiency of each previously untested new enrollee, whose primary language is other than English, shall be assessed. This assessment may be conducted pursuant to paragraph (2) of this subdivision, or as set forth in this subdivision. If the district decides not to follow the procedures in paragraph (2), each previously untested new enrollee, whose primary language is other than English, shall be evaluated using the instrument designated by the Department of Education. In cases where there is reasonable doubt by school authorities as to whether the pupil is limited English speaking within the meaning of subdivision (d) of Section 52163, or request is made for further assessment pursuant to Section 52164.3, an English language proficiency assessment

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exempt from the state census procedures described in subdivision (a) and paragraph (1) of this subdivision."

shall be undertaken to evaluate the pupil's English language skills. This second level of assessment shall be completed within 60 days after the date of the pupil's enrollment. The assessment shall be conducted by persons who speak and understand the primary language of the limited-English-speaking pupils, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are limited-English-speaking pupils. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

(2) Any district may elect to follow federal requirements regarding the census so long as the language skills described in subdivision (d) of Section 52163 are assessed.

Chapter 848, Statutes of 1978, Section 4, added Education Code Section

52164.2[6] which requires school districts to take another census and provide corrected information after the Department of Education has reviewed the results of an annual census and finds that the information provided by a school district appears to be inaccurate or where the census has been incorrectly taken.

Chapter 848, Statutes of 1978, Section 5, added Education Code Section 52164.3[7] which requires each school district to reassess pupils whose primary language is other than English, whether they are designated as non-English speaking, limited English speaking, or fluent English speaking, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation. Subdivision (b) requires in all such cases of reassessment, the

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[6] Education Code Section 52164.2, added by Chapter 848, Statutes of 1978, Section 4:

"The Department of Education shall review the results of the census each year. Where the information provided by a school district appears to be inaccurate, the department shall audit the district's census through an onsite visit. Where the census has been incorrectly taken, or the results appear to be inaccurate, the department shall require another census to be taken and the corrected information to be provided."

[7] Education Code Section 52164.3, added by Chapter 848, Statutes of 1978, Section 5:

"(a) Each school district shall reassess pupils whose primary language is other than English, whether they are designated as non-English speaking, limited English speaking, or fluent English speaking, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation.

(b) In all such cases of reassessment, the parent or guardian of the pupil shall be notified of the result. This notice shall be given orally when school personnel have reason to think that a written notice will not be understood."

parent or guardian of the pupil be notified of the result. This notice shall be given orally when school personnel have reason to think that a written notice will not be understood."

Chapter 848, Statutes of 1978, Section 7, added Education Code Section 52164.5[8] which requires all pertinent information from the assessment of language skills for each pupil whose primary language is other than English to be retained by the school district as long as the pupil is enrolled in the district. Each school district shall report annually to the Department of Education the number of pupils whose primary language is other than English, the number of pupils who are non-English speaking, and the number of pupils who are limited English speaking. Each school shall further report the total number of pupils whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), or (c) of Section 52163, the number of such pupils who have become bilingual and literate in English and in their primary language, and the number of such pupils who have demonstrated adequate proficiency to be

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[8] Education Code Section 52164.5, added by Chapter 848, Statutes of 1978, Section 7:

"Pertinent information from the assessment of language skills for each pupil whose primary language is other than English shall be retained by the school district as long as the pupil is enrolled in the district. Each school district shall report annually to the Department of Education, and the department shall report to the State Board of Education, the number of pupils whose primary language is other than English, the number of pupils who are non-English speaking, and the number of pupils who are limited English speaking. Each school shall further report the total number of pupils whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), or (c) of Section 52163, the number of such pupils who have become bilingual and literate in English and in their primary language, and the number of such pupils who have demonstrated adequate proficiency to be placed in mainstream classes."

placed in mainstream classes.

Chapter 1339, Statutes of 1980, Section 10, amended Education Code Section 52164 to make technical changes.

Chapter 1339, Statutes of 1980, Section 11, amended Education Code Section 52164.1[9]. Subdivision (a) was amended to require home language determinations to be

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[9] Education Code Section 52164.1, added by Chapter 848, Statutes of 1978, Section 3, as amended by Chapter 1339, Statutes of 1980, Section 11:

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

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

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

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

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

made only once, unless the results are disputed by a parent or legal guardian.

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

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

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

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

The assessments shall be conducted by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency, as defined in subdivision (m) of Section 52163. A school district may require that the assessment be conducted by persons who hold a valid, regular California teaching credential and who meet the other qualifications specified in this paragraph. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

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

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

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

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

3. If the assessment conducted pursuant to this subdivision indicates that

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

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

5. The parent or guardian of the pupil to be notified of the results of the assessment.

Other technical changes were also made.

Chapter 1339, Statutes of 1980, Section 12, amended Education Code Section 52164.2[10] to also require an audit of the district's census where parents, teachers, or counselors file a formal written complaint that the census is inaccurate; deletes the

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[10] Education Code Section 52164.2, added by Chapter 848, Statutes of 1978, Section 4, as amended by Chapter 1339, Statutes of 1980, Section 12:

"The Department of Education shall review the results of the census each year. Where the information provided by a school district appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate, the department shall audit the district's census. Where the department concludes that the census has been incorrectly taken, or the results appear to be inaccurate, the department shall require another census to be taken and the corrected information to be provided."

requirement of an onsite visit; and requires another census when the department concludes that the census was taken incorrectly.

Chapter 1339, Statutes of 1980, Section 13, amended Education Code Section 52164.3 to make technical changes.

Chapter 1339, Statutes of 1980, Section 15, amended Education Code Section 52164.5 to make technical changes.

Chapter 1339, Statutes of 1980, Section 16, added Education Code Section 52164.6[11] which requires each school district to establish reclassification criteria to

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[11] Education Code Section 52164.6, added by Chapter 1339, Statutes of 1980, Section 16:

"Reclassification criteria shall be established by each school district in which pupils of limited English proficiency are enrolled. The criteria shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(a) Teacher evaluation, including a review of the pupil's curriculum mastery.
(b) Objective assessment of language proficiency and reading and writing skills.
(c) Parental opinion and consultation.
(d) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

The board shall, no later than April 1, 1981, adopt regulations setting forth standards for language reclassification criteria to be adopted by school districts. The board's regulations shall, at a minimum, prescribe a reclassification process which shall utilize multiple criteria as required by this section.

The superintendent shall, by May 1, 1981, prepare and distribute to each school district in which pupils of limited English proficiency are enrolled, background material and guidelines for language reclassification criteria to be adopted by school districts.

Each school district shall, in following the board's regulations, no later than September 1, 1981, establish criteria for determining when pupils of limited English proficiency enrolled in programs defined in Section 52163 have developed the English

determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(a) Teacher evaluation, including a review of the pupil's curriculum mastery.

(b) Objective assessment of language proficiency and reading and writing skills.

(c) Parental opinion and consultation.

(d) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

Each school district shall, in following the board's regulations, establish criteria for determining when pupils of limited English proficiency enrolled in programs defined in Section 52163 have developed the English language skills of comprehension, speaking, reading, and writing necessary to succeed in an English-only instructional setting.

Chapter 219, Statutes of 1981, Section 2, amended Education Code Section 48985 to make technical changes.

Chapter 922, Statutes of 1994, Section 123, amended Education Code Section 52164.6 to delete the requirement that the superintendent prepare and distribute

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language skills of comprehension, speaking, reading, and writing necessary to succeed in an English-only instructional setting."

background material and guidelines for language reclassification criteria and made other technical changes.

Title 5, California Code of Regulations[12]

Title 5, California Code of Regulations, Subchapter 4, entitled "English Language Learner Education", commencing with Section 11300, was first filed in 1998.

Section 11300 (added in 1998), defines "school term" as each school's semester or equivalent, as determined by the local governing board.

Section 11301 (added in 1998), subdivision (a), provides that for purposes of "a good working knowledge of English" and "reasonable fluency in English", an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments. Subdivision (b), provides that, at any time, including during the school year, a parent or guardian may have his or her child moved into an English mainstream classroom. Subdivision (c) provides that an English learner may be re-enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

[12] Copies of each of the Title 5 Regulations cited are attached hereto as Exhibit 4, and are incorporated herein by reference.

Section 11302 (added in 1998), requires school districts to continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

Section 11303 (added in 2003), requires that the reclassification procedures used to reclassify a pupil from English learner to proficient in English shall include, but not be limited to, a responsible administrative mechanism for the effective and efficient conduct of the language reclassification process, which shall include each of the following procedural components:

(a) Assessment of language proficiency using the English language development test, as provided for by Education Code section 60810 pursuant to the procedures for conducting that test provided in Subchapter 7.5 (commencing with Section 11510).

(b) Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.

(c) Parental involvement through:

(1) Notice to parent(s) or guardian(s) of language reclassification and placement, including a description of the reclassification process and the parent's opportunity to participate; and

(2) Encouragement of the participation of parent(s) or guardian(s) in the school district's reclassification procedure, including seeking their opinion and consultation during the reclassification process.

(d) Until the statewide, empirically-established range of performance in basic English/language arts skills is established as required by Education Code section 313(d)(4), evaluation of the pupil's performance as specified in Section 11302(b).

Section 11304, (added in 2003), requires school districts to monitor the progress of pupils reclassified to ensure correct classification and placement.

Section 11305, (added in 2003), requires school districts to maintain documentation of multiple criteria information, as specified in Section 11303(a) and (d), and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303(b) and (c).

Section 11306, (added in 2003), requires school districts reporting the presence of English learners, to conduct an annual assessment of the English language development and academic progress of those pupils.

Section 11307 (added in 2003), subdivision (a), provides that all pupils whose primary language is other than English who have not been previously assessed or are

new enrollees to the school district shall have their English language skills assessed within 30 calendar days from the date of initial enrollment. Subdivision (b), requires that the census of English learners shall be taken in a form and manner prescribed by the State Superintendent of Public Instruction in accord with uniform census taking methods. Subdivision (c), requires that the results of the census shall be reported by grade level on a school-by-school basis to the Department of Education not later than April 30 of each year.

Section 11308, (added in 2003), subdivision (a), requires each school district with more than 50 English learners in attendance, to establish advisory committees on programs and services for English learners. School advisory committees on education programs and services for English learners shall be established in each school with more than 20 English learners in attendance. Both school district and school advisory committees shall be established in accordance with Education Code section 62002.5 (advisory committees). Subdivision (b) provides that the parents or guardians of English learners shall elect the parent members of the school advisory committees. Subdivision (c) provides that school district advisory committees shall advise the school district governing board on at least the following tasks:

(1) Developing a district master plan for education programs and services for English learners.

(2) Conducting a district wide needs assessment on a school-by-school basis.

(3) Establishing district program, goals, and objectives for programs and

services for English learners.

(4) Developing a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(5) Administering the annual language census.

(6) Reviewing and commenting on the school district reclassification procedures.

(7) Reviewing and commenting on the written notifications required to be sent to parents and guardians pursuant to this subchapter.

Subdivision (d), requires school districts to provide all members of school district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subdivision (c).

Section 11309 (added as section 11303 in 1998, renumbered and last amended in 2003), subdivision (a), requires that all parents and guardians be notified of the placement of their children in a structured English immersion program, and of an opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally-adopted procedures for requesting a parental exception waiver, and any locally-adopted guidelines for evaluating a parental waiver request. Subdivision (b), requires school districts to establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and,

upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil.

(2) Parents and guardians must be informed that the pupil must be placed for a period of not less than thirty calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to the guidelines established by the local governing board.

(3) The school principal and educational staff may recommend a waiver to a parent or guardian and must inform the parent or guardian of such a recommendation.

(4) Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

Subdivision (c) requires the school district to act upon all parental exception waivers within twenty instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty day placement in an English language classroom. These should be acted upon either no later than ten calendar days after the expiration of that thirty day English language classroom placement or within twenty instructional days of submission of the

parental waiver to the school principal, whichever is later. Subdivision (d) provides that in cases where a parental exceptions waiver pursuant to Education Code sections 311 (b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education or to the court. Subdivision (e) provides that, for waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

Section 11310 (added as Section 11304 in 1998, renumbered and last amended in 2003), subdivision (a), requires school district governing boards, upon written request of the State Board of Education, to submit any guidelines or procedures adopted pursuant to Education Code section 311 to the State Board of Education for its review. Subdivision (b) provides that any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education.

Section 11315 (added as Section 11305 in 1998, renumbered and last amended in 2003) provides that in distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and local education agencies shall disburse the funds at their discretion consistent with the following:

(1) The funds made available to local educational agencies offering

Community Based English Tutoring based upon the number of pupils identified as English learners in the prior year census.

(2) The governing boards may disburse these funds at their discretion to carry out the purposes of this section and shall require providers of adult English language instruction which receive funds authorized by Educations Code section 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(3) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

Section 11316 (added in 2003) requires that all notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

Title 5, California Code of Regulations, Subchapter 7.5, entitled "California English Language Development Test", commencing with Section 11510, was first filed on October 4, 2001 to be operative November 3, 2001.

Section 11510 (added in 2001 and last amended in 2003), provides definitions for the Subchapter.

Section 11511 (added in 2001), subdivision (a), requires that any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test, shall be assessed for English language proficiency by using the California English Language Development Test within 30 calendar days of enrollment in the school district. Subdivision (b) requires that the English language development of all currently enrolled English learners shall be assessed by administering the California English Language Development Test during the annual assessment window. Subdivision (c) requires school districts to administer the test in accordance with the test publisher's directions, except as provided by Section 11516.5. Subdivision (d) provides that if the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered.

Section 11511.5 (added in 2001), requires school districts to notify parents or guardians for each pupil assessed using the California English Language Development Test, of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. The notification shall comply with the requirements of Education Code Section 48985.

Section 11512 (added in 2001), subdivision (a), requires school districts to maintain a record of all pupils who participate in each administration of the California

English Language Development Test. This record shall include the following information for each administration:

(1) The name of each pupil who took the test;

(2) The grade level of each pupil who took the test;

(3) The date on which the administration of the test was completed for each pupil; and

(4) The test results obtained for each pupil;

Subdivision (b) requires the school district to enter in each pupil's record the following information for each administration of the test:

(1) The date referred to by subdivision (a)(3); and

(2) The pupil's test results.

Subdivision (c) provides that the record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

Section 11512.5 (added in 2001 and last amended in 2003), subdivision (a) requires each school district to provide the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in United States schools; and

(12) District and school mobility.

Subdivision (b) provides that the information required by subdivision (a) is for the purposes of aggregate analyses and reporting only. Subdivision (c), requires school districts to provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

Section 11513 (added in 2001), subdivision (a), requires that sixty calendar days before the beginning of the annual assessment window of each school year, the superintendent of each school district shall designate from among the employees of the school district a California English Language Development Test district coordinator. The superintendent shall notify the publisher of the California English Language Development Test of the identity and contact information for the California English

Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test. Subdivision (b) provides a list of responsibilities for the California English Language Development Test district coordinator which include.

(1) Responding to correspondence and inquiries from the publisher.

(2) Determining school district and individual school test and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514, and signing the Test Security Agreement.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to the test publisher no more than 10 working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

Subdivision (c) requires the California English Language Development Test district coordinator certify to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California

English Language Development Test in the manner and as otherwise required by the publisher.

Section 11513.5 (added in 2001), subdivision (a), requires the superintendent of the school district, to annually designate a California English Language Development Test site coordinator for each test site, including, but not limited to, each charter school, each court school, and each school or program operated by a school district, from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving issues that arise as a result of the administration of the California English Language Development Test. Subdivision (b) provides that the California English Language Development Test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section

11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

Section 11514 (added in 2001), subdivision (a) provides that the California English Language Development Test site coordinator shall ensure that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test. Subdivision (c) provides that all California English Language Development Test district and test site coordinators sign the California English Language Development Test Security Agreement set forth in subdivision (d).

Subdivision (e) provides that each California English Language Development Test site coordinator shall deliver the tests and test materials only to those persons actually administering the California English Language Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g). Subdivision (f) provides that all persons having access to the California English Language Development Test, including but not limited to the California English Language Development Test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g). Subdivision (h) provides that in order to maintain the security of the California English Language Development Test, all California English Language Development Test district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory. Subdivision (i), provides that it is the sole responsibility of the school district to maintain the security of the test materials until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher. Subdivision (j) provides that secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district by the test publisher.

Section 11516 (added in 2001), provides that all pupils shall have sufficient time to complete the test as provided in the directions for test administration.

Section 11516.5 (added in 2001), provides that pupils with disabilities shall take the California English Language Development Test with those accommodations for testing that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.

Section 11517 (added in 2001 and last amended in 2003), subdivision (a), requires each school district to report to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment from November 1, 2002 through June 30, 2003. Thereafter, each school district shall report the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve-month period prior to June 30 of each year. Subdivision (b) requires the superintendent of each school district to certify the accuracy of all information submitted to the California Department of Education. Subdivision (c) provides that the report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after June 30 of each year.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Education Code Sections and California Code of Regulations sections referenced in this test claim result in school districts incurring costs mandated by the

state, as defined in Government Code section 17514[13], by creating new state-mandated duties related to the uniquely governmental function of providing services to the public and these statutes apply to school districts and do not apply generally to all residents and entities in the state.[14]

The new duties mandated by the state upon school districts and county offices of education require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

Education Code

A) Pursuant to Education Code Sections 52164 through 52164.6, developing and

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[13] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

[14] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155, 172; 275 Cal.Rptr. 449:

"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

implementing policies and procedures, and periodically updating those policies and procedures, necessary to comply with the requirements to assess and reassess students

B) Pursuant to Education Code Section 48985, sending all notices, reports, statements, or records to the parent or guardian of any pupil or pupils who speak a single primary language other than English in both English and the pupil's primary language when 15 percent or more of the students speak a single primary language other than English.

C) Pursuant to Education Code Section 52164, ascertaining not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of pupils of limited English proficiency within the district, and classifying them according to their primary language, age, and grade level. This count shall be known as the "census of pupils of limited English proficiency". This census shall be taken by individual, actual count, and not by estimates or samplings and include all pupils of limited English proficiency, including migrant and special education pupils. Reporting the results of this census to the Department of Education not later than the 30th day of April of each year.

D) Pursuant to Education Code Section 52164.1, using census-taking methods prescribed by the superintendent, with the approval of the State Board of Education, which shall include, but need not be limited to, the following:

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

(2) An assessment of the language skills of all pupils whose primary language is other than English as pupils enroll in the district and shall determine whether such pupils are fluent in English or are of limited English proficiency.

(3) For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available.

E) Pursuant to Education Code Section 52164.1, administering a diagnostic assessment in the language designated for basic skills instruction measuring speaking, comprehension, reading, and writing. Updating such diagnostic assessment as necessary to provide a curriculum meeting the individual needs of each pupil of limited English proficiency.

F) Pursuant to Education Code Section 52164.1, further assessing the pupil's primary language skills including consultation with the pupil's parents or guardians, the classroom teacher, the pupil, or others who are familiar with the pupil's language ability in various environments if the assessment conducted pursuant to this subdivision indicates that the pupil has no proficiency in the primary language.

G) Pursuant to Education Code Section 52164.1, completing the diagnostic assessment process within 90 days after the date of the pupil's initial enrollment in accordance with rules and regulations adopted by the board.

H) Pursuant to Education Code Section 52164.1, notifying the parent or guardian of the pupil of the results of the assessment.

I) Pursuant to Education Code Section 52164.1, conducting the assessments by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency

J) Pursuant to Education Code Section 52164.2, taking another census when the Department of Education concludes that the census has been incorrectly taken, or the results appear to be inaccurate, or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate

K) Pursuant to Education Code Section 52164.3, subdivision (a), reassessing pupils whose primary language is other than English, whether they are designated as limited English proficient, or fluent English proficient, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation. Pursuant to subdivision (b), notifying the parent or guardian of the pupil of the result, orally when school personnel have reason to think that a written notice will not be understood.".

L) Pursuant to Education Code Section 52164.5, retaining pertinent information from the assessment of language skills for each pupil whose primary language is other than English as long as the pupil is enrolled in the district. Reporting annually to the Department of Education the number of pupils:

(1) whose primary language is other than English;

(2) who are of limited English proficiency;

(3) whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), (c), (d), (e) or (f) of Section 52163;

(4) the number of such pupils who have become bilingual and literate in English and in their primary language, as appropriate; and

(5) the number of such pupils who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.

M) Pursuant to Education Code Section 52164.6, establishing reclassification criteria in each school district in which pupils of limited English proficiency are enrolled which shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(1) Teacher evaluation, including a review of the pupil's curriculum mastery.

(2) Objective assessment of language proficiency and reading and writing skills.

(3) Parental opinion and consultation.

(4) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

Title 5, California Code of Regulations

A) Pursuant to Title 5, California Code of Regulations Sections 11300 through 11316 and Sections 11510 through 11517, developing and implementing policies and procedures, and periodically updating those policies and procedures, necessary to administer the California English Language Development Test (CELDT).

B) Pursuant to Title 5, California Code of Regulations, Section 11301, subdivision (a), transferring an English learner from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments. Pursuant to subdivision (c), re-enrolling an English learner in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a), unless the parents or guardians of the pupil object to the extended placement.

C) Pursuant to Title 5, California Code of Regulations, Section 11302, continually

providing additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

1) demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers; and

2) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

D) Pursuant to Title 5, California Code of Regulations, Section 11303, including in the reclassification procedures used to reclassify a pupil from English learner to proficient in English, a responsible administrative mechanism process which shall include each of the following procedural components:

1) Assessment of language proficiency using the procedures for conducting the English Language Development test provided in Subchapter 7.5 (commencing with Section 11510).

2) Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.

3) Parental involvement through:

a) Notice to parent(s) or guardian(s) of language reclassification and placement, including a description of the reclassification process and the parent's opportunity to participate; and

b) Encouragement of the participation of the parent(s) or guardian(s) in the school district's reclassification procedure, including seeking their opinion and consultation during the reclassification process.

4) Until the statewide, empirically-established range of performance is established as required by Education Code section 313(d)(4), evaluation of the pupil's performance as specified in Section 11302(b).

E) Pursuant to Title 5, California Code of Regulations, Section 11304, monitoring the progress of pupils reclassified to ensure correct classification and placement.

F) Pursuant to Title 5, California Code of Regulations, Section 11305, maintaining documentation of multiple criteria information, as specified in Section 11303(a) and (d), and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303(b) and (c).

G) Pursuant to Title 5, California Code of Regulations, Section 11306, conducting an annual assessment of the English language development and academic progress of those pupils.

H) Pursuant to Title 5, California Code of Regulations, 11307:

(1) Pursuant to subdivision (a), assessing the English language skills of all pupils whose primary language is other than English who have not been previously assessed or who are new enrollees to the school district within 30 calendar days from the date of initial enrollment.

(2) Pursuant to subdivision (b), taking the census of English learners, in a

form and manner prescribed by the State Superintendent of Public Instruction in accord with uniform census taking methods.

(3) Pursuant to subdivision (c), reporting the results of the census by grade level on a school-by-school basis to the Department of Education not later than April 30 of each year.

I) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (a), establishing school district advisory committees in each school district with more than 50 English learners in attendance and school advisory committees for English learners in each school with more than 20 English learners in attendance.

J) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (c), considering the advice of School District Advisory Committees on the following tasks and implementing them when appropriate:

(a) Developing a district master plan for education programs and services for English learners.

(b) Conducting a district wide needs assessment on a school-by-school basis.

(c) Establishing district programs, goals, and objectives for programs and services for English learners.

(d) Developing a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(e) Administrating the annual language census.

(f) Reviewing and commenting on the school district reclassification procedures.

(g) Reviewing and commenting on the written notifications required to be sent to parents and guardians.

K) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (d), providing all members of school district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c).

L) Pursuant to Title 5, California Code of Regulations, Section 11309:

(1) Pursuant to subdivision (a), informing parents of the placement of their children in a structured English immersion program and notifying them of an opportunity to apply for a parental exception waiver which shall include a description of the locally-adopted procedures for requesting a parental exception waiver and any locally-adopted guidelines for evaluating a parental waiver request.

(2) Pursuant to subdivision (b), establishing procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311.

(3) Pursuant to subdivision (c), acting upon all parental exception waivers within twenty instructional days of submission.

(4) Pursuant to subdivision (d), informing parents and guardians in writing of the reason(s) for denial and advising that they may appeal the decision to

the local board of education if such an appeal is authorized by the local board of education, or to the court.

M) Pursuant to Title 5, California Code of Regulations, Section 11310, subdivision (a), submitting any guidelines or procedures adopted pursuant to Education Code section 311 to the State Board of Education, upon their written request.

N) Pursuant to Title 5, California Code of Regulations, Section 11316, providing all notices and other communications to parents or guardians in English and in the parent's or guardians' primary language.

O) Pursuant to Title 5, California Code of Regulations, Section 11510, subdivision (f), obtaining a home language survey.

P) Pursuant to Title 5, California Code of Regulations, Section 11511:

1) Pursuant to subdivision (a), assessing for English language proficiency, within 30 days of enrollment in the school district, any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test.

(2) Pursuant to subdivision (b), assessing the English language development of all currently enrolled English learners by administering the California English Language Development Test during the annual assessment window.

(3) Pursuant to subdivision (c), administering the English Language

Development Test in accordance with the test publisher's directions, except as provided by Section 11516.5.

(4) Pursuant to subdivision (d), the cost of materials ordered, later deemed to be excessive, defined as the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered.

Q) Pursuant to Title 5, California Code of Regulations, Section 11511.5, notifying the parents or guardians, for each pupil assessed using the California English Language Development Test, of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher and complying with the requirements of Education Code Section 48985 (Notices to parents in language other than English).

R) Pursuant to Title 5, California Code of Regulations, Section 11512:

(1) Pursuant to subdivision (a), maintaining a record of all pupils who participate in each administration of the California English Language Development Test, including the following information for each administration:

(a) The name of each pupil who took the test.

(b) The grade level of each pupil who took the test.

(c) The date on which the administration of the test was completed for each pupil.

(d) The test results obtained for each pupil.

(2) Pursuant to subdivision (b), entering in each pupil's record the following information for each administration of the test:

(a) The date referred to by subdivision (a)(3).

(b) The pupil's test results.

(3) Pursuant to subdivision (c), the record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

S) Pursuant to Title 5, California Code of Regulations, Section 11512.5, subdivision (a), providing the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in United States schools; and

(12) District and school mobility.

Pursuant to Title 5, California Code of Regulations, Section 11512.5, subdivision (c), providing the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

T) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision (a), designating from among the employees of the school district, a California English Language Development Test district coordinator. Notifying the publisher of the California English Language Development Test of the identity and contact information for the California English Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test.

U) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision (b):

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school test and test material

needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514 and signing the Test Security Agreement set forth in Section 11514 prior to receipt of the test materials.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and test data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be

returned to the test publisher no more than ten (10) working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

V) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision (c), certifying to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California English Language Development Test in the manner and as otherwise required by the publisher.

W) Pursuant to Title 5, California Code of Regulations, Section 11513.5, subdivision (a), designating, annually, a California English Language Development Test site coordinator for each test site from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving

issues that arise as a result of the administration of the California English Language Development Test.

X) Pursuant to Title 5, California Code of Regulations, Section 11513.5, subdivision (b), performance of the following responsibilities by the test site coordinator:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section 11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies

between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

Y) Pursuant to Title 5, California Code of Regulations, Section 11514:

(1) Pursuant to subdivision (a), ensuring that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test.

(2) Pursuant to subdivision (b), limiting access to the California English Language Development Test to pupils being administered the test and employees of the school district directly responsible for its administration.

(3) Pursuant to subdivision (c), signing the California English Language Development Test Security Agreement set forth in subdivision (d).

(4) Pursuant to subdivision (e), delivering the tests and test materials only to those persons actually administering the California English Language Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g).

(5) Pursuant to subdivision (f), acknowledging the limited purpose of their

access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g).

(6) Pursuant to subdivision (h), maintaining the security of the California English Language Development Test, being responsible for inventory control and using appropriate inventory control forms to monitor and track test inventory.

(7) Pursuant to subdivision (i), ensuring the security of the test materials that have been duly delivered by the test publisher until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher.

(8) Pursuant to subdivision (j), securing transportation of the materials within a school district.

Z) Pursuant to Title 5, California Code of Regulations, Section 11516.5, providing accommodations for testing for pupils with disabilities that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.

AA) Pursuant to Title 5, California Code of Regulations, Section 11517:

(1) Pursuant to subdivision (a), reporting to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for

annual or initial assessment from November 1, 2002 through June 30, 2003. Thereafter, each school district shall report the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve-month period prior to June 30 of each year.

2) Pursuant to subdivision (b) certifying the accuracy of all information submitted to the California Department of Education.

3) Pursuant to subdivision (c), the report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after June 30 of each year.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[15] statutory exceptions to a finding

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[15] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive

of costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code sections, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[16]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

Education Code Section 404[17], subdivision (b), provides that upon adopting

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order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[16] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

[17] Education Code Section 404, added by Chapter 71, Statutes of 1999, Section 1, and last amended by Chapter 77, Statutes of 2000, Section 2:

"(a) (1) The Superintendent of Public Instruction shall allocate to each participating local educational agency, for each pupil enrolled in any of grades 4

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to 8, inclusive, and identified as eligible for participation in the program established pursuant to this chapter one hundred dollars ($100) per school year.

(2) If the available funding is insufficient to support the minimum allocation set forth in paragraph (1), the Superintendent of Public Instruction shall give priority for funding to schools with the highest proportion of pupils enrolled who are identified as English language learners.

(b) (1) From funds appropriated specifically for this purpose, local educational agencies may receive an allocation of one hundred dollars ($100) on a one-time basis for each English language learner enrolled in kindergarten or any of grades 1 to 12, inclusive, who is reclassified to English-fluent status. Each local educational agency applying for an allocation pursuant to this subdivision shall describe the procedures and criteria for reclassification of English language learners to English-fluent status. A local educational agency may not claim funding pursuant to subdivision (a) for any pupil who has been classified as fluent in the English language if the local educational agency has received funding on behalf of that pupil pursuant to this subdivision. In order to be eligible for funding pursuant to this subdivision, a local educational agency shall implement the English language development assessment established pursuant to Section 60810.

(2) This subdivision shall only be implemented upon adoption of English language development standards by the State Board of Education pursuant to Section 60811.

(c) Not later than 60 days after the effective date of the act adding this section, the Superintendent of Public Instruction shall notify local educational agencies of the availability of funds for the English Language Acquisition Program. For purposes of this chapter, "local educational agency" means a school district, charter school, or county office of education. Each local educational agency shall have the opportunity to request funds appropriated for the purposes of this chapter not later than 60 days after the notification from the Superintendent of Public Instruction.

(d) As a condition of receiving funds under subdivision (a), each local educational agency shall certify that it will do all of the following:

(1) Conduct academic assessments of English language learners to ensure appropriate placement of those pupils. The assessments shall include:

(A) Initial assessment of English language learners to determine their English proficiency level.

(B) Ongoing assessment conducted at least annually to ensure accurate placement of English language learners, to communicate progress, and to provide formative assessment information to refine the program. Assessment measures shall include, but are not limited to, the state standardized testing and reporting program required by Section

and implementing the English language development standards, local agencies may receive an allocation of one hundred dollars ($100) on a one-time basis for each English language learner enrolled in kindergarten or any of grades 1 to 12, inclusive, who is reclassified to English-fluent status. In order to be eligible for funding pursuant to this

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60640, unless a pupil is exempted by law, and the English language development assessment instrument to be developed pursuant to Section 60810, when it is developed.

(2) Provide a program for English language development instruction to assist pupils in successfully achieving the English language development standards adopted by the State Board of Education pursuant to Section 60811. The program shall include structured immersion instruction to be provided for English learners, such as specially designed academic instruction in English and sheltered English strategies to ensure access by English language learners to the core curriculum, unless the local educational agency has obtained a waiver pursuant to Section 310.

(3) Provide supplemental instructional support, such as intersession, before and after school opportunities or summer school, to provide English language learners with continuing English language development. These opportunities are to supplement the regular school program and may include, but are not limited to, newcomer centers and tutorial support, mentors, or any other program that meets the objectives of the program established pursuant to this chapter. Academic support services needed to provide these opportunities may be funded by this program.

(4) Coordinate services and funding sources available to English language learners, including, but not limited to, community-based English tutoring programs established pursuant to Article 4 (commencing with Section 315) of Chapter 3, programs for at-risk youth, after-school, intersession, and summer school programs, reading programs established pursuant to Chapter 16 (commencing with Section 53025) of Part 28 and any available federal funds. The local educational agency shall also certify that it integrates adult community-based tutoring resources with the program established pursuant to this chapter.

(e) Funding allocated pursuant to this chapter shall supplement existing resources supporting language acquisition for English language learners in grades 4 to 8, inclusive. Funds may be used for any of the purposes identified in the program established pursuant to this chapter.

(f) Funding for this program is contingent on an appropriation specifically for this purpose in the annual Budget Act or any other measure."

subdivision, a local educational agency shall implement the English language development assessment established pursuant to Section 60810. To the extent these funds are appropriated and actually received specifically for the administration of the California English Language Assessment Test program, those funds would reduce the costs incurred as alleged in this test claim.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: Declaration of Elizabeth Blasquez
Assistant Superintendent, Curriculum and Instruction
Castro Valley Unified School District

Exhibit 2: Copies of Statutes Cited

Chapter 36, Statutes of 1977

Chapter 848, Statutes of 1978

Chapter 1339, Statutes of 1980

Chapter 219, Statutes of 1981

Chapter 922, Statutes of 1994

Exhibit 3: Copies of Code Sections Cited

Education Code Section 48985

Education Code Section 52164

Education Code Section 52164.1

Education Code Section 52164.2

Education Code Section 52164.3

Education Code Section 52164.5

Education Code Section 52164.6

Exhibit 4: Copies of Title 5, California Code of Regulations Cited

Section 11300

Section 11301

Section 11302

Section 11303

Section 11304

Section 11305

Section 11306

Section 11307

Section 11308

Section 11309

Section 11310

Section 11315

Section 11316

Section 11510

Section 11511

Section 11511.5

Section 11512

Section 11512.5

Section 11513

Section 11513.5

Section 11514

Section 11516

Section 11516.5

Section 11517

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PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on September 12, 2003, at Castro Valley, California by:

Jerry Macy
Deputy Superintendent
Castro Valley Unified School District

Voice: (510) 537-3335 Ext. 1223
Fax: (510) 886-7529

PART VI. APPOINTMENT OF REPRESENTATIVE

Castro Valley Unified School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.

Jerry Macy
Deputy Superintendent

9/12/03
Date

EXHIBIT 1
DECLARATION

DECLARATION OF ELIZABETH BLASQUEZ

Castro Valley Unified School District

Test Claim of Castro Valley Unified School District

COSM No. _____

Statutes

Chapter 922, Statutes of 1994
Chapter 219, Statutes of 1981
Chapter 1339, Statutes of 1980
Chapter 848, Statutes of 1978
Chapter 36, Statutes of 1977

Code Sections

Education Code Section 48985
Education Code Section 52164
Education Code Section 52164.1
Education Code Section 52164.2
Education Code Section 52164.3
Education Code Section 52164.5
Education Code Section 52164.6

Title 5, California Code of Regulations

Section 11300
Section 11301
Section 11302
Section 11303
Section 11304
Section 11305
Section 11306
Section 11307
Section 11308
Section 11309
Section 11310
Section 11316
Section 11510
Section 11511
Section 11511.5
Section 11512
Section 11512.5
Section 11513
Section 11513.5
Section 11514
Section 11516.5
Section 11517

California English Language Development Test - 2

I, Elizabeth Blasquez, Assistant Superintendent, Curriculum and Instruction, Castro Valley Unified School District, make the following declaration and statement.

In my capacity as Assistant Superintendent, Curriculum and Instruction, I am responsible for establishing and implementing procedures for the administration of the California English Language Development Test. I am familiar with the provisions and requirements of the statutes, Education Code Sections and Title 5, California Code of Regulations sections enumerated above.

These Education Code Sections and Title 5, California Code of Regulations sections require the Castro Valley Unified School District to:

Education Code

A) Pursuant to Education Code Sections 52164 through 52164.6, developing and implementing policies and procedures, and periodically updating those policies and procedures, necessary to comply with the requirements to assess and reassess students

B) Pursuant to Education Code Section 48985, sending all notices, reports, statements, or records to the parent or guardian of any pupil or pupils who speak a single primary language other than English in both English and the pupil's primary language when 15 percent or more of the students speak a single primary language other than English.

C) Pursuant to Education Code Section 52164, ascertaining not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of pupils of limited English proficiency within the district, and classifying them according to their primary language, age, and grade level. This count shall be known as the "census of pupils of limited English proficiency". This census shall be taken by individual, actual count, and not by estimates or samplings and include all pupils of limited English proficiency, including migrant and special education pupils. Reporting the results of this census to the Department of Education not later than the 30th day of April of

each year.

D) Pursuant to Education Code Section 52164.1, using census-taking methods prescribed by the superintendent, with the approval of the State Board of Education, which shall include, but need not be limited to, the following:

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

(2) An assessment of the language skills of all pupils whose primary language is other than English as pupils enroll in the district and shall determine whether such pupils are fluent in English or are of limited English proficiency.

(3) For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available.

E) Pursuant to Education Code Section 52164.1, administering a diagnostic assessment in the language designated for basic skills instruction measuring speaking, comprehension, reading, and writing. Updating such diagnostic assessment as necessary to provide a curriculum meeting the individual needs of each pupil of limited English proficiency.

F) Pursuant to Education Code Section 52164.1, further assessing the pupil's primary language skills including consultation with the pupil's parents or

guardians, the classroom teacher, the pupil, or others who are familiar with the pupil's language ability in various environments if the assessment conducted pursuant to this subdivision indicates that the pupil has no proficiency in the primary language.

G) Pursuant to Education Code Section 52164.1, completing the diagnostic assessment process within 90 days after the date of the pupil's initial enrollment in accordance with rules and regulations adopted by the board.

H) Pursuant to Education Code Section 52164.1, notifying the parent or guardian of the pupil of the results of the assessment.

I) Pursuant to Education Code Section 52164.1, conducting the assessments by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency

J) Pursuant to Education Code Section 52164.2, taking another census when the Department of Education concludes that the census has been incorrectly taken, or the results appear to be inaccurate, or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate

K) Pursuant to Education Code Section 52164.3, subdivision (a), reassessing pupils whose primary language is other than English, whether they are designated as limited English proficient, or fluent English proficient, when a parent or guardian,

teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation. Pursuant to subdivision (b), notifying the parent or guardian of the pupil of the result, orally when school personnel have reason to think that a written notice will not be understood.".

L) Pursuant to Education Code Section 52164.5, retaining pertinent information from the assessment of language skills for each pupil whose primary language is other than English as long as the pupil is enrolled in the district. Reporting annually to the Department of Education the number of pupils:

(1) whose primary language is other than English;

(2) who are of limited English proficiency;

(3) whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), (c), (d), (e) or (f) of Section 52163;

(4) the number of such pupils who have become bilingual and literate in English and in their primary language, as appropriate; and

(5) the number of such pupils who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.

M) Pursuant to Education Code Section 52164.6, establishing reclassification criteria in each school district in which pupils of limited English proficiency are enrolled which shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including,

but not limited to, all of the following:

(1) Teacher evaluation, including a review of the pupil's curriculum mastery.

(2) Objective assessment of language proficiency and reading and writing skills.

(3) Parental opinion and consultation.

(4) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

Title 5, California Code of Regulations

A) Pursuant to Title 5, California Code of Regulations Sections 11300 through 11316 and Sections 11510 through 11517, developing and implementing policies and procedures, and periodically updating those policies and procedures, necessary to administer the California English Language Development Test (CELDT).

B) Pursuant to Title 5, California Code of Regulations, Section 11301, subdivision (a), transferring an English learner from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments. Pursuant to subdivision (c), re-enrolling an English learner in a structured English immersion program not

normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a), unless the parents or guardians of the pupil object to the extended placement.

C) Pursuant to Title 5, California Code of Regulations, Section 11302, continually providing additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

1) demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers; and

2) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

D) Pursuant to Title 5, California Code of Regulations, Section 11303, including in the reclassification procedures used to reclassify a pupil from English learner to proficient in English, a responsible administrative mechanism process which shall include each of the following procedural components:

1) Assessment of language proficiency using the procedures for conducting the English Language Development test provided in Subchapter 7.5 (commencing with Section 11510).

2) Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.

3) Parental involvement through:

a) Notice to parent(s) or guardian(s) of language reclassification and placement, including a description of the reclassification process and the parent's opportunity to participate; and

b) Encouragement of the participation of the parent(s) or guardian(s) in the school district's reclassification procedure, including seeking their opinion and consultation during the reclassification process.

4) Until the statewide, empirically-established range of performance is established as required by Education Code section 313(d)(4), evaluation of the pupil's performance as specified in Section 11302(b).

E) Pursuant to Title 5, California Code of Regulations, Section 11304, monitoring the progress of pupils reclassified to ensure correct classification and placement.

F) Pursuant to Title 5, California Code of Regulations, Section 11305, maintaining documentation of multiple criteria information, as specified in Section 11303(a) and (d), and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303(b) and (c).

G) Pursuant to Title 5, California Code of Regulations, Section 11306, conducting an annual assessment of the English language development and academic progress of those pupils.

H) Pursuant to Title 5, California Code of Regulations, 11307:

(1) Pursuant to subdivision (a), assessing the English language skills of all

pupils whose primary language is other than English who have not been previously assessed or who are new enrollees to the school district within 30 calendar days from the date of initial enrollment.

(2) Pursuant to subdivision (b), taking the census of English learners, in a form and manner prescribed by the State Superintendent of Public Instruction in accord with uniform census taking methods.

(3) Pursuant to subdivision (c), reporting the results of the census by grade level on a school-by-school basis to the Department of Education not later than April 30 of each year.

I) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (a), establishing school district advisory committees in each school district with more than 50 English learners in attendance and school advisory committees for English learners in each school with more than 20 English learners in attendance.

J) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (c), considering the advice of School District Advisory Committees on the following tasks and implementing them when appropriate:

(a) Developing a district master plan for education programs and services for English learners.

(b) Conducting a district wide needs assessment on a school-by-school basis.

(c) Establishing district programs, goals, and objectives for programs

and services for English learners.

(d) Developing a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(e) Administrating the annual language census.

(f) Reviewing and commenting on the school district reclassification procedures.

(g) Reviewing and commenting on the written notifications required to be sent to parents and guardians.

K) Pursuant to Title 5, California Code of Regulations, Section 11308, subdivision (d), providing all members of school district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c).

L) Pursuant to Title 5, California Code of Regulations, Section 11309:

(1) Pursuant to subdivision (a), informing parents of the placement of their children in a structured English immersion program and notifying them of an opportunity to apply for a parental exception waiver which shall include a description of the locally-adopted procedures for requesting a parental exception waiver and any locally-adopted guidelines for evaluating a parental waiver request.

(2) Pursuant to subdivision (b), establishing procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311.

(3) Pursuant to subdivision (c), acting upon all parental exception waivers within twenty instructional days of submission.

(4) Pursuant to subdivision (d), informing parents and guardians in writing of the reason(s) for denial and advising that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.

M) Pursuant to Title 5, California Code of Regulations, Section 11310, subdivision (a), submitting any guidelines or procedures adopted pursuant to Education Code section 311 to the State Board of Education, upon their written request.

N) Pursuant to Title 5, California Code of Regulations, Section 11316, providing all notices and other communications to parents or guardians in English and in the parent's or guardians' primary language.

O) Pursuant to Title 5, California Code of Regulations, Section 11510, subdivision (f), obtaining a home language survey.

P) Pursuant to Title 5, California Code of Regulations, Section 11511:

1) Pursuant to subdivision (a), assessing for English language proficiency, within 30 days of enrollment in the school district, any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test.

(2) Pursuant to subdivision (b), assessing the English language development

of all currently enrolled English learners by administering the California English Language Development Test during the annual assessment window.

(3) Pursuant to subdivision (c), administering the English Language Development Test in accordance with the test publisher's directions, except as provided by Section 11516.5.

(4) Pursuant to subdivision (d), the cost of materials ordered, later deemed to be excessive, defined as the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered.

Q) Pursuant to Title 5, California Code of Regulations, Section 11511.5, notifying the parents or guardians, for each pupil assessed using the California English Language Development Test, of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher and complying with the requirements of Education Code Section 48985 (Notices to parents in language other than English).

R) Pursuant to Title 5, California Code of Regulations, Section 11512:

(1) Pursuant to subdivision (a), maintaining a record of all pupils who participate in each administration of the California English Language Development Test, including the following information for each administration:

(a) The name of each pupil who took the test.

(b) The grade level of each pupil who took the test.

(c) The date on which the administration of the test was completed for each pupil.

(d) The test results obtained for each pupil.

(2) Pursuant to subdivision (b), entering in each pupil's record the following information for each administration of the test:

(a) The date referred to by subdivision (a)(3).

(b) The pupil's test results.

(3) Pursuant to subdivision (c), the record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

S) Pursuant to Title 5, California Code of Regulations, Section 11512.5, subdivision (a), providing the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in United States schools; and

(12) District and school mobility.

Pursuant to Title 5, California Code of Regulations, Section 11512.5, subdivision (c), providing the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

T) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision (a), designating from among the employees of the school district, a California English Language Development Test district coordinator. Notifying the publisher of the California English Language Development Test of the identity and contact information for the California English Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test.

U) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision

(b):

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school test and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514 and signing the Test Security Agreement set forth in Section 11514 prior to receipt of the test materials.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and test data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites

within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to the test publisher no more than ten (10) working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

V) Pursuant to Title 5, California Code of Regulations, Section 11513, subdivision (c), certifying to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California English Language Development Test in the manner and as otherwise required by the publisher.

W) Pursuant to Title 5, California Code of Regulations, Section 11513.5, subdivision (a), designating, annually, a California English Language Development Test site

coordinator for each test site from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving issues that arise as a result of the administration of the California English Language Development Test.

X) Pursuant to Title 5, California Code of Regulations, Section 11513.5, subdivision (b), performance of the following responsibilities by the test site coordinator:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section 11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

Y) Pursuant to Title 5, California Code of Regulations, Section 11514:

(1) Pursuant to subdivision (a), ensuring that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test.

(2) Pursuant to subdivision (b), limiting access to the California English Language Development Test to pupils being administered the test and employees of the school district directly responsible for its administration.

(3) Pursuant to subdivision (c), signing the California English Language Development Test Security Agreement set forth in subdivision (d).

(4) Pursuant to subdivision (e), delivering the tests and test materials only to those persons actually administering the California English Language

Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g).

(5) Pursuant to subdivision (f), acknowledging the limited purpose of their access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g).

(6) Pursuant to subdivision (h), maintaining the security of the California English Language Development Test, being responsible for inventory control and using appropriate inventory control forms to monitor and track test inventory.

(7) Pursuant to subdivision (i), ensuring the security of the test materials that have been duly delivered by the test publisher until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher.

(8) Pursuant to subdivision (j), securing transportation of the materials within a school district.

Z) Pursuant to Title 5, California Code of Regulations, Section 11516.5, providing accommodations for testing for pupils with disabilities that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.

AA) Pursuant to Title 5, California Code of Regulations, Section 11517:

(1) Pursuant to subdivision (a), reporting to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment from November 1, 2002 through June 30, 2003. Thereafter, each school district shall report the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve-month period prior to June 30 of each year.

2) Pursuant to subdivision (b) certifying the accuracy of all information submitted to the California Department of Education.

3) Pursuant to subdivision (c), the report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after June 30 of each year.

It is estimated that the Castro Valley School District incurred more than $1,000 in staffing and other costs for the period from July 1, 2002 through June 30, 2003 to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws

of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this _____ day of September, 2003, at Castro Valley, California

Elizabeth Blasquez
Assistant Superintendent
Curriculum and Instruction
Castro Valley Unified School District

EXHIBIT 2
COPIES OF STATUTES CITED

CHAPTER 36

An act to amend Sections 40, 1042, 1330, 1891, 1904, 1908, 2104, 2502, 4200, 4210, 4321, 4364, 5012, 5016, 5018, 5204, 5454, 8203, 8210, 8211, 8212, 8240, 8242, 8245, 8246, 8248, 8250, 8250.1, 8251, 8252, 8254, 8321, 8326, 8327, 8329, 8330, 8360, 8361, 8362, 8363, 8364, 8365, 8366, 8367, 8368, 8369, 8383, 8395, 8500, 10101, 10103, 10104, 10106, 10601, 10602, 10603, 10604, 10606, 12516, 14002, 14003, 14020, 15104, 16035, 16040, 16044, 16057, 16058, 16063, 16192, 16250, 16310, 16343, 18383, 18535, 19422, 19423, 19424, 19510, 19511, 19512, 19515, 19521, 19522, 21107, 21108, 21110, 21111, 21112, 21180, 21183, 21189, 21192, 22112, 22114, 22122, 22127, 22142, 22401, 22716, 22802, 22809, 23006, 23100, 23108, 23401, 23506, 23702, 23703, 23704, 23800, 23803, 23804, 23811, 23900, 23903, 23909, 23910, 23918, 23919, 23920, 23921, 24100, 24200, 24203, 24600, 33332, 35041.5, 35101, 35174, 35214, 35300, 35330, 35511, 35512, 35515, 35518, 35704, 35705, 37220, 37228, 39002, 39140, 39143, 39149, 39210, 39214, 39227, 39230, 39321, 39363.5, 39440, 39602, 39651, 39674, 39830, 40000, 40013, 41015, 41020, 41201, 41301, 41372, 41601, 41700, 41718, 41761, 41762, 41840, 41856, 41857, 41859, 41863, 41886, 41888, 41915, 42238, 42244, 42245, 42603, 42631, 42633, 42635, 42636, 42639, 42643, 42831, 44008, 44009, 44228, 44263, 44274, 44335, 44346, 44853, 44909, 45023.5, 45057, 45203, 45205, 45207, 45250, 46010, 46111, 46300, 48011, 48200, 48265, 48412, 48414, 48938, 48980, 49061, 49063, 49065, 49068, 49069, 49070, 49075, 49076, 49077, 51226, 51767, 51872, 52002, 52012, 52015, 52113, 52309, 52315, 52317, 52321, 52324, 52372, 52500, 52506, 52517, 52570, 52612, 54002, 54006, 54123, 54125, 54665, 54666, 54669, 56336, 56601, 56717, 56811, 56829, 60014, 60101, 60201, 60202, 60204, 60222, 60223, 60261, 60640, 60643, 60664, 66602, 68014, 69273, 69274, 69511, 69532, 69536, 69538, 69565, 69566, 69582, 69583, 69584,

69602, 69604, 69605, 69621, 69623, 71046, 72023, 72246, 72419.5, 72511, 72620, 72632, 72640, 74162, 74165, 74644, 74645, 76066, 76140, 76143, 76210, 76221, 76223, 76225, 76230, 76231, 76232, 76240, 76242, 76243, 76244, 78031, 78247, 78405, 78461, 78462, 78601, 78932, 79020, 79150, 81033, 81130, 81133, 81139, 81160, 81165, 81178, 81180, 81350, 81363.5, 81390, 81602, 81651, 81820, 81822, 81831, 81833, 82321, 82508, 84035, 84040, 84201, 84301, 84322, 84324, 84327, 84362, 84520, 84521, 84522, 84526, 84528, 84533, 84701, 84706, 84790, 84817, 84836, 84838, 85132, 85133, 85133.5, 85203, 85231, 85233, 85235, 85236, 85239, 85243, 85431, 87008, 87009, 87215, 87290, 87422, 87470, 87830, 88070, 88203, 88205, 88207, 89033, 89301, 89304, 89505, 89900, 89903, 90273, 92492, 94110, 94144, 94151, 94153, 94190, 94191, and 94324 of, to amend the heading of Article 5 (commencing with Section 8360) of Chapter 2 of Part 6 of, and the heading of Article 5 (commencing with Section 19510) of Chapter 8 of Part 11 of, to add Sections 1294.5, 1910, 2112, 2113, 2500.3, 2506.5, 5015.5, 5203.5, 8243.5, 8331, 8512, 16051.5, 16071.5, 16321.7, 16330.5, 18534.3, 18534.5, 22141, 22141.5, 22229, 22504, 22608, 22725, 22726, 22727, 23400.5, 23701, 23904.5, 23910.5, 23910.6, 24104, 24105, 24202, 33318, 35016, 35046, 35511.4, 35511.5, 35512.1, 35512.2, 35512.3, 35512.4, 35512.5, 35513.5, 37065.4, 37065.5, 39002.5, 39141.6, 39234, 39384, 39617, 39645.5, 39646, 39649.5, 41716.5, 41760.5, 41836, 41841, 42239.5, 42244.2, 42244.3, 42244.4, 42244.5, 42244.6, 42244.7, 42637.5, 42649, 42650, 42901.5, 44253.5, 44253.6, 44978.5, 45206.5, 48204, 48985, 49064, 51224, 51225, 51225.5, 51411, 51760.5, 52022.5, 52310.5, 52327.5, 52331, 52501.3, 52501.5, 52610, 56033.5, 56034.5, 56613.5, 56728.5, 60200, 66903.2, 66903.4, 66903.6, 68082, 71094, 71095, 72013, 72026.5, 72241.5, 72426, 74011.5, 74161.4, 74162.3, 74162.5, 74162.7, 74163.5, 76222, 78014, 78440, 78452, 78460.5, 78462.5, 81033.5, 81131.6, 81184, 81383, 81645.5, 81646, 81649.5, 84521.5, 84524.5, 84726, 84730.5, 84850, 85112, 85134.5, 85237.5, 85265, 85266, 87781.5, 88205.5, 89519, and 89546 to, to add Article 6 (commencing with Section 1340) to Chapter 2 of Part 2, Article 2 (commencing with Section 7050) to Chapter 1 of Part 5, Article 14.5 (commencing with Section 18555) to Chapter 3 of Part 11, Chapter 1.5 (commencing with Section 33080) to Part 20, Article 8 (commencing with Section 33400) to Chapter 3 of Part 20, Article 13.5 (commencing with Section 35335) to Chapter 2 of Part 21, Article 2 (commencing with Section 39030) to Chapter 1 of Part 23, Chapter 12 (commencing with Section 43000) to Part 24, Article 3 (commencing with Section 52160) to Chapter 7 of Part 28, Chapter 13 (commencing with Section 67100) to Part 40, Article 9 (commencing with Section 81190) to Chapter 1 of Part 49, Article 4.5 (commencing with Section 84762) to Chapter 5 of Part 50, Article 2.5 (commencing with Section 89550) to Chapter 5 of Part 55, and Chapter 3.5 (commencing with Section 94360) to Part 59 of, to add and repeal Sections 10916, 39213, 39233, 46605.5, 68076.6, 68077.5, 69538.5, 81163, and 81183 of, to add and repeal Chapter 2.5 (commencing with Section 8400) of Part 6 and Article 1.5 (commencing with Section 69503) of Chapter 2 of Part 42 of, to repeal Sections 8380, 8512, 10605, 10608, 14030, 16078, 22141, 23700,

23701, 24202, 24501, 33384, 35517, 37531, 37645, 39215, 39216, 39217, 39218, 39219, 39220, 39221, 39222, 39223, 39224, 39646, 44034, 44641, 45314, 45315, 45316, 49064, 51224, 51225, 52152, 52390, 52610, 52613, 54109, 54425, 54601, 54640, 54641, 54670, 56616, 56630, 56631, 56632, 58513, 60200, 60247, 60630, 60631, 60632, 68110, 74167, 76222, 78000, 78400, 78440, 78450, 78460, 78463, 78615, 81166, 81167, 81168, 81169, 81170, 81171, 81172, 81173, 81174, 81175, 81646, 84524, 84525, 84721, 84722, 84723, 84731, 84760, 84770, 84780, 84850, 85112, 85130, 85135, 85136, 85137, 85138, 85139, 85140, 85141, 87034, 88133, 88134, and 88135 of, and to repeal Article 2 (commencing with Section 5050) of Chapter 1 of Part 4, Chapter 4 (commencing with Section 5500) of Part 4, Article 4 (commencing with Section 54680) of Chapter 9 of Part 29, and Article 3 (commencing with Section 84550) of Chapter 4 of Part 50 of, the Education Code as enacted by Chapter 1010 and Chapter 1011 of the Statutes of 1976, and to repeal Sections 91, 190.5, 373, 403, 472, 473, 474, 475, 477, 653, 895.12, 924.6, 945.1, 1009.7, 1070, 1073, 1081.5, 1102, 1114, 1117.5, 1118, 1120, 1203.2, 1203.5, 1251, 1463, 1992, 1992.1, 1992.2, 1993, 1993.1, 1993.2, 1993.3, 1993.4, 1993.5, 1994.1, 1996, 1999, 2369, 2370, 3100, 3106, 3202, 3255, 5201, 5207, 5302, 5605.15, 5605.16, 5701, 5702.1, 5702.5, 5708, 5746, 5746.1, 5749.8, 5750.6, 5750.10, 5753, 5753.1, 5756, 5756.1, 5756.5, 5757, 5757.1, 5764.5, 5768.2, 5768.6, 5769, 5769.4, 5778, 5778.5, 5779, 5780, 5902, 5985.1, 5991, 6443.5, 6445.1, 6445.11, 6445.14, 6445.22, 6499.56, 6499.57, 6499.60, 6499.232, 6499.237, 6750.1, 6755.4, 6812.1, 6820.5, 6871.6, 6872.1, 6880.16, 6880.46, 6950.6, 7020, 7451.7, 7451.11, 7455.3, 7456, 7459, 7460, 7463.5, 7466.5, 8573, 8574, 8574.5, 8575, 9222, 9322, 9400, 9401, 9402, 9404, 9422, 9423, 9461, 10705, 10805.1, 10921, 10926, 10932, 10934, 10935, 10936, 10939, 10940, 10941, 10946, 10947, 10948, 10953, 11002, 11251, 11475, 11475.1, 11475.2, 11475.5, 11476.1, 11477, 11481, 11487, 11501, 12101, 12101.1, 12406, 12603, 12605, 12851, 12910, 12911, 13116.1, 13125.4, 13125.5, 13134, 13135.1, 13166, 13175, 13220.16, 13271, 13329, 13401.5, 13468.4, 13501.5, 13529, 13656, 13656.2, 13656.4, 13657, 13708, 13830, 13832, 13835.2, 13838, 13846.5 as added by Chapter 1308 of the Statutes of 1976, 13846.5 as added by Chapter 1412 of the Statutes of 1976, 13846.8, 13870.2, 13931, 13946, 13969, 13988.1, 13988.2, 13988.3, 13997, 14023, 14031, 14056, 14070, 14076, 14084.1, 14100.5, 14111, 14116.5, 14116.10, 14152, 14153, 14154, 14155, 14180, 14185, 14186, 14189, 14210, 14210.5, 14214, 14214.1, 14214.3, 14220.1, 14220.5, 14225, 14226, 14227, 14228, 14245, 14245.2, 14260, 14280, 14283, 14284, 14390, 15002.1, 15002.2, 15002.3, 15451, 15452.3, 15454, 15459.1, 15501, 15503.1, 15503.5, 15516, 15518, 15518.01, 15518.2, 15716, 15802.1, 15815, 15835, 15955.3, 15955.5, 15957.1, 15958, 16051.1, 16053.1, 16075, 16501, 16521, 16665, 16702, 16709, 16710, 16711, 16720, 16721, 16722.1, 16725, 16726, 16728, 16730, 16730.1, 16732, 16733, 16735, 16740.5, 16746, 16746.5, 16750, 16751, 16752, 16760, 16761, 16762, 16763, 16764, 16765, 16766, 16767, 16768, 16769, 16783, 16794, 16851, 17203, 17206, 17262, 17301, 17301.2, 17301.9, 17301.12, 17301.13, 17303.5, 17303.6, 17402, 17407, 17411.1, 17503, 17601.1, 17611, 17651, 17667, 17668.6, 17668.8, 17669, 17701.4, 17702, 17702.2, 17946, 17951, 17951.1, 17970, 18055, 18056, 18057, 18060,

18102.6, 18102.9, 18151, 18258, 19576, 19578, 19581, 19584.4, 19589, 19590, 19594, 19601.5, 19682.5, 19699.9, 19700.51, 19700.78, 19700.608, 19700.695, 20065, 20067, 20076, 20078, 20110, 20204, 20212, 20213, 20450.5, 20452, 20456.4, 20803, 20905, 20905.55, 20906, 20906.1, 20906.2, 20906.3, 20906.4, 20906.5 as added by Chapter 323 of the Statutes of 1976, 20906.5 as added by Chapter 397 of the Statutes of 1976, 20907, 20935, 20935.1, 20935.15, 20935.2, 20954, 21102, 21104, 21106, 21107, 21107.6, 21109, 21113, 21118, 21119, 21352, 21702.2, 22601, 22712.5, 22712.6, 22712.7, 22809, 22855.5, 22856.5, 22859.6, 23583.22, 23604.5, 23802, 23805, 24054, 24055, 24204, 24217, 24317, 25393, 25411.5, 25411.7, 25424.3, 25425, 25430.1, 25430.3, 25430.4, 25430.5, 25430.7, 25430.8, 25430.9, 25430.10, 25430.12, 25430.14, 25430.15, 25430.16, 25457.5, 25502.1, 25505.4, 25505.8, 25505.20, 25506.5, 25515.3, 25515.7, 27803, 27804, 27805, 27901, 27902, 27902.1, 27903, 27952, 27953, 28204, 28455.1, 28455.2, 28456, 29042, 30303, 30313, 30320, 30321.5, 30328, 30329, 31026, 31058, 31059, 31061, 31062, 31063, 31151, 31154, 31160, 31163, 31913, 31913.5, 40201, 40402, 40405, 40406, 40406.5, 41006, 41007, 41201.1, 41202, 41203, 41402, 41403.1, 41404, 41801, 41803, 42200, 42401, 43003, 43203, 45000, and 45022 of, to repeal Article 2.5 (commencing with Section 27) of Chapter 1 of Division 1, Article 7 (commencing with Section 490) of Chapter 3 of Division 2, Article 9.5 (commencing with Section 1084) of Chapter 3 of Division 4, Article 14.5 (commencing with Section 1900) of Chapter 6 of Part 2 of Division 1 of Title 1, Chapter 5.76 (commencing with Section 5767) of Division 6, Article 1.5 (commencing with Section 12930) of Chapter 1 of Division 10, Article 2 (commencing with Section 15051) of Chapter 1 of Division 11, Division 12.4 (commencing with Section 16690), Article 8.2 (commencing with Section 17971) of Chapter 3 and Chapter 3.9 (commencing with Section 20940) of Division 14, Chapter 1.2 (commencing with Section 22509) and Chapter 4.5 (commencing with Section 22670) of Division 16.5, Article 3 (commencing with Section 24320) of Chapter 9 of Division 18, Article 11.5 (commencing with Section 28520) of Chapter 6 of Division 20, Chapter 1.5 (commencing with Section 29090) of Division 21, and Article 1 (commencing with Section 40100) of Chapter 1 of Division 25 of, and to repeal the headings of Chapter 4 (commencing with Section 16760) of Division 12.5, and Article 4 (commencing with Section 27901) of Chapter 5 of Division 20 of, the Education Code as enacted by Chapter 2 of the Statutes of 1959, relating to education law and declaring the urgency thereof, to take effect immediately.

[Approved by Governor April 29, 1977. Filed with Secretary of State April 29, 1977.]

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

SECTION 1. This act shall be known and may be cited as the 1977 Education Code Supplemental Act.

SEC. 1.5. Section 40 of the Education Code as enacted by Chapter

that school district, provided such home is properly licensed as required by law. The person maintaining such a home shall provide evidence to the school that a current license is in effect or that a license is not required under the law.

SEC. 476. Section 48985 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

48985. When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52103 by the first day of April in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

SEC. 477. Section 49064 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

49064. A log or record shall be maintained for each pupil's record which lists all persons, agencies, or organizations requesting or receiving information from the record and the legitimate interests therefor. Such listing need not include:

(a) Parents or pupils to whom access is granted pursuant to Section 49069 or paragraph (6) of subdivision (a) of Section 49076;

(b) Parties to whom directory information is released pursuant to Section 49073;

(c) Parties for whom written consent has been executed by the parent pursuant to Section 49075; or

(d) School officials or employees having a legitimate educational interest pursuant to paragraph (1) of subdivision (a) of Section 49076.

The log or record shall be open to inspection only by a parent and the school official, or his designee, responsible for the maintenance of pupil records, and to other school officials with legitimate educational interests in the records, and to the Comptroller General of the United States, the Secretary of Health, Education, and Welfare, an administrative head of an education agency as defined in Public Law 93-380, and state educational authorities as a means of auditing the operation of the system.

SEC. 478. Section 51224 is added to the Education Code as enacted by Chapter 1010 of the Statutes of 1976, to read:

51224. The governing board of any school district maintaining a high school shall prescribe courses of study designed to provide the skills and knowledge required for adult life for pupils attending the schools within its school district. The governing board shall prescribe separate courses of study, including, but not limited to, a course of study designed to prepare prospective students for admission to state colleges and universities and a course of study for vocational training.

SEC. 479. Section 51225 is added to the Education Code as enacted

incorporate the changes made in the Education Code, in 1976, into the Education Code as enacted by Chapter 1010 of the Statutes of 1976. It is not the intent of the Legislature to make any substantive change in the law.

SEC. 1136. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The new reorganized Education Code, enacted by Chapter 1010 of the Statutes of 1976, will become operative on April 30, 1977, which is long before the effective date of ordinary statutes enacted in 1977 in the 1977–78 Regular Session of the Legislature. Other 1976 education legislation was directed to the Education Code as enacted by Chapter 2 of the Statutes of 1959. This bill would adapt such other education legislation enacted in 1976 to the reorganized Education Code as enacted by Chapter 1010 of the Statutes of 1976. In order that statutory continuity may be maintained and that administrative confusion may be avoided, such adaptation must become operative on the operative date of the new Education Code. It is, therefore, necessary that this act take effect immediately as an urgency statute.

CHAPTER 848

An act to amend Section 52168 of, to add Sections 52164.1, 52164.2, 52164.3, 52164.4, and 52164.5 to, and to repeal and add Section 52164 of, the Education Code, relating to school districts, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 18, 1978. Filed with Secretary of State September 19, 1978.]

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

SECTION 1. Section 52164 of the Education Code is repealed.

SEC. 2. Section 52164 is added to the Education Code, to read:

52164. Each school district shall ascertain not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of limited-English-speaking pupils within the district, and shall classify them according to their primary language, age, and grade level. This count shall be known

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as the "census of limited-English-speaking pupils" and shall consist of a determination of the primary language of each pupil enrolled in the school district and an assessment of the language skills of all pupils whose primary language is other than English.

The census shall be taken by individual, actual count, and not by estimates or samplings. All limited-English-speaking pupils, including migrant and special education pupils, shall be counted. Special language assessment instruments, designated by the superintendent and in compliance with the requirements of subdivision (i) of Section 56301, may be used for special education pupils. The results of this census shall be reported to the Department of Education not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer limited-English-speaking pupils and pupils who no longer attend school in the district, and shall be reported pursuant to Section 52164.1. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.

SEC. 3. Section 52164.1 is added to the Education Code, to read:

52164.1. The superintendent, with the approval of the State Board of Education, shall prescribe census-taking methods, applicable to all school districts in the state, which shall include, but need not be limited to, the following:

(a) A determination of the primary language of each pupil enrolled in the school district. The primary language of new pupils shall be determined as they enroll. Once determined, the primary language need not be redetermined unless the parent or guardian claims there is an error. The primary language of each pupil enrolled in each district shall be determined not later than September 15, 1978, and kept current thereafter, as new pupils enroll. Home language determinations resulting from the 1977 home language survey need not be redone.

(b) An assessment of the language skills of all pupils whose primary language is other than English.

(1) The English language proficiency of each previously untested new enrollee, whose primary language is other than English, shall be assessed. This assessment may be conducted pursuant to paragraph (2) of this subdivision, or as set forth in this subdivision. If the district decides not to follow the procedures in paragraph (2), each previously untested new enrollee, whose primary language is other than English, shall be evaluated using the instrument designated by the Department of Education. This assessment shall be completed within 30 days after the date of the pupil's enrollment unless the temporary identification prescribed in Section 52164.4 is used. In cases where there is reasonable doubt by school authorities as to whether the pupil is limited English speaking within the meaning of subdivision (d) of Section 52163, or request is made for further assessment pursuant to Section 52164.3, an English language proficiency assessment shall be undertaken to evaluate the pupil's

English language skills. The instruments used shall be consistent with state standards as adopted by the State Board of Education. This second level of assessment shall be completed within 60 days after the date of the pupil's enrollment. The assessment of all pupils whose primary language is other than English shall be completed no later than March 1 of each year. Tests, materials, and procedures to determine proficiency in English shall be selected and administered so as not to be racially, culturally, or sexually discriminatory.

The Department of Education shall designate the instruments to be used by school districts, and such instruments shall be available by July 1 of the year preceding the date the census report is due, commencing July 1, 1979, and each year thereafter.

The assessments shall be conducted by persons who speak and understand the primary language of the limited-English-speaking pupils, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are limited-English-speaking pupils, as defined in subdivision (d) of Section 52163. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

(2) Any district may elect to follow federal requirements regarding the census so long as the language skills described in subdivision (d) of Section 52163 are assessed. So long as such a federally approved census procedure is followed on a districtwide basis and is consistent with Section 52164, the district shall be exempt from the state census procedures described in subdivision (a) and paragraph (1) of this subdivision.

SEC. 4. Section 52164.2 is added to the Education Code, to read:

52164.2. The Department of Education shall review the results of the census each year. Where the information provided by a school district appears to be inaccurate, the department shall audit the district's census through an onsite visit. Where the census has been incorrectly taken, or the results appear to be inaccurate, the department shall require another census to be taken and the corrected information to be provided.

SEC. 5. Section 52164.3 is added to the Education Code, to read:

52164.3. (a) Each school district shall reassess pupils whose primary language is other than English, whether they are designated as non-English speaking, limited English speaking, or fluent English speaking, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation.

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(b) In all such cases of reassessment, the parent or guardian of the pupil shall be notified of the result. This notice shall be given orally when school personnel have reason to think that a written notice will not be understood.

SEC. 6. Section 52164.4 is added to the Education Code, to read:

52164.4. If a kindergarten or previously untested first grade pupil enrolling in a school for the first time speaks a language other than English in the home, such pupil may be enrolled as a limited-English-speaking pupil in a bilingual program pursuant to subdivision (a), (b), or (c) of Section 52163 at least until the census procedure for that year is completed.

SEC. 7. Section 52164.5 is added to the Education Code, to read:

52164.5. Pertinent information from the assessment of language skills for each pupil whose primary language is other than English shall be retained by the school district as long as the pupil is enrolled in the district. Each school district shall report annually to the Department of Education, and the department shall report to the State Board of Education, the number of pupils whose primary language is other than English, the number of pupils who are non-English speaking, and the number of pupils who are limited English speaking. Each school district shall further report the total number of pupils whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), or (c) of Section 52163, the number of such pupils who have become bilingual and literate in English and in their primary language, and the number of such pupils who have demonstrated adequate proficiency to be placed in mainstream classes.

SEC. 8. Section 52168 of the Education Code is amended to read:

52168. (a) The maximum allocation allowable for the 1977–78 and subsequent school years to school districts providing instruction pursuant to Section 52165 shall not exceed the maximum allowances established by the superintendent and the district pursuant to Section 3932 of Title 5 of the California Administrative Code, for each limited-English-speaking pupil who receives instruction in a program pursuant to Section 52165. This amount per pupil shall include all state and local categorical aid funds allocated to districts providing programs under Section 52165 which are wholly or partially allocated on the basis of the educational needs of limited-English-speaking pupils. The superintendent shall ensure that funds appropriated pursuant to this article supplement and do not supplant categorical funds allocated from other local or state sources in meeting the needs of limited-English-speaking pupils.

(b) School districts may claim funds appropriated pursuant to this article for expenditures in the following categories only:

(1) The employment of bilingual-crosscultural teachers and aides; however, funds are available for employment expenditures only to the extent such personnel are employed in providing bilingual services to eligible pupils. School districts applying for these funds shall submit an assurance that personnel hired for this program only

supplement and do not supplant district personnel.

(2) The purchase and development of special bilingual-bicultural teaching materials;

(3) The costs of special in-service training to develop bilingual-crosscultural instructional skills with preference given to teachers and teacher aides employed as part of the bilingual-bicultural program; and

(4) Reasonable expenses (which may include transportation, child care, meals, and training) of parent advisory groups on bilingual-bicultural education, at the school and school district level, in the course of their duties as members of the parent advisory groups. The State Board of Education shall adopt rules and regulations defining reasonable expenses.

(5) Health and auxiliary services to the extent that they meet the direct needs of eligible pupils.

(6) Reasonable district administrative expenses allowed pursuant to regulations of the board.

(c) Nothing contained in this section shall be interpreted to authorize school districts to reduce per pupil expenditures from local, state, or federal sources for the education of limited-English-speaking pupils.

SEC. 9. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to that section nor shall there be an appropriation made by this act because there are savings as well as costs in this act which, in the aggregate, do not result in additional net costs.

SEC. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to eliminate unnecessary confusion and to assist school districts in the effective implementation of bilingual education programs in the 1978–79 school year, it is necessary for this act to take immediate effect.

CHAPTER 1339

An act to amend Sections 10106, 44253.5, 52015, 52161, 52162, 52163, 52164, 52164.1, 52164.2, 52164.3, 52164.4, 52164.5, 52165, 52166, 52167, 52168, 52171.6, 52172, 52173, 52175, 52176, 52177, 52178, 54024, and 56001 of, to add Sections 52163.5, 52163.6, and 52164.6 to, to repeal and add Sections 52170, 52171, 52174, and 52178.5 to, and to repeal Sections 52047 and 52169.1 of, the Education Code, relating to bilingual education.

[Approved by Governor September 30, 1980. Filed with Secretary of State September 30, 1980.]

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

SECTION 1. This act shall be known and may be cited as the Bilingual Education Improvement and Reform Act of 1980.

SEC. 2. Section 10106 of the Education Code is amended to read:

10106. The Commission for Teacher Preparation and Licensing shall serve as a clearinghouse for bilingual-crosscultural teaching personnel. The commission shall compile, continually update, and maintain a directory of bilingual-crosscultural teachers available to teach in bilingual education programs. The directory shall be sent to all school districts on or before March 15 annually. The commission shall, upon request, assist school districts in the recruitment of such teachers.

SEC. 3. Section 44253.5 of the Education Code is amended to

(m) "Pupils of limited English proficiency" are pupils who do not have the clearly developed English language skills of comprehension, speaking, reading, and writing necessary to receive instruction only in English at a level substantially equivalent to pupils of the same age or grade whose primary language is English. The determination of which pupils are pupils of limited English proficiency shall be made in accordance with the procedures specified in Sections 52164 and 52164.1. Pupils who have no proficiency in their primary language are not included within this definition.

(n) "Pupils of fluent English proficiency" are pupils whose English proficiency is comparable to that of the majority of pupils, of the same age or grade, whose primary language is English.

(o) "Department" means the Department of Education.

SEC. 8. Section 52163.5 is added to the Education Code, to read:

52163.5. Each of the program options defined in subdivision (a), (b), (c), (d), (e), or (f) of Section 52163 shall include structured activities which promote the pupil's positive self-image and crosscultural understanding.

The Legislature recognizes that language development is a continuum and that pupils in the same classroom may have varying levels of English and primary language skills. The individualized instruction for each pupil, pursuant to all of the program options, shall be based on a continuing evaluation of the pupil's progress by the classroom teacher, and by others, as appropriate. An English development component is required for all participating pupils. Pupils with greater strength in their primary language shall receive instruction in academic subjects through the primary language as long as such instruction is needed to sustain academic achievement. As pupils develop the skills which allow them to learn more effectively in English, more of their instruction shall be through the English language. A primary language component shall be provided as specified in subdivision (a), (b), (c), (d), (e), or (f) of Section 52163, but shall be less extensive as the pupil progresses into English.

SEC. 9. Section 52163.6 is added to the Education Code, to read:

52163.6. The Legislature recognizes that for many languages there is a shortage of primary language textbooks, curriculum, teacher training programs, and bilingual personnel. The requirement for reading in the primary language may be waived by the board if the district documents the lack of available materials, personnel, and training programs. The department shall maintain a list of available curriculum materials and teacher training programs in all appropriate languages, to verify the waiver requests. The waiver is renewable yearly. Each waiver request shall be signed by the chairperson of the district bilingual committee. The waiver does not eliminate the requirement for primary oral language development.

SEC. 10. Section 52164 of the Education Code is amended to read:

52164. Each school district shall ascertain not later than the first

day of March of each year, under regulations prescribed by the State Board of Education, the total number of pupils of limited English proficiency within the district, and shall classify them according to their primary language, age, and grade level. This count shall be known as the "census of pupils of limited English proficiency" and shall consist of a determination of the primary language of each pupil enrolled in the school district and an assessment of the language skills of all pupils whose primary language is other than English.

The census shall be taken by individual, actual count, and not by estimates or samplings. All pupils of limited English proficiency, including migrant and special education pupils, shall be counted. Special language assessment instruments, designated by the superintendent and in compliance with the requirements of subdivision (j) of Section 56001, may be used for special education pupils. The results of this census shall be reported to the Department of Education not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer pupils of limited English proficiency and pupils who no longer attend school in the district, and shall be reported pursuant to Section 52164.1. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.

SEC. 11. Section 52164.1 of the Education Code is amended to read:

52164.1. The superintendent, with the approval of the State Board of Education, shall prescribe census-taking methods, applicable to all school districts in the state, which shall include, but need not be limited to, the following:

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

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

(c) For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment

instruments are available. Parallel forms of the instruments used to determine English proficiency shall be used, if available. The results of the parallel assessment shall determine the extent and sequence in which English and the primary language will be used in the instruction of basic skills.

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

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

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

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

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

The assessments shall be conducted by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency, as defined in subdivision (m) of Section 52163. A school district may require that the assessment be conducted by persons who hold a valid, regular California teaching credential and who meet the other qualifications specified in this paragraph. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small

number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

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

SEC. 12. Section 52164.2 of the Education Code is amended to read:

52164.2. The Department of Education shall review the results of the census each year. Where the information provided by a school district appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate, the department shall audit the district's census. Where the department concludes that the census has been incorrectly taken, or the results appear to be inaccurate, the department shall require another census to be taken and the corrected information to be provided.

SEC. 13. Section 52164.3 of the Education Code is amended to read:

52164.3. (a) Each school district shall reassess pupils whose primary language is other than English, whether they are designated as limited English proficient, or fluent English proficient, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation.

(b) In all cases of reassessment, the parent or guardian of the pupil shall be notified of the result. This notice shall be given orally when school personnel have reason to think that a written notice will not be understood.

SEC. 14. Section 52164.4 of the Education Code is amended to read:

52164.4. If a previously untested pupil enrolling in a school for the first time speaks a language other than English in the home, such pupil shall be enrolled as a pupil of limited English proficiency in a bilingual program pursuant to subdivision (a), (b), (c), (e), or (f) of Section 52163 at least until that child has been assessed pursuant to Section 52164.

SEC. 15. Section 52164.5 of the Education Code is amended to read:

52164.5. Pertinent information from the assessment of language skills for each pupil whose primary language is other than English shall be retained by the school district as long as the pupil is enrolled in the district. Each school district shall report annually to the Department of Education, and the department shall report to the

State Board of Education, the number of pupils (1) whose primary language is other than English; (2) who are of limited English proficiency; (3) whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), (c), (d), (e) or (f) of Section 52163; (4) the number of such pupils who have become bilingual and literate in English and in their primary language, as appropriate; and (5) the number of such pupils who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.

SEC. 16. Section 52164.6 is added to the Education Code, to read:

52164.6. Reclassification criteria shall be established by each school district in which pupils of limited English proficiency are enrolled. The criteria shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(a) Teacher evaluation, including a review of the pupil's curriculum mastery.

(b) Objective assessment of language proficiency and reading and writing skills.

(c) Parental opinion and consultation.

(d) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

The board shall, no later than April 1, 1981, adopt regulations setting forth standards for language reclassification criteria to be adopted by school districts. The board's regulations shall, at a minimum, prescribe a reclassification process which shall utilize multiple criteria as required by this section.

The superintendent shall, by May 1, 1981, prepare and distribute to each school district in which pupils of limited English proficiency are enrolled, background material and guidelines for language reclassification criteria to be adopted by school districts.

Each school district shall, in following the board's regulations, no later than September 1, 1981, establish criteria for determining when pupils of limited English proficiency enrolled in programs defined in Section 52163 have developed the English language skills of comprehension, speaking, reading, and writing necessary to succeed in an English-only instructional setting.

SEC. 17. Section 52165 of the Education Code is amended to read:

52165. Each pupil of limited English proficiency enrolled in the California public school system in kindergarten through grade 12 shall receive instruction in a language understandable to the pupil which recognizes the pupil's primary language and teaches the pupil English.

(a) In kindergarten through grade 6;

(1) Whenever the language census indicates that any school of a

region, or county office shall be made to insure the highest quality educational offerings.

(n) Appropriate qualified staff are employed, consistent with credentialing requirements, to fulfill the responsibilities of the local plan and that positive efforts to employ qualified handicapped individuals are made.

(o) Regular and special education personnel are adequately prepared to provide educational instruction and services to individuals with exceptional needs.

SEC. 38. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code and Section 6 of Article XIII B of the California Constitution, no appropriation is made by this act pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 39. (a) The provisions of this act shall become operative on July 1, 1981, except as specified in subdivision (b).

(b) Sections 7, 16, 19, 24, 25, 32, 33, 34, and 35 of this act shall become operative on January 1, 1981.

CHAPTER 219

An act to amend Sections 8000 and 48985 of the Education Code, relating to education.

[Approved by Governor July 18, 1981. Filed with Secretary of State July 19, 1981.]

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

SECTION 1. Section 8000 of the Education Code is amended to read:

8000. The California Advisory Council on Vocational Education, hereinafter referred to as the council in this article, is hereby created, consisting of the Director of the Employment Development Department or his or her representative, the Director of the Department of Rehabilitation, or his or her representative, the Secretary of the Youth and Adult Correctional Agency, or his or her

representative, the Chairperson of the Comprehensive Employment and Training Council, or his or her designee, a member of the Assembly Education Committee appointed by the Speaker of the Assembly, a member of the Senate Education Committee appointed by the Senate Committee on Rules and 19 members appointed by the Governor.

Appointed council members shall be appointed for terms of three years or until a successor has been appointed except that members appointed for the fiscal year 1978–79, one-third of the membership shall be appointed for terms of one year each and one-third shall be appointed for terms of two years each, and appointments to fill vacancies shall be for such terms as remain unexpired. The council shall have as a majority of its members lay persons who are not professional educators or administrators currently in the field of education.

Nothing in this article shall prevent the reappointment or replacement of any individual serving on the council, provided any such reappointment is in conformity to all of the criteria established in this article. Any individual serving on the council on the operative date of the amendment to this section enacted in 1977 may continue to serve beyond October 1, 1977, or until a replacement is appointed or the individual is reappointed, but in no event may such an individual serve more than 90 days after such operative date.

Any members of the council missing three consecutive meetings, not through sickness or absence from the state, shall forfeit their office, thereby creating a vacancy.

SEC. 2. Section 48985 of the Education Code is amended to read:

48985. When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

CHAPTER 922

An act to amend Sections 2550, 2551, 2557, 8447.5, 8911, 11005, 19175, 33472, 39310, 39312, 41610, 41963, 41964, 42238, 42238.9, 42246, 42247.3, 42268, 42289, 44104, 44225.5, 44258.15, 44276, 44276.1, 44276.6, 44301, 44327, 44834.2, 44931, 44959, 44966, 45344.5, 46142, 48232, 49068.5, 49427, 49582, 51215, 51217, 51229, 51264, 51266, 51749.3, 51900, 52106, 52164.6, 52169, 52171, 52171.6, 52177, 52321, 52324.6, 52506, 52523, 52902, 52903, 54442, 54652, 54734, 56446, 56830, 58601, 58702, 58802, and 64100 of, to repeal Sections 1916, 8212.5, 8272, 8273, 8433, 8446, 8479, 8609, 8616, 8632, 8850, 8851, 8853, 8854, 8855, 8958, 11004, 11400, 11402, 14022.4, 18490, 18491, 18492, 19172, 19471, 19472, 19474, 19657, 32377, 33390, 37304, 37705, 39181, 39234, 39311.5, 39619.4, 39619.8, 41203.2, 41408, 41853.3, 41853.5, 41961, 42122.5, 42127.10, 42238.7, 42238.10, 42248, 42251, 42288, 42950.1, 43000, 43002, 44102, 44227.4, 44235.2, 44255, 44276.5, 44329, 44492.5, 44764, 44775, 44904, 44905, 45023.4, 45037, 45164, 46151, 48644.3, 49150.5, 49583, 51219.5, 51267, 51757, 51900.5, 52134, 52178.1, 52178.4, 52213, 52333, 52335.25, 52616.5, 52909, 52960, 52963, 52983, 54658, 54753, 54753.1, 54761, 56441.12, 56444, 56522, 56880, 58408, 58410, 58411, 58412, 58560, 58562, 58701, 60247.5, 60701, and 62007.5 of, and to repeal Chapter 6.8 (commencing with Section 8930) of Part 6 of, and Article 10 (commencing with Section 60730) of Part 33 of, the Education Code,

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to amend Section 7907 of the Government Code, and to repeal Section 11335 of the Welfare and Institutions Code, relating to education.

[Approved by Governor September 27, 1994. Filed with Secretary of State September 28, 1994.]

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

SECTION 1. Section 1916 of the Education Code is repealed.

SEC. 2. Section 2550 of the Education Code is amended to read:

2550. For each fiscal year, the Superintendent of Public Instruction shall make the following computations to determine the amount to be allocated for direct services and other purposes provided by county superintendents of schools:

(a) For programs operated pursuant to subdivision (a) of Section 14054, the Superintendent of Public Instruction shall:

(1) Determine the allowances that county superintendents received per unit of average daily attendance in the prior fiscal year. The Superintendent of Public Instruction shall increase each amount by a percentage equal to the inflation allowance calculated for the current fiscal year pursuant to Section 2557.

(2) Multiply each amount determined in paragraph (1) by the actual number of units of average daily attendance in the prior fiscal year for programs maintained by each county superintendent. For purposes of this paragraph, the number of units of average daily attendance shall include only elementary districts with less than 901 units of average daily attendance, high school districts with less than 301 units of average daily attendance, and unified school districts with less than 1,501 units of average daily attendance within each county superintendent's jurisdiction.

(b) For programs operated pursuant to subdivision (b) of Section 14054, the Superintendent of Public Instruction shall:

(1) Determine the allowances that county superintendents received per unit of average daily attendance in the prior fiscal year for programs for kindergarten and grades 1 to 12, inclusive. The Superintendent of Public Instruction shall increase each amount by a percentage equal to the inflation allowance calculated in Section 2557.

(2) Multiply each amount determined in paragraph (1) by the estimated units of average daily attendance in the current fiscal year for programs for kindergarten and grades 1 to 12, inclusive, maintained by each county superintendent. For the purposes of this paragraph, the estimate shall include only the total units of average daily attendance credited to all elementary, high school, and unified school districts within each county superintendent's jurisdiction and to the county superintendent.

SEC. 3. Section 2551 of the Education Code is amended to read:

2551. The Superintendent of Public Instruction shall perform the

health education plans.

(b) Identify innovative teaching methods for the instruction in health in the public schools.

(c) With the cooperation and assistance of the State Department of Health, develop methods of evaluating the effectiveness of instruction in health.

(d) Develop model instructional materials for comprehensive health education courses and make these materials available to local school districts.

(e) In cooperation with the Commission on Teacher Credentialing, assist teacher training institutions in development of courses on comprehensive health education.

(f) Assist in the development of adult education programs which include parents, students, and community health agencies and personnel.

(g) With the cooperation of, and assistance of, the qualified instructional staffs of state-supported public institutions of higher education, develop and establish a health education training program for public school teachers and administrators to provide in-service training at the local district or regional level.

SEC. 120. Section 51900.5 of the Education Code is repealed.

SEC. 121. Section 52106 of the Education Code is amended to read:

52106. Incentive funding for the Language Arts Enrichment Program in Grades 1 to 3, inclusive, shall be apportioned in accordance with this section.

(a) Enrollment in grades 1 to 3, inclusive, used to calculate district apportionments shall be certified as of October 1 of the prior fiscal year. This enrollment figure shall equal total enrollment minus the number of special education pupils enrolled in special day classes on a full-time basis.

(b) Funds apportioned pursuant to this section shall not become part of a district's revenue limit, and shall be identified as a separate item of expenditure on financial reports filed by school districts with the state pursuant to statute or regulation.

SEC. 122. Section 52134 of the Education Code is repealed.

SEC. 123. Section 52164.6 of the Education Code is amended to read:

52164.6. Reclassification criteria shall be established by each school district in which pupils of limited English proficiency are enrolled. The criteria shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(a) Teacher evaluation, including a review of the pupil's curriculum mastery.

(b) Objective assessment of language proficiency and reading and writing skills.

(c) Parental opinion and consultation.

(d) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

The board shall adopt regulations setting forth standards for language reclassification criteria to be adopted by school districts. The board's regulations shall, at a minimum, prescribe a reclassification process that utilizes multiple criteria as required by this section.

Each school district shall, in following the board's regulations establish criteria for determining when pupils of limited English proficiency enrolled in programs defined in Section 52163 have developed the English language skills of comprehension, speaking, reading, and writing necessary to succeed in an English-only instructional setting.

SEC. 124. Section 52169 of the Education Code is amended to read:

52169. (a) The requirements for establishing programs mandated pursuant to subdivision (b) of Section 52165 shall be in effect beginning with the 1977–78 school year.

(b) Nothing contained in this section shall be interpreted to authorize school districts to reduce per pupil expenditures from local, state, or federal sources for the education of limited-English-speaking pupils.

SEC. 125. Section 52171 of the Education Code is amended to read:

52171. Each district shall submit annually to the department an evaluation of pupil progress for every program that has been approved pursuant to this article in a form and manner prescribed by the superintendent.

SEC. 126. Section 52171.6 of the Education Code is amended to read:

52171.6. (a) The superintendent shall report annually to the Legislature on bilingual education programs as part of the multiple-funded program evaluation required pursuant to Section 33403. The superintendent shall coordinate the design of school district and state evaluations to minimize the data collection and reporting requirements at the school and district levels. Pupil performance data for bilingual programs may be collected and analyzed on a sample basis with appropriate controls for pupil and instructional program characteristics.

The multiple-funded program evaluation shall include all of the following:

(1) A summary of district reports submitted pursuant to subdivision (a) of Section 52170 on the number of identified pupils of limited-English proficiency, funds from all sources available for programs to meet the needs of those identified pupils, and the numbers of identified pupils who are not being provided with

of taxes for a county superintendent of schools.

(g) For the 1988–89 fiscal year and each fiscal year thereafter, the state apportionments to county superintendents which shall be considered "proceeds of taxes" for a county superintendent of schools shall be equal to the lesser of the following:

(1) The total amount of state apportionments received for that fiscal year, excluding amounts paid for reimbursement of state mandates in accordance with the provisions of Section 6 of Article XIII B of the California Constitution or of Section 17561 or for reimbursement of court or federal mandates imposed on or after November 6, 1979.

(2) The appropriations limit for the county superintendent for that fiscal year, less the sum of all of the following:

(A) Interest earned on the proceeds of taxes during the current fiscal year.

(B) The 50 percent of miscellaneous funds received during the current fiscal year which are from the proceeds of taxes.

(C) Locally voted taxes received during the current year, such as parcel taxes or square foot taxes, other than for voter-approved bonded debt.

(D) Any other local proceeds of taxes received during the current year, such as excess bond revenues transferred to a district's general fund pursuant to Section 15234 of the Education Code.

(E) Local proceeds of taxes received during the current fiscal year which offset state aid.

(3) Amounts paid for court or federal mandates shall be excluded from the appropriations limit.

SEC. 173. Section 11335 of the Welfare and Institutions Code is repealed.

SEC. 174. Any section of any act enacted by the Legislature during the 1994 calendar year that takes effect on or before January 1, 1995, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section amended or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, this act.

EXHIBIT 3
COPIES OF CODE SECTIONS

§ 48985. Notices to parents in language other than English

When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

(Added by Stats.1977, c. 36, § 476, eff. April 29, 1977, operative April 30, 1977. Amended by Stats.1981, c. 219, p. 1142, § 2.)

§ 52164. Census

Each school district shall ascertain not later than the first day of March of each year, under regulations prescribed by the State Board of Education, the total number of pupils of limited English proficiency within the district, and shall classify them according to their primary language, age, and grade level. This count shall be known as the "census of pupils of limited English proficiency" and shall consist of a determination of the primary language of each pupil enrolled in the school district and an assessment of the language skills of all pupils whose primary language is other than English.

The census shall be taken by individual, actual count, and not by estimates or samplings. All pupils of limited English proficiency, including migrant and special education pupils, shall be counted. Special language assessment instruments, designated by the superintendent and in compliance with the requirements of subdivision (j) of Section 56001, may be used for special education pupils. The results of this census shall be reported to the Department of Education not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer pupils of limited English proficiency and pupils who no longer attend school in the district, and shall be reported pursuant to Section 52164.1. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.

(Added by Stats.1978, c. 848, p. 2686, § 2, urgency, eff. Sept. 19, 1978. Amended by Stats.1980, c. 1339, p. 4699, § 10, operative July 1, 1981.)

§ 52164.1. Census-taking methods; determination of primary language; assessment of language skills; notice

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

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

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

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

A diagnostic assessment in the language designated for basic skills instruction measuring speaking, comprehension, reading, and writing, shall be

administered for instructional use at the district level. Such diagnostic assessment shall be updated as necessary to provide a curriculum meeting the individual needs of each pupil of limited English proficiency.

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

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

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

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

The assessments shall be conducted by persons who speak and understand English and the primary language of the pupils assessed, who are adequately trained and prepared to evaluate cultural and ethnic factors, and who shall follow procedures formulated by the superintendent to determine which pupils are pupils of limited English proficiency, as defined in subdivision (m) of Section 52163. A school district may require that the assessment be conducted by persons who hold a valid, regular California teaching credential and who meet the other qualifications specified in this paragraph. The superintendent may waive the requirement that the assessment be conducted by persons who can speak and understand the pupil's primary language where the primary language is spoken by a small number of pupils and the district certifies that it is unable to comply. This certification shall be accompanied by a statement from the district superintendent that the chairperson of the district advisory committee on bilingual education has been consulted and was unable to assist in the effort to locate appropriate individuals to administer the assessment.

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

(Added by Stats.1978, c. 848, p. 2687, § 3, urgency, eff. Sept. 19, 1978. Amended by Stats.1980, c. 1339, p. 4700, § 11, operative July 1, 1981.)

§ 52164.2. Census; review and correction

The Department of Education shall review the results of the census each year. Where the information provided by a school district appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate, the department shall audit the district's census. Where the department concludes that the census has been incorrectly taken, or the results appear to be inaccurate, the department shall require another census to be taken and the corrected information to be provided.

(Added by Stats.1978, c. 848, p. 2688, § 4, urgency, eff. Sept. 19, 1978. Amended by Stats.1980, c. 1339, p. 4702, § 12, operative July 1, 1981.)

§ 52164.3. Designation of pupil as limited English proficient or fluent English proficient; claim of error by parent, guardian, etc., reassessment

(a) Each school district shall reassess pupils whose primary language is other than English, whether they are designated as limited English proficient, or fluent English proficient, when a parent or guardian, teacher, or school site administrator claims that there is a reasonable doubt about the accuracy of the pupil's designation.

(b) In all cases of reassessment, the parent or guardian of the pupil shall be notified of the result. This notice shall be given orally when school personnel have reason to think that a written notice will not be understood.

(Added by Stats.1978, c. 848, p. 2688, § 5, urgency, eff. Sept. 19, 1978. Amended by Stats.1980, c. 1339, p. 4702, § 13, operative July 1, 1981.)

§ 52164.5. Retention of information; reports to department and state board of education

Pertinent information from the assessment of language skills for each pupil whose primary language is other than English shall be retained by the school district as long as the pupil is enrolled in the district. Each school district shall report annually to the Department of Education, and the department shall report to the State Board of Education, the number of pupils (1) whose primary language is other than English; (2) who are of limited English proficiency; (3) whose primary language is other than English who are enrolled in classes defined in subdivision (a), (b), (c), (d), (e) or (f) of Section 52163; (4) the number of such pupils who have become bilingual and literate in English and in their primary language, as appropriate; and (5) the number of such pupils who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.

(Added by Stats.1978, c. 848, p. 2689, § 7, urgency, eff. Sept. 19, 1978. Amended by Stats.1980, c. 1339, p. 4702, § 15, operative July 1, 1981.)

§ 52164.6. **Reclassification; criteria; process; regulations**

Reclassification criteria shall be established by each school district in which pupils of limited English proficiency are enrolled. The criteria shall determine when pupils of limited English proficiency have developed the English language skills necessary to succeed in an English-only classroom. The reclassification process shall, at a minimum, utilize multiple criteria, including, but not limited to, all of the following:

(a) Teacher evaluation, including a review of the pupil's curriculum mastery.

(b) Objective assessment of language proficiency and reading and writing skills.

(c) Parental opinion and consultation.

(d) An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.

The board shall * * * adopt regulations setting forth standards for language reclassification criteria to be adopted by school districts. The board's regulations shall, at a minimum, prescribe a reclassification process * * * that utilizes multiple criteria as required by this section.

* * *

Each school district shall, in following the board's regulations * * * establish criteria for determining when pupils of limited English proficiency enrolled in programs defined in Section 52163 have developed the English language skills of comprehension, speaking, reading, and writing necessary to succeed in an English-only instructional setting.

(Amended by Stats.1994, c. 922 (A.B.2587), § 123.)

EXHIBIT 4
COPIES OF REGULATIONS CITED

NOTE: Authority cited: Section 44491(a), Education Code. Reference: Section 44495(d), Education Code.

Subchapter 4. English Language Learner Education

§ 11300. Definitions.

"School term" as used in Education Code section 330 means each school's semester or equivalent, as determined by the local governing board, which next begins following August 2, 1998. For multitrack or year round schools, a semester or equivalent may begin on different days for each school track.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 330, Education Code.

HISTORY

1. New subchapter 4 (sections 11300–11305) and section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day. For prior history of subchapter 4, see Register 77, No. 39.
2. Certificate of Compliance as to 7–23–98 order, including amendment of subchapter heading, transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11301. Knowledge and Fluency in English.

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

(b) At any time, including during the school year, a parent or guardian may have his or her child moved into an English language mainstream classroom.

(c) An English learner may be re–enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305 and 306(c), Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11302. Duration of Services.

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English–language proficiency comparable to that of the school district's average native English–language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 306 and 310, Education Code; U.S. Code, Title 20, Section 1703(f); *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11303. Reclassification.

The reclassification procedures used to reclassify a pupil from English learner to proficient in English shall include, but not be limited to, a responsible administrative mechanism for the effective and efficient conduct of the language reclassification process, which shall include each of the following procedural components:

(a) Assessment of language proficiency using the English language development test, as provided for by Education Code section 60810 pursuant to the procedures for conducting that test provided in Subchapter 7.5 (commencing with Section 11510).

(b) Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil. .

(c) Parental involvement through:

(1) Notice to parent(s) or guardian(s) of language reclassification and placement, including a description of the reclassification process and the parent's opportunity to participate; and

(2) Encouragement of the participation of parent(s) or guardian(s) in the school district's reclassification procedure, including seeking their opinion and consultation during the reclassification process.

(d) Until the statewide, empirically–established range of performance in basic English/language arts skills is established as required by Education Code section 313(d)(4), evaluation of the pupil's performance as specified in Section 11302(b).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Amendment of subsection (a)(3) filed 8–10–98 as an emergency; operative 8–10–98 (Register 98, No. 33). A Certificate of Compliance must be transmitted to OAL by 12–7–98 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 7–23–98 order and 8–10–98 order, including amendment of subsections (b) and (c), transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).
4. Renumbering of former section 11303 to section 11309 and new section 11303 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11304. Monitoring.

School districts shall monitor the progress of pupils reclassified to ensure correct classification and placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code; U.S. Code, Title 20, Section 1703(f); *Casteneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).
3. Renumbering of former section 11304 to section 11310 and new section 11304 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11305. Documentation.

School districts shall maintain documentation of multiple criteria information, as specified in Section 11303(a) and (d), and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303(b) and (c).

NOTE: Authority cited: Sections 33031 and 49062, Education Code. Reference: Section 313 and 49062, Education Code; U.S. Code, Title 20, Section 1703(f); *Casteneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 7–23–98 order, including amendment of subsection (b), transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).
3. Renumbering of former section 11305 to section 11315 and new section 11305 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11306. Annual Assessment.

School districts reporting the presence of English learners shall conduct an annual assessment of the English language development and academic progress of those pupils.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313, 60640 and 60810, Education Code.

HISTORY

1. New section filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11307. Census.

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

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

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

NOTE: Authority cited: Sections 33031 and 62000.2, Education Code. Reference: Sections 313 and 62002, Education Code.

HISTORY

1. New section filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11308. Advisory Committees.

(a) School district advisory committees on programs and services for English learners shall be established in each school district with more than 50 English learners in attendance. School advisory committees on education programs and services for English learners shall be established in each school with more than 20 English learners in attendance. Both school district and school advisory committees shall be established in accordance with Education Code section 62002.5.

(b) The parents or guardians of English learners shall elect the parent members of the school advisory committee (or subcommittee, if appropriate). The parents shall be provided the opportunity to vote in the election. Each school advisory committee shall have the opportunity to elect at least one member to the School District Advisory Committee, except that school districts with more than 30 school advisory committees may use a system of proportional or regional representation.

(c) School District Advisory Committees shall advise the school district governing board on at least the following tasks:

(1) Development of a district master plan for education programs and services for English learners. The district master plan will take into consideration the school site master plans.

(2) Conducting of a district wide needs assessment on a school–by–school basis.

(3) Establishment of district program, goals, and objectives for programs and services for English learners.

(4) Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(5) Administration of the annual language census.

(6) Review and comment on the school district reclassification procedures.

(7) Review and comment on the written notifications required to be sent to parents and guardians pursuant to this subchapter.

(d) School districts shall provide all members of school district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c). Training provided advisory committee members in accordance with this subsection shall be planned in full consultation with the members, and funds provided under this chapter may be used to meet the costs of providing the training to include the costs associated with the attendance of the members at training sessions.

NOTE: Authority cited: Sections 33031 and 62000.2, Education Code. Reference: Sections 313, 62002 and 62002.5, Education Code.

HISTORY

1. New section filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11309. Parental Exception Waivers.

(a) In order to facilitate parental choice of program, all parents and guardians must be informed of the placement of their children in a structured English immersion program and must be notified of an opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally–adopted procedures for requesting a parental exception waiver, and any locally–adopted guidelines for evaluating a parental waiver request.

(b) School districts shall establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

(2) Pursuant to Education Code section 311(c), parents and guardians must be informed that the pupil must be placed for a period of not less than thirty (30) calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

(3) Pursuant to Education Code sections 311(b) and (c), the school principal and educational staff may recommend a waiver to a parent or guardian. Parents and guardians must be informed in writing of any recommendation for an alternative program made by the school principal and educational staff and must be given notice of their right to refuse to accept the recommendation. The notice shall include a full description of the recommended alternative program and the educational materials to be used for the alternative program as well as a description of all other programs available to the pupil. If the parent or guardian elects to request the alternative program recommended by the school principal and educational staff, the parent or guardian must comply with the requirements of Education Code section 310 and all procedures and requirements otherwise applicable to a parental exception waiver.

(4) Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

(c) All parental exception waivers shall be acted upon by the school within twenty (20) instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty (30)–day placement in an English language classroom. These waivers must be acted upon either no later than ten (10) calendar days after the expiration of that thirty (30)–day English language classroom placement or within twenty (20) instructional days of submission of the parental waiver to the school principal, whichever is later.

(d) In cases where a parental exception waiver pursuant to Education Code sections 311(b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.

(e) For waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. Renumbering and amendment of former section 11303 to new section 11309 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11310. State Board of Education Review of Guidelines for Parental Exception Waivers.

(a) Upon written request of the State Board of Education, school district governing boards shall submit any guidelines or procedures adopted pursuant to Education Code section 311 to the State Board of Education for its review.

(b) Any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education. The sole purpose of the review shall be to make a determination as to whether those guidelines or procedures comply with the parental exception waiver guidelines set forth in Section 11309.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. Renumbering and amendment of former section 11304 to new section 11310 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11315. Community Based English Tutoring.

In distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and local educational agencies shall disburse the funds at their discretion consistent with the following:

(a) The funds made available by Education Code sections 315 and 316 shall be apportioned by the State Superintendent of Public Instruction to local educational agencies offering Community Based English Tutoring based upon the number of pupils identified as English learners in the prior year census.

(b) The governing boards of local educational agencies may disburse these funds at their discretion to carry out the purposes of this section. Local educational agency governing boards shall require providers of adult English language instruction which receive funds authorized by Education Code sections 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(c) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

NOTE: Authority cited: Sections 316 and 33031, Education Code. Reference: Sections 315 and 316, Education Code.

HISTORY

1. Renumbering and amendment of former section 11305 to new section 11315 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11316. Notice to Parents or Guardians.

All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313 and 48985, Education Code.

HISTORY

1. New section filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

Subchapter 5. English Language Centers

HISTORY

1. Repealer of Chapter 5 (Sections 11400–11422) filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39). For prior history, see Register 69, No. 51.

Subchapter 6. Summer Schools (Other Than Classes for Adults, Adult Schools, and Evening High Schools)

§ 11470. Application of Chapter.

This chapter applies to all summer schools receiving state reimbursement, except classes for adults, adult schools, and evening high schools.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761, and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. New Chapter 8 (§§ 11470–11474) filed 2–24–70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
3. Repealer of Chapter 6 (Sections 11440–11444) and renumbering of Chapter 8 (Sections 11470–11475) to Chapter 6 filed 11–7–79; effective thirtieth day thereafter (Register 79, No. 45).
4. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11471. Approval Required.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

HISTORY

1. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. Repealer of section and amendment of NOTE filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11472. Courses Authorized.

In addition to mathematics and science authorized by Education Code section 37253(a), summer school courses may be offered in any of the areas of study specified in Education Code sections 51210(a) through (g) for grades 1 to 6 and 51220(a) through (j) for grades 7 to 12.

NOTE: Authority cited: Section 37253(d), Education Code. Reference: Sections 37253, 51210, 51220 and 51730–51732, Education Code.

HISTORY

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. New section filed 5–16–95 as an emergency; operative 5–16–95 (Register 95, No. 20). A Certificate of Compliance must be transmitted to OAL by 9–13–95 or emergency language will be repealed by operation of law on the following day.
3. Repealed by operation of Government Code section 11346.1(g) (Register 95, No. 39).
4. New section filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).
5. Amendment filed 3–19–96; operative 4–18–96 (Register 96, No. 12).

§ 11473. Level of Difficulty.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11474. Time and Duration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

HISTORY

1. Amendment filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
2. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
3. Repealer of section and amendment of NOTE filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11475. Work Experience Education.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. New section filed 5–18–72; effective thirtieth day thereafter (Register 72, No. 21).

(1) The majority of the committee membership shall represent the occupation for which instruction is given.

(2) Documentation of advisory committee minutes, with recommendations in regard to the course being offered, shall be on file.

(j) The courses offered in a Regional Occupational Center or Regional Occupational Program shall only be for providing training, upgrading, and retraining in recognized occupations and/or emerging occupations to meet the labor demand as determined and verified by the Regional Occupational Center or Regional Occupational Program.

(k) The course shall not unnecessarily reduce or supplant the vocational education efforts of any participating district but shall become an extension or augmentation of vocational education opportunities and enrollments in the participating districts.

(*l*) Instruction in the course is being provided by an instructor meeting the requirements pursuant to Education Code Section 52323, the California State Plan for Vocational Education, and providing immediate supervision and control as defined by Section 10091 of this title.

NOTE: Authority cited: Section 52309, Education Code. Reference: Section 52309, Education Code.

HISTORY

1. Amendment and renumbering of Section 11508 to 11504 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
2. Repealer of subsection (l) and renumbering of subsection (m) to subsection (l) filed 9–19–79; effective thirtieth day thereafter (Register 79, No. 38).

§ 11505. Counseling and Guidance.

A Regional Occupational Center or a Regional Occupational Program shall provide individual vocational counseling and guidance directly supportive of, and contributory to, the instructional programs that constitute the course offerings of the Regional Center or Regional Occupational Program. The counseling and guidance services funded pursuant to the provisions of Article 1, Chapter 9, Part 28, Division 4, Title 2* of the Education Code shall not be construed as general support for guidance and counseling services for the total school enrollment or for the total vocational education enrollment in a school.

HISTORY

1. Amendment and renumbering of Section 11509 to 11505 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).

§ 11506. Evaluation.

Each Regional Occupational Center or Regional Occupational Program shall submit to the Department of Education in such detail, at such time, and in such manner as the Department of Education deems necessary, an evaluation of the Regional Occupational Center or Regional Occupational Program. This evaluation shall include but not be limited to the following information:

(a) Analysis of the cost of individual centers, programs, and services.

(b) Enrollments defined in terms of high school students, post–high school students, and adults.

(c) Number of trainees employed in specific entry–level occupations.

(d) Number of trainees continuing training in other institutions.

(e) Dropout rates and placement data.

(f) Activities pursuant to Education Code Sections 52305(c), 52306 and 52307.

HISTORY

1. New subsection (f) filed 4–19–74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11510 to 11506 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
3. Amendment of subsection (f) filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).

§ 11507. Administration.

Each Regional Occupational Center or Regional Occupational Program shall be organized and administered in such manner that there will be a clear and separate audit trail of all income and expenditures, of all agreements and contracts, of enrollments, and of all other statistical information pertaining to fiscal and instructional accountability.

HISTORY

1. Renumbering of Section 11511 to 11507 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).

§ 11508. Establishing and Operating Business, Commercial, Trade, Manufacturing or Construction Activities.

(a) Regional occupational centers and regional occupational programs may establish and operate business, commercial, trade, manufacturing or construction activities which may include the sale of products or services to private or public corporations or companies, or to the general public as authorized in subdivision (c) of Education Code Section 52305.

(b) Where the activities described in subsection (a) of this section include the sale of products or services to private or public corporations or companies, or to the general public, the regional occupational center or regional occupational program shall request prior approval from the State Department of Education. Application for approval shall be submitted on a form prescribed by the Superintendent of Public Instruction and the proposal therein shall comply with all the conditions set forth in Education Code Sections 52306 and 52307.

HISTORY

1. New section filed 4–19–74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11512 to 11508 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
3. Amendment of section and repealer of NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).

Subchapter 7.5. California English Language Development Test

Article 1. General

§ 11510. Definitions.

For the purposes of the test required by Education Code Section 313(a), referred to as the California English Language Development Test, the following definitions shall apply:

(a) An "administration" means a pupil's attempt to take all sections of the California English Language Development Test, including speaking, listening, reading, and writing.

(b) "Annual assessments" are administrations of the California English Language Development Test to enrolled pupils who are currently identified as English learners.

(c) "Annual assessment window" means the period of time designated by the Superintendent of Public Instruction and the State Board of Education for the annual assessments conducted using the California English Language Development Test. Initial assessments, as defined in subdivision (g), may be administered during the annual assessment window.

(d) "Eligible pupil" means one who is enrolled in a California public school in kindergarten or any of grades 1 through 12 with a native language other than English or who is currently identified as an English learner.

(e) "Grade level" means the grade assigned to the pupil by the school district.

(f) "Home language survey" is a form administered by the school district to be completed by the pupil's parent or guardian indicating language use by the pupil or family which, if completed, would fulfill the school district's obligation required by Education Code section 52164.1.

(g) "Initial assessments" are administrations of the California English Language Development Test to pupils who are identified as having a native language other than English, based on the home language survey, and for whom there is no record of English language development assessment results.

(h) "School districts" include school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

(i) "Test materials" are materials necessary for administration of the California English Language Development Test, including but not limited to audio-cassettes, test manuals, pupil test booklets, forms for recording pupil responses and background information, video tapes, answer keys, and scoring rubrics.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306, 313, 52164.1 and 60810, Education Code.

HISTORY

1. New subchapter 7.5 (articles 1–4), article 1 (section 11510) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).
2. Amendment of subsection (f), repealer of subsection (j) and amendment of NOTE filed 4–14–2003; operative 4–14–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

Article 2. Administration

§ 11511. English Language Development Assessment.

(a) Any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test, shall be assessed for English language proficiency by using the California English Language Development Test within 30 calendar days of enrollment in the school district.

(b) The English language development of all currently enrolled English learners shall be assessed by administering the California English Language Development Test during the annual assessment window.

(c) The school district shall administer test in accordance with the test publisher's directions, except as provided by Section 11516.5.

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the test publisher by the California Department of Education as part of the contract with the test publisher for the current year.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 37200, Education Code.

HISTORY

1. New article 2 (sections 11511-11514) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11511.5. Reporting to Parents.

For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 48985, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11512. District Documentation and Pupil Records.

(a) The school district shall maintain a record of all pupils who participate in each administration of the California English Language Development Test. This record shall include the following information for each administration:

(1) The name of each pupil who took the test.

(2) The grade level of each pupil who took the test.

(3) The date on which the administration of the test was completed for each pupil.

(4) The test results obtained for each pupil.

(b) The school district shall enter in each pupil's record the following information for each administration of the test:

(1) The date referred to by subdivision (a)(3).

(2) The pupil's test results.

(c) The record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313(b) and 60810(d), Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11512.5. Data for Analysis of Pupil Proficiency.

(a) Each school district shall provide the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in United States schools; and

(12) District and school mobility.

(b) The information required by subdivision (a) is for the purposes of aggregate analyses and reporting only.

(c) School districts shall provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313, 60810 and 60812, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).
2. Amendment of subsection (a)(11) and amendment of NOTE filed 4–14–2003; operative 4–14–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

§ 11513. California English Language Development Test District Coordinator.

(a) Sixty calendar days before the beginning of the annual assessment window of each school year, the superintendent of each school district shall designate from among the employees of the school district a California English Language Development Test district coordinator. The superintendent shall notify the publisher of the California English Language Development Test of the identity and contact information for the California English Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test.

(b) The California English Language Development Test district coordinator's responsibilities shall include, but are not limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school test and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514. The California English Language Development Test district coordinator shall sign the Test Security Agreement set forth in Section 11514 prior to receipt of the test materials.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and test data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to the test publisher no more than ten (10) working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) The California English Language Development Test district coordinator shall certify to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California English Language Development Test in the manner and as otherwise required by the publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11513.5. California English Language Development Test Site Coordinator.

(a) Annually, the superintendent of the school district shall designate a California English Language Development Test site coordinator for each test site, including, but not limited to, each charter school, each court school, and each school or program operated by a school district, from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving issues that arise as a result of the administration of the California English Language Development Test.

(b) The California English Language Development Test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section 11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11514. Test Security.

(a) The California English Language Development Test site coordinator shall ensure that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test.

(b) Access to the California English Language Development Test materials is limited to pupils being administered the California English Language Development Test and employees of the school district directly responsible for administration of the California English Language Development Test.

(c) All California English Language Development Test district and test site coordinators shall sign the California English Language Development Test Security Agreement set forth in subdivision (d).

(d) The California English Language Development Test Security Agreement shall be as follows:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
TEST SECURITY AGREEMENT

(1) I will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test' security.

(2) I will keep on file the names of persons having access to tests and test materials. I will require all persons having access to the material to sign the California English Language Development Test Security Affidavit that will be kept on file in the school district office.

(3) I will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates.

By signing my name to this document, I am assuring that I and anyone having access to the test materials will abide by the above conditions.

By: _____
Title: _____
School District: _____
Date: _____

(e) Each California English Language Development Test site coordinator shall deliver the tests and test materials only to those persons actually administering the California English Language Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California English Language Development Test, including but not limited to the California English Language Development Test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g).

(g) The California English Language Development Test Security Affidavit shall be completed by each test examiner and test proctor:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
SECURITY AFFIDAVIT

I acknowledge that I will have access to the California English Language Development Test for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other per

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils to remove test materials from the room where testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated California English Language Development Test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil taking the test and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure California English Language Development Test booklet or document.

(C) Coaching eligible pupils during testing or altering or interfering with the pupil's responses in any way.

(D) Making answer keys available to pupils.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed: _____

Print Name: _____

Position: _____

School: _____

School District: _____

Date: _____

(h) To maintain the security of the California English Language Development Test, all California English Language Development Test district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district by the test publisher is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher.

(j) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district by the test publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

Article 3. Accommodations

§ 11516. Timing/Scheduling.

All pupils shall have sufficient time to complete the test as provided in the directions for test administration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.

HISTORY

1. New article 3 (sections 11516-11516.5) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11516.5. Pupils with Disabilities.

Pupils with disabilities shall take the California English Language Development Test with those accommodations for testing that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60810(d), Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

Article 4. Apportionment

§ 11517. Apportionment Reporting Schedule.

(a) Each school district shall report to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment from November 1, 2002 through June 30, 2003. Thereafter, each school district shall report the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve–month period prior to June 30 of each year.

(b) The superintendent of each school district shall certify the accuracy of all information submitted to the California Department of Education.

(c) The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after June 30 of each year.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810, Education Code.

HISTORY

1. New article 3 (section 11517) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).
2. Amendment of subsections (a) and (c) and amendment of NOTE filed 4–14–2003; operative 4–14–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

Subchapter 8. High School Proficiency Certificates

Article 1. Certificate of Proficiency

§ 11520. Definitions.

(a) "Parent" as used in Education Code Section 48410(e), relating to verified parental approval, means the natural parent, or adoptive parent or guardian, having legal custody of the pupil.

NOTE: Authority cited: Sections 48410, 48412 and 51426, Education Code.

HISTORY

1. New Article 1 (Sections 11520–11522) filed 11–21–75; effective thirtieth day thereafter (Register 75, No. 47).
2. Amendment of section and NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
3. Editorial correction to title of Article 1 (Register 79, No. 4).
4. Renumbering of Chapter 10 (Sections 11520–11532) to Chapter 8 filed 11–7–79; effective thirtieth day thereafter (Register 79, N. 45). For prior history of Chapter 10, see Register 74, No. 3.

§ 11521. Placement on Pupil Transcript.

A school district shall, for each pupil who demonstrates proficiency as provided in Education Code Section 48410(e), indicate the pupil's accomplishment and the date of the proficiency certificate award on the pupil's official transcript.

HISTORY

1. Amendment filed 7–18–78; effective thirtieth day thereafter (Register 78, No. 29).

§ 11522. Requirement for Exemption from School Attendance Form.

Each school district shall develop a form which evidences parental consent for exemption from further compulsory school attendance pur-

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January 8, 2007

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, CA 95814

RE: No. CSM. 03-TC-06
California English Language Development Test - 2

Dear Ms. Higashi:

Please find enclosed a supplement to the test claim filing, specifically, a history of the Title 5, CCR, sections included in the test claim.

Sincerely,

Keith B. Petersen

Keith B. Petersen
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Supplement to the:	)	No. CSM. 03-TC-06
	)	
Test Claim Filed September 22, 2003	)	California English Language
	)	Development Test - 2
	)	
	)	History Index for
	)	Title 5, California Code of Regulations
by **Castro Valley**	)	
Unified School District	)	
	)	Section 11300
	)	Section 11301
	)	Section 11302
	)	Section 11303
	)	Section 11304
	)	Section 11305
	)	Section 11306
	)	Section 11307
	)	Section 11308
	)	Section 11309
	)	Section 11310
	)	Section 11316
	)	Section 11510
	)	Section 11511
	)	Section 11511.5
	)	Section 11512
	)	Section 11512.5
	)	Section 11513
	)	Section 11513.5
	)	Section 11514
	)	Section 11516.5
	)	Section 11517
_____	)	

SUPPLEMENTAL INFORMATION

This supplement to the test claim provides an index and copy of each change to the Title 5, CCR, sections included in the test claim. The Registers cited are attached as Exhibit A. Amended language is underlined (new language) or stricken out (deleted language).

HISTORY OF TITLE 5, CCR, SECTIONS INCLUDED IN THE TEST CLAIM

Register 98-30 § 11300: New subchapter 4 and new section filed as emergency.
§ 11301: New section filed as emergency.
§ 11302: New section filed as emergency.
§ 11303: New section filed as emergency.
§ 11304: New section filed as emergency.
§ 11305: New section filed as emergency.

Register 98-33 § 11303: Amendment of subsection (a)(3); filed as emergency.

Register 99-01 § 11300: Certificate of Compliance transmitted and filed.
§ 11301: Certificate of Compliance transmitted and filed.
§ 11302: Certificate of Compliance transmitted and filed.
§ 11303: Amendment to subsections (b) and (c); Certificate of Compliance transmitted and filed.
§ 11304: Certificate of Compliance transmitted and filed.
§ 11305: Amendment to subsection (b); Certificate of Compliance transmitted and filed.

Register 2001-40 § 11510: New subchapter 7.5, article 1, and section.

§ 11511: New article 2 and section.

§ 11511.5: New section.

§ 11512: New section.

§ 11512.5: New section.

§ 11513: New section.

§ 11513.5: New section.

§ 11514: New section.

§ 11516: New section.

§ 11516.5: New section.

§ 11517: New section.

Register 2003-02 § 11303: Renumbering of former § 11303 to § 11309 and new section.

§ 11304: Renumbering of former § 11304 to § 11310 and new section.

§ 11305: Renumbering of former § 11305 to § 11315 and new section.

§ 11306: New section.

§ 11307: New section.

§ 11308: New section.

§ 11309: Renumbering and amendment from former § 11303.

§ 11310: Renumbering and amendment from former § 11304.

§ 11315: Renumbering and amendment from former § 11305.

§ 11316: New section.

Register 2003-16 § 11510: Amendment of subsection (f), repealer of subsection (j) and amendment of Note.

§ 11512.5: Amendment of subsection (a)(11) and Note.

§ 11517: Amendment of subsections (a) and (c) and Note.

Subsequent Registers: There may be changes to the regulations after the date the test claim was filed, which are not included.

CERTIFICATION

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this document is true and complete to the best of my own knowledge or information or belief, and that the attached regulations are true and correct copies of documents from archives of a recognized law library.

EXECUTED this 8th day of January 2008, at Sacramento, California

FOR THE TEST CLAIMANT
Keith Petersen, President
SixTen and Associates

ATTACHMENT
Exhibit A Title 5, CCR Registers

§ 11300

§ 11301

§ 11302

§ 11303

§ 11304

§ 11305

NOTE: Authority cited: Section 44491(a), Education Code. Reference: Section 44495(d), Education Code.

Subchapter 4. English Language Education for Immigrant Children

§ 11300. Definitions.

"School term" as used in Education Code section 330 means each school's semester or equivalent, as determined by the local governing board, which next begins following August 2, 1998. For multitrack or year round schools, a semester or equivalent may begin on different days for each school track.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 330, Education Code.

HISTORY

1. New subchapter 4 (sections 11300–11305) and section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day. For prior history of subchapter 4, see Register 77, No. 39.

§ 11301. Knowledge and Fluency in English.

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

(b) At any time, including during the school year, a parent or guardian may have his or her child moved into an English language mainstream classroom.

(c) An English learner may be re–enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305 and 306(c), Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11302. Duration of Services.

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English–language proficiency comparable to that of the school district's average native English–language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 306 and 310, Education Code; U.S. Code, Title 20, Section 1703(f); *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11303. Parental Exception Waivers.

(a) Parents and guardians must be informed of the placement of their children in a structured English immersion program and must be notified of an opportunity to apply for a parental exception waiver. School districts shall establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

(2) Pursuant to Education Code section 311(c), parents and guardians must be informed that the student must be placed for a period of not less than thirty (30) calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

(3) Parental exception waivers shall be granted unless the school principal and educational staff have substantial evidence that the alternative program requested by the parent would not be better suited for the pupil.

(b) All parental exception waivers shall be acted upon by the school within twenty (20) instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty– (30)–day placement in an English language classroom. These waivers must be acted upon either no later than ten (10) calendar days after the expiration of that thirty–(30)–day English language classroom placement or within twenty (20) instructional days of submission of the parental waiver to the school principal, whichever is later.

(c) In cases where a parental exception waiver pursuant to Education Code sections 311(b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial, and if relevant, advised of any procedures that exist to appeal the decision to the local board of education.

(d) For waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11304. State Board of Education Review of Guidelines for Parental Exception Waivers.

(a) Upon written request of the State Board of Education, school district governing boards shall submit any guidelines or procedures adopted pursuant to Education Code section 311 of the State Board of Education for its review.

(b) Any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education. The sole purpose of the review shall be to make a determination as to whether those guidelines or procedures comply with the parental exception waiver guidelines set forth in Section 11303.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11305. Community Based English Tutoring.

In distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and local educational agencies shall disburse the funds at their discretion consistent with the following:

(a) The funds made available by Education Code sections 315 and 316 shall be apportioned by the State Superintendent of Public Instruction to

local educational agencies offering Community Based English Tutoring based upon the number of limited English proficient (LEP) pupils identified in the Annual Language Census Survey in the prior year.

(b) The governing boards of local educational agencies may disburse these funds at their discretion to carryout the purposes of this section. Local educational agency governing boards shall require providers of adult English language instruction which receive funds authorized by Education Code sections 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(c) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

(d) Local educational agencies shall not receive any funds pursuant to Education Code sections 315 and 316 until the first day that Chapter 3 (commencing with Section 300) of Part 1 of the Education Code is operative for that local educational agency.

NOTE: Authority cited: Sections 316 and 33031, Education Code. Reference: Sections 315 and 316, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

Subchapter 5. English Language Centers

HISTORY

1. Repealer of Chapter 5 (Sections 11400–11422) filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39). For prior history, see Register 69, No. 51.

Subchapter 6. Summer Schools (Other Than Classes for Adults, Adult Schools, and Evening High Schools)

§ 11470. Application of Chapter.

This chapter applies to all summer schools receiving state reimbursement, except classes for adults, adult schools, and evening high schools.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761, and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. New Chapter 8 (§§ 11470–11474) filed 2–24–70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
3. Repealer of Chapter 6 (Sections 11440–11444) and renumbering of Chapter 8 (Sections 11470–11475) to Chapter 6 filed 11–7–79; effective thirtieth day thereafter (Register 79, No. 45).
4. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11471. Approval Required.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

HISTORY

1. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. Repealer of section and amendment of NOTE filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11472. Courses Authorized.

In addition to mathematics and science authorized by Education Code section 37253(a), summer school courses may be offered in any of the areas of study specified in Education Code sections 51210(a) through (g) for grades 1 to 6 and 51220(a) through (j) for grades 7 to 12.

NOTE: Authority cited: Section 37253(d), Education Code. Reference: Sections 37253, 51210, 51220 and 51730–51732, Education Code.

HISTORY

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. New section filed 5–16–95 as an emergency; operative 5–16–95 (Register 95, No. 20). A Certificate of Compliance must be transmitted to OAL by 9–13–95 or emergency language will be repealed by operation of law on the following day.
3. Repealed by operation of Government Code section 11346.1(g) (Register 95, No. 39).
4. New section filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).
5. Amendment filed 3–19–96; operative 4–18–96 (Register 96, No. 12).

§ 11473. Level of Difficulty.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11474. Time and Duration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

HISTORY

1. Amendment filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
2. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
3. Repealer of section and amendment of NOTE filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11475. Work Experience Education.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

HISTORY

1. New section filed 5–18–72; effective thirtieth day thereafter (Register 72, No. 21).
2. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

Subchapter 7. Regional Occupational Centers and Regional Occupational Programs

§ 11500. Scope.

The provisions of this chapter apply to all Regional Occupational Centers and Regional Occupational Programs established and maintained under the authority of Article 1 (commencing with Section 52300), Chapter 9, Part 28, Division 4, Title 2* of the Education Code.

NOTE: Authority cited for Chapter 9: Section 152 (33031*), 7451.6 (52306*) and 7451.7 (52309*), Education Code. Reference: Chapter 14 (Sections 7450–7466) of Division 6 of Part 2 (Article 1 Sections 52300–52330, Chapter 9, Part 28, Division 4, Title 2*), Education Code.

HISTORY

1. New Chapter 9 (§§ 11500 through 11511) filed 4–23–71; effective thirtieth day thereafter (Register 71, No. 17).
2. Amendment filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
3. Repealer of Chapter 7 (Sections 11460–11461) and renumbering of Chapter 9 (Sections 11500–11508) to Chapter 7 filed 11–7–79; effective thirtieth day thereafter (Register 79, No. 45). *

§ 11501. Definitions.

(a) A Regional Occupational Center is a vocational or technical training program established and maintained in a separate, identifiable physical facility pursuant to Article 1, Chapter 9, Part 28, Division 4, Title 2* of the Education Code.

(b) "Region served" means the area of a county or counties which constitutes the attendance area of the high school district or districts that form the membership of a Regional Occupational Center and Program.

(c) A "school unit" within a participating district includes, but is not limited to: a community college, a high school, a continuation high school or continuation classes, an adult school or classes for adults, or a private school.

(d) "Course/class" means any credit or noncredit instructional unit in a subject area or field of organized knowledge, usually provided on a semester, year, or other prescribed length-of-time basis.

NOTE: Authority cited: Section 44491(a), Education Code. Reference: Section 44495(d), Education Code.

Subchapter 4. English Language Education for Immigrant Children

§ 11300. Definitions.

"School term" as used in Education Code section 330 means each school's semester or equivalent, as determined by the local governing board, which next begins following August 2, 1998. For multitrack or year round schools, a semester or equivalent may begin on different days for each school track.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 330, Education Code.

HISTORY

1. New subchapter 4 (sections 11300–11305) and section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day. For prior history of subchapter 4, see Register 77, No. 39.

§ 11301. Knowledge and Fluency in English.

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

(b) At any time, including during the school year, a parent or guardian may have his or her child moved into an English language mainstream classroom.

(c) An English learner may be re-enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305 and 306(c), Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11302. Duration of Services.

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 306 and 310, Education Code; U.S. Code, Title 20, Section 1703(f); *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11303. Parental Exception Waivers.

(a) Parents and guardians must be informed of the placement of their children in a structured English immersion program and must be notified of an opportunity to apply for a parental exception waiver. School districts shall establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

(2) Pursuant to Education Code section 311(c), parents and guardians must be informed that the student must be placed for a period of not less than thirty (30) calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

(3) Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

(b) All parental exception waivers shall be acted upon by the school within twenty (20) instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty- (30)-day placement in an English language classroom. These waivers must be acted upon either no later than ten (10) calendar days after the expiration of that thirty-(30)-day English language classroom placement or within twenty (20) instructional days of submission of the parental waiver to the school principal, whichever is later.

(c) In cases where a parental exception waiver pursuant to Education Code sections 311(b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial, and if relevant, advised of any procedures that exist to appeal the decision to the local board of education.

(d) For waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Amendment of subsection (a)(3) filed 8–10–98 as an emergency; operative 8–10–98 (Register 98, No. 33). A Certificate of Compliance must be transmitted to OAL by 12–7–98 or emergency language will be repealed by operation of law on the following day.

§ 11304. State Board of Education Review of Guidelines for Parental Exception Waivers.

(a) Upon written request of the State Board of Education, school district governing boards shall submit any guidelines or procedures adopted pursuant to Education Code section 311 of the State Board of Education for its review.

(b) Any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education. The sole purpose of the review shall be to make a determination as to whether those guidelines or procedures comply with the parental exception waiver guidelines set forth in Section 11303.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

§ 11305. Community Based English Tutoring.

In distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and

local educational agencies shall disburse the funds at their discretion consistent with the following:

(a) The funds made available by Education Code sections 315 and 316 shall be apportioned by the State Superintendent of Public Instruction to local educational agencies offering Community Based English Tutoring based upon the number of limited English proficient (LEP) pupils identified in the Annual Language Census Survey in the prior year.

(b) The governing boards of local educational agencies may disburse these funds at their discretion to carryout the purposes of this section. Local educational agency governing boards shall require providers of adult English language instruction which receive funds authorized by Education Code sections 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(c) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

(d) Local educational agencies shall not receive any funds pursuant to Education Code sections 315 and 316 until the first day that Chapter 3 (commencing with Section 300) of Part 1 of the Education Code is operative for that local educational agency.

NOTE: Authority cited: Sections 316 and 33031, Education Code. Reference: Sections 315 and 316, Education Code.

HISTORY

1. New section filed 7-23-98 as an emergency; operative 7-23-98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11-20-98 or emergency language will be repealed by operation of law on the following day.

Subchapter 5. English Language Centers

HISTORY

1. Repealer of Chapter 5 (Sections 11400-11422) filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39). For prior history, see Register 69, No. 51.

Subchapter 6. Summer Schools (Other Than Classes for Adults, Adult Schools, and Evening High Schools)

§ 11470. Application of Chapter.

This chapter applies to all summer schools receiving state reimbursement, except classes for adults, adult schools, and evening high schools.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761, and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. New Chapter 8 (§§ 11470-11474) filed 2-24-70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
3. Repealer of Chapter 6 (Sections 11440-11444) and renumbering of Chapter 8 (Sections 11470-11475) to Chapter 6 filed 11-7-79; effective thirtieth day thereafter (Register 79, No. 45).
4. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11471. Approval Required.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730-51732, Education Code.

HISTORY

1. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
2. Repealer of section and amendment of NOTE filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11472. Courses Authorized.

In addition to mathematics and science authorized by Education Code section 37253(a), summer school courses may be offered in any of the areas of study specified in Education Code sections 51210(a) through (g) for grades 1 to 6 and 51220(a) through (j) for grades 7 to 12.

NOTE: Authority cited: Section 37253(d), Education Code. Reference: Sections 37253, 51210, 51220 and 51730-51732, Education Code.

HISTORY

1. Repealer filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
2. New section filed 5-16-95 as an emergency; operative 5-16-95 (Register 95, No. 20). A Certificate of Compliance must be transmitted to OAL by 9-13-95 or emergency language will be repealed by operation of law on the following day.
3. Repealed by operation of Government Code section 11346.1(g) (Register 95, No. 39).
4. New section filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).
5. Amendment filed 3-19-96; operative 4-18-96 (Register 96, No. 12).

§ 11473. Level of Difficulty.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. Repealer filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11474. Time and Duration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730-51732, Education Code.

HISTORY

1. Amendment filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
2. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
3. Repealer of section and amendment of NOTE filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11475. Work Experience Education.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. New section filed 5-18-72; effective thirtieth day thereafter (Register 72, No. 21).
2. Repealer filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).

Subchapter 7. Regional Occupational Centers and Regional Occupational Programs

§ 11500. Scope.

The provisions of this chapter apply to all Regional Occupational Centers and Regional Occupational Programs established and maintained under the authority of Article 1 (commencing with Section 52300), Chapter 9, Part 28, Division 4, Title 2* of the Education Code.

NOTE: Authority cited for Chapter 9: Section 152 (33031*), 7451.6 (52306*) and 7451.7 (52309*), Education Code. Reference: Chapter 14 (Sections 7450-7466) of Division 6 of Part 2 (Article 1 Sections 52300-52330, Chapter 9, Part 28, Division 4, Title 2*), Education Code.

HISTORY

1. New Chapter 9 (§§ 11500 through 11511) filed 4-23-71; effective thirtieth day thereafter (Register 71, No. 17).
2. Amendment filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).
3. Repealer of Chapter 7 (Sections 11460-11461) and renumbering of Chapter 9 (Sections 11500-11508) to Chapter 7 filed 11-7-79; effective thirtieth day thereafter (Register 79, No. 45). *

§ 11501. Definitions.

(a) A Regional Occupational Center is a vocational or technical training program established and maintained in a separate, identifiable physical facility pursuant to Article 1, Chapter 9, Part 28, Division 4, Title 2* of the Education Code.

(b) "Region served" means the area of a county or counties which constitutes the attendance area of the high school district or districts that form the membership of a Regional Occupational Center and Program.

(c) A "school unit" within a participating district includes, but is not limited to: a community college, a high school, a continuation high school

§ 11300

§ 11301

§ 11302

§ 11303

§ 11304

§ 11305

NOTE: Authority cited: Section 44491(a), Education Code. Reference: Section 44495(d), Education Code.

Subchapter 4. English Language Learner Education

§ 11300. Definitions.

"School term" as used in Education Code section 330 means each school's semester or equivalent, as determined by the local governing board, which next begins following August 2, 1998. For multitrack or year round schools, a semester or equivalent may begin on different days for each school track.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 330, Education Code.

HISTORY

1. New subchapter 4 (sections 11300–11305) and section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day. For prior history of subchapter 4, see Register 77, No. 39.
2. Certificate of Compliance as to 7–23–98 order, including amendment of subchapter heading, transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11301. Knowledge and Fluency in English.

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

(b) At any time, including during the school year, a parent or guardian may have his or her child moved into an English language mainstream classroom.

(c) An English learner may be re–enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305 and 306(c), Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11302. Duration of Services.

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English–language proficiency comparable to that of the school district's average native English–language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 306 and 310, Education Code; U.S. Code, Title 20, Section 1703(f); *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11303. Parental Exception Waivers.

(a) Parents and guardians must be informed of the placement of their children in a structured English immersion program and must be notified of an opportunity to apply for a parental exception waiver. School districts shall establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

(2) Pursuant to Education Code section 311(c), parents and guardians must be informed that the student must be placed for a period of not less than thirty (30) calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

(3) Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

(b) All parental exception waivers shall be acted upon by the school within twenty (20) instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty (30)–day placement in an English language classroom. These waivers must be acted upon either no later than ten (10) calendar days after the expiration of that thirty (30)–day English language classroom placement or within twenty (20) instructional days of submission of the parental waiver to the school principal, whichever is later.

(c) In cases where a parental exception waiver pursuant to Education Code sections 311(b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial and, if relevant, advised of any procedures that exist to appeal the decision to the local board of education.

(d) For waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Amendment of subsection (a)(3) filed 8–10–98 as an emergency; operative 8–10–98 (Register 98, No. 33). A Certificate of Compliance must be transmitted to OAL by 12–7–98 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 7–23–98 order and 8–10–98 order, including amendment of subsections (b) and (c), transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11304. State Board of Education Review of Guidelines for Parental Exception Waivers.

(a) Upon written request of the State Board of Education, school district governing boards shall submit any guidelines or procedures adopted pursuant to Education Code section 311 of the State Board of Education for its review.

(b) Any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education. The sole purpose of the review shall be to make a determination as to whether those guidelines or procedures comply with the parental exception waiver guidelines set forth in Section 11303.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

History

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11305. Community Based English Tutoring.

In distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and local educational agencies shall disburse the funds at their discretion consistent with the following:

(a) The funds made available by Education Code sections 315 and 316 shall be apportioned by the State Superintendent of Public Instruction to local educational agencies offering Community Based English Tutoring based upon the number of limited English proficient (LEP) pupils identified in the Annual Language Census Survey in the prior year.

(b) The governing boards of local educational agencies may disburse these funds at their discretion to carry out the purposes of this section. Local educational agency governing boards shall require providers of adult English language instruction which receive funds authorized by Education Code sections 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(c) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

(d) Local educational agencies shall not receive any funds pursuant to Education Code sections 315 and 316 until the first day that Chapter 3 (commencing with Section 300) of Part 1 of the Education Code is operative for that local educational agency.

Note: Authority cited: Sections 316 and 33031, Education Code. Reference: Sections 315 and 316, Education Code.

History

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order, including amendment of subsection (b), transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

Subchapter 5. English Language Centers

History

1. Repealer of Chapter 5 (Sections 11400–11422) filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39). For prior history, see Register 69, No. 51.

Subchapter 6. Summer Schools (Other Than Classes for Adults, Adult Schools, and Evening High Schools)

§ 11470. Application of Chapter.

This chapter applies to all summer schools receiving state reimbursement, except classes for adults, adult schools, and evening high schools.

Note: Authority cited: Sections 33031, 37250, 51731, 51761, and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

History

1. New Chapter 8 (§§ 11470–11474) filed 2–24–70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
3. Repealer of Chapter 6 (Sections 11440–11444) and renumbering of Chapter 8 (Sections 11470–11475) to Chapter 6 filed 11–7–79; effective thirtieth day thereafter (Register 79, No. 45).
4. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11471. Approval Required.

Note: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

History

1. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. Repealer of section and amendment of Note filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11472. Courses Authorized.

In addition to mathematics and science authorized by Education Code section 37253(a), summer school courses may be offered in any of the areas of study specified in Education Code sections 51210(a) through (g) for grades 1 to 6 and 51220(a) through (j) for grades 7 to 12.

Note: Authority cited: Section 37253(d), Education Code. Reference: Sections 37253, 51210, 51220 and 51730–51732, Education Code.

History

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
2. New section filed 5–16–95 as an emergency; operative 5–16–95 (Register 95, No. 20). A Certificate of Compliance must be transmitted to OAL by 9–13–95 or emergency language will be repealed by operation of law on the following day.
3. Repealed by operation of Government Code section 11346.1(g) (Register 95, No. 39).
4. New section filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).
5. Amendment filed 3–19–96; operative 4–18–96 (Register 96, No. 12).

§ 11473. Level of Difficulty.

Note: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

History

1. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11474. Time and Duration.

Note: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730–51732, Education Code.

History

1. Amendment filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).
2. Amendment filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).
3. Repealer of section and amendment of Note filed 9–28–95; operative 9–28–95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11475. Work Experience Education.

Note: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730–51732 and 51761, Education Code.

History

1. New section filed 5–18–72; effective thirtieth day thereafter (Register 72, No. 21).
2. Repealer filed 4–13–83; effective thirtieth day thereafter (Register 83, No. 16).

Subchapter 7. Regional Occupational Centers and Regional Occupational Programs

§ 11500. Scope.

The provisions of this chapter apply to all Regional Occupational Centers and Regional Occupational Programs established and maintained under the authority of Article 1 (commencing with Section 52300), Chapter 9, Part 28, Division 4, Title 2* of the Education Code.

Note: Authority cited for Chapter 9: Section 152 (33031*), 7451.6 (52306*) and 7451.7 (52309*), Education Code. Reference: Chapter 14 (Sections 7450–7466) of Division 6 of Part 2 (Article 1 Sections 52300–52330, Chapter 9, Part 28, Division 4, Title 2*), Education Code.

History

1. New Chapter 9 (§§ 11500 through 11511) filed 4–23–71; effective thirtieth day thereafter (Register 71, No. 17).

(l) The majority of the committee membership shall represent the occupation for which instruction is given.

(2) Documentation of advisory committee minutes, with recommendations in regard to the course being offered, shall be on file.

(j) The courses offered in a Regional Occupational Center or Regional Occupational Program shall only be for providing training, upgrading, and retraining in recognized occupations and/or emerging occupations to meet the labor demand as determined and verified by the Regional Occupational Center or Regional Occupational Program.

(k) The course shall not unnecessarily reduce or supplant the vocational education efforts of any participating district but shall become an extension or augmentation of vocational education opportunities and enrollments in the participating districts.

(*l*) Instruction in the course is being provided by an instructor meeting the requirements pursuant to Education Code Section 52323, the California State Plan for Vocational Education, and providing immediate supervision and control as defined by Section 10091 of this title.

NOTE: Authority cited: Section 52309, Education Code. Reference: Section 52309, Education Code.

HISTORY

1. Amendment and renumbering of Section 11508 to 11504 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
2. Repealer of subsection (l) and renumbering of subsection (m) to subsection (l) filed 9–19–79; effective thirtieth day thereafter (Register 79, No. 38).

§ 11505. Counseling and Guidance.

A Regional Occupational Center or a Regional Occupational Program shall provide individual vocational counseling and guidance directly supportive of, and contributory to, the instructional programs that constitute the course offerings of the Regional Center or Regional Occupational Program. The counseling and guidance services funded pursuant to the provisions of Article 1, Chapter 9, Part 28, Division 4, Title 2* of the Education Code shall not be construed as general support for guidance and counseling services for the total school enrollment or for the total vocational education enrollment in a school.

HISTORY

1. Amendment and renumbering of Section 11509 to 11505 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).

§ 11506. Evaluation.

Each Regional Occupational Center or Regional Occupational Program shall submit to the Department of Education in such detail, at such time, and in such manner as the Department of Education deems necessary, an evaluation of the Regional Occupational Center or Regional Occupational Program. This evaluation shall include but not be limited to the following information:

(a) Analysis of the cost of individual centers, programs, and services.

(b) Enrollments defined in terms of high school students, post–high school students, and adults.

(c) Number of trainees employed in specific entry–level occupations.

(d) Number of trainees continuing training in other institutions.

(e) Dropout rates and placement data.

(f) Activities pursuant to Education Code Sections 52305(c), 52306 and 52307.

HISTORY

1. New subsection (f) filed 4–19–74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11510 to 11506 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
3. Amendment of subsection (f) filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).

§ 11507. Administration.

Each Regional Occupational Center or Regional Occupational Program shall be organized and administered in such manner that there will be a clear and separate audit trail of all income and expenditures, of all agreements and contracts, of enrollments, and of all other statistical information pertaining to fiscal and instructional accountability.

HISTORY

1. Renumbering of Section 11511 to 11507 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).

§ 11508. Establishing and Operating Business, Commercial, Trade, Manufacturing or Construction Activities.

(a) Regional occupational centers and regional occupational programs may establish and operate business, commercial, trade, manufacturing or construction activities which may include the sale of products or services to private or public corporations or companies, or to the general public as authorized in subdivision (c) of Education Code Section 52305.

(b) Where the activities described in subsection (a) of this section include the sale of products or services to private or public corporations or companies, or to the general public, the regional occupational center or regional occupational program shall request prior approval from the State Department of Education. Application for approval shall be submitted on a form prescribed by the Superintendent of Public Instruction and the proposal therein shall comply with all the conditions set forth in Education Code Sections 52306 and 52307.

HISTORY

1. New section filed 4–19–74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11512 to 11508 filed 12–7–76; designated effective 7–1–77 (Register 76, No. 50).
3. Amendment of section and repealer of NOTE filed 9–23–77; effective thirtieth day thereafter (Register 77, No. 39).

Subchapter 7.5. California English Language Development Test

Article 1. General

§ 11510. Definitions.

For the purposes of the test required by Education Code Section 313(a), referred to as the California English Language Development Test, the following definitions shall apply:

(a) An "administration" means a pupil's attempt to take all sections of the California English Language Development Test, including speaking, listening, reading, and writing.

(b) "Annual assessments" are administrations of the California English Language Development Test to enrolled pupils who are currently identified as English learners.

(c) "Annual assessment window" means the period of time designated by the Superintendent of Public Instruction and the State Board of Education for the annual assessments conducted using the California English Language Development Test. Initial assessments, as defined in subdivision (g), may be administered during the annual assessment window.

(d) "Eligible pupil" means one who is enrolled in a California public school in kindergarten or any of grades 1 through 12 with a native language other than English or who is currently identified as an English learner.

(e) "Grade level" means the grade assigned to the pupil by the school district.

(f) "Home language survey" is a form prepared by the school district to be completed by the pupil's parent or guardian indicating language use by the pupil or family.

(g) "Initial assessments" are administrations of the California English Language Development Test to pupils who are identified as having a native language other than English, based on the home language survey, and for whom there is no record of English language development assessment results.

(h) "School districts" include school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

(i) "Test materials" are materials necessary for administration of the California English Language Development Test, including but not lim-

ited to audio-cassettes, test manuals, pupil test booklets, forms for recording pupil responses and background information, video tapes, answer keys, and scoring rubrics.

(j) "Test proctor" is an employee of a school district who has received training specifically designed to prepare him or her to assist the test examiner in administration of the California English Language Development Test.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313, 52164.1 and 60810, Education Code.

HISTORY

1. New subchapter 7.5 (articles 1-4), article 1 (section 11510) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Article 2. Administration

§ 11511. English Language Development Assessment.

(a) Any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test, shall be assessed for English language proficiency by using the California English Language Development Test within 30 calendar days of enrollment in the school district.

(b) The English language development of all currently enrolled English learners shall be assessed by administering the California English Language Development Test during the annual assessment window.

(c) The school district shall administer test in accordance with the test publisher's directions, except as provided by Section 11516.5.

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the test publisher by the California Department of Education as part of the contract with the test publisher for the current year.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 37200, Education Code.

HISTORY

1. New article 2 (sections 11511-11514) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11511.5. Reporting to Parents.

For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 48985, Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11512. District Documentation and Pupil Records.

(a) The school district shall maintain a record of all pupils who participate in each administration of the California English Language Development Test. This record shall include the following information for each administration:

(1) The name of each pupil who took the test.

(2) The grade level of each pupil who took the test.

(3) The date on which the administration of the test was completed for each pupil.

(4) The test results obtained for each pupil.

(b) The school district shall enter in each pupil's record the following information for each administration of the test:

(1) The date referred to by subdivision (a)(3).

(2) The pupil's test results.

(c) The record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313(b) and 60810(d), Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11512.5. Data for Analysis of Pupil Proficiency.

(a) Each school district shall provide the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in California schools; and

(12) District and school mobility.

(b) The information required by subdivision (a) is for the purposes of aggregate analyses and reporting only.

(c) School districts shall provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, 60810(c) and 60812, Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11513. California English Language Development Test District Coordinator.

(a) Sixty calendar days before the beginning of the annual assessment window of each school year, the superintendent of each school district shall designate from among the employees of the school district a California English Language Development Test district coordinator. The superintendent shall notify the publisher of the California English Language Development Test of the identity and contact information for the California English Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test.

(b) The California English Language Development Test district coordinator's responsibilities shall include, but are not limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school test and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514. The California English Language Development Test district coordinator shall sign the Test Security Agreement set forth in Section 11514 prior to receipt of the test materials.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and test data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to the test publisher no more than ten (10) working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) The California English Language Development Test district coordinator shall certify to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California English Language Development Test in the manner and as otherwise required by the publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11513.5. California English Language Development Test Site Coordinator.

(a) Annually, the superintendent of the school district shall designate a California English Language Development Test site coordinator for each test site, including, but not limited to, each charter school, each court school, and each school or program operated by a school district, from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving issues that arise as a result of the administration of the California English Language Development Test.

(b) The California English Language Development Test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section 11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11514. Test Security.

(a) The California English Language Development Test site coordinator shall ensure that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test.

(b) Access to the California English Language Development Test materials is limited to pupils being administered the California English Language Development Test and employees of the school district directly responsible for administration of the California English Language Development Test.

(c) All California English Language Development Test district and test site coordinators shall sign the California English Language Development Test Security Agreement set forth in subdivision (d).

(d) The California English Language Development Test Security Agreement shall be as follows:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
TEST SECURITY AGREEMENT

(1) I will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test' security.

(2) I will keep on file the names of persons having access to tests and test materials. I will require all persons having access to the material to sign the California English Language Development Test Security Affidavit that will be kept on file in the school district office.

(3) I will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates.

By signing my name to this document, I am assuring that I and anyone having access to the test materials will abide by the above conditions.

By: _____

Title: _____

School District: _____

Date: _____

(e) Each California English Language Development Test site coordinator shall deliver the tests and test materials only to those persons actually administering the California English Language Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California English Language Development Test, including but not limited to the California English Language Development Test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g).

(g) The California English Language Development Test Security Affidavit shall be completed by each test examiner and test proctor:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
SECURITY AFFIDAVIT

I acknowledge that I will have access to the California English Language Development Test for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils to remove test materials from the room where testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated California English Language Development Test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil taking the test and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure California English Language Development Test booklet or document.

(C) Coaching eligible pupils during testing or altering or interfering with the pupil's responses in any way.

(D) Making answer keys available to pupils.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed: _____

Print Name: _____

Position: _____

School: _____

School District: _____

Date: _____

(h) To maintain the security of the California English Language Development Test, all California English Language Development Test district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district by the test publisher is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher.

(j) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district by the test publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Article 3. Accommodations

§ 11516. Timing/Scheduling.

All pupils shall have sufficient time to complete the test as provided in the directions for test administration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.

HISTORY

1. New article 3 (sections 11516-11516.5) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11516.5. Pupils with Disabilities.

Pupils with disabilities shall take the California English Language Development Test with those accommodations for testing that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60810(d), Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Article 4. Apportionment

§ 11517. Apportionment.

(a) Each school district shall report to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve-month period prior to October 31 of each year.

(b) The superintendent of each school district shall certify the accuracy of all information submitted to the California Department of Education.

(c) The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after October 31 of each year.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313 and 60810(d), Education Code.

HISTORY

1. New article 3 (section 11517) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Subchapter 8. High School Proficiency Certificates

Article 1. Certificate of Proficiency

§ 11520. Definitions.

(a) "Parent" as used in Education Code Section 48410(e), relating to verified parental approval, means the natural parent, or adoptive parent or guardian, having legal custody of the pupil.

NOTE: Authority cited: Sections 48410, 48412 and 51426, Education Code.

HISTORY

1. New Article 1 (Sections 11520-11522) filed 11-21-75; effective thirtieth day thereafter (Register 75, No. 47).
2. Amendment of section and NOTE filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
3. Editorial correction to title of Article 1 (Register 79, No. 4).
4. Renumbering of Chapter 10 (Sections 11520-11532) to Chapter 8 filed 11-7-79; effective thirtieth day thereafter (Register 79, N. 45). For prior history of Chapter 10, see Register 74, No. 3.

§ 11521. Placement on Pupil Transcript.

A school district shall, for each pupil who demonstrates proficiency as provided in Education Code Section 48410(e), indicate the pupil's accomplishment and the date of the proficiency certificate award on the pupil's official transcript.

HISTORY

1. Amendment filed 7-18-78; effective thirtieth day thereafter (Register 78, No. 29).

§ 11522. Requirement for Exemption from School Attendance Form.

Each school district shall develop a form which evidences parental consent for exemption from further compulsory school attendance pursuant to Education Code Section 48410(e). The form shall be made available upon request to 16- and 17-year-old pupils who have demonstrated proficiency. The form shall contain at least the following information:

(a) A general explanation of the pupil's rights of exemption from compulsory school attendance and of re-enrollment in the public high schools.

NOTE: Authority cited: Section 44491(a), Education Code. Reference: Section 44495(d), Education Code.

Subchapter 4. English Language Learner Education

§ 11300. Definitions.

"School term" as used in Education Code section 330 means each school's semester or equivalent, as determined by the local governing board, which next begins following August 2, 1998. For multitrack or year round schools, a semester or equivalent may begin on different days for each school track.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 330, Education Code.

HISTORY

1. New subchapter 4 (sections 11300–11305) and section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day. For prior history of subchapter 4, see Register 77, No. 39.
2. Certificate of Compliance as to 7–23–98 order, including amendment of subchapter heading, transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11301. Knowledge and Fluency in English.

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

(b) At any time, including during the school year, a parent or guardian may have his or her child moved into an English language mainstream classroom.

(c) An English learner may be re–enrolled in a structured English immersion program not normally intended to exceed one year if the pupil has not achieved a reasonable level of English proficiency as defined in Section 11301(a) unless the parents or guardians of the pupil object to the extended placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305 and 306(c), Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11302. Duration of Services.

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have:

(a) demonstrated English–language proficiency comparable to that of the school district's average native English–language speakers; and

(b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 306 and 310, Education Code; U.S. Code, Title 20, Section 1703(f); *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).

§ 11303. Reclassification.

The reclassification procedures used to reclassify a pupil from English learner to proficient in English shall include, but not be limited to, a responsible administrative mechanism for the effective and efficient conduct of the language reclassification process, which shall include each of the following procedural components:

(a) Assessment of language proficiency using the English language development test, as provided for by Education Code section 60810 pursuant to the procedures for conducting that test provided in Subchapter 7.5 (commencing with Section 11510).

(b) Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.

(c) Parental involvement through:

(1) Notice to parent(s) or guardian(s) of language reclassification and placement, including a description of the reclassification process and the parent's opportunity to participate; and

(2) Encouragement of the participation of parent(s) or guardian(s) in the school district's reclassification procedure, including seeking their opinion and consultation during the reclassification process.

(d) Until the statewide, empirically–established range of performance in basic English/language arts skills is established as required by Education Code section 313(d)(4), evaluation of the pupil's performance as specified in Section 11302(b).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Amendment of subsection (a)(3) filed 8–10–98 as an emergency; operative 8–10–98 (Register 98, No. 33). A Certificate of Compliance must be transmitted to OAL by 12–7–98 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 7–23–98 order and 8–10–98 order, including amendment of subsections (b) and (c), transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).
4. Renumbering of former section 11303 to section 11309 and new section 11303 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11304. Monitoring.

School districts shall monitor the progress of pupils reclassified to ensure correct classification and placement.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code; U.S. Code, Title 20, Section 1703(f); *Casteneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 7–23–98 order transmitted to OAL 11–19–98 and filed 12–30–98 (Register 99, No. 1).
3. Renumbering of former section 11304 to section 11310 and new section 11304 filed 1–8–2003; operative 1–8–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11305. Documentation.

School districts shall maintain documentation of multiple criteria information, as specified in Section 11303(a) and (d), and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303(b) and (c).

NOTE: Authority cited: Sections 33031 and 49062, Education Code. Reference: Section 313 and 49062, Education Code; U.S. Code, Title 20, Section 1703(f); *Casteneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009–1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041–1042.

HISTORY

1. New section filed 7–23–98 as an emergency; operative 7–23–98 (Register 98, No. 30). A Certificate of Compliance must be transmitted to OAL by 11–20–98 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 7-23-98 order, including amendment of subsection (b), transmitted to OAL 11-19-98 and filed 12-30-98 (Register 99, No. 1).
3. Renumbering of former section 11305 to section 11315 and new section 11305 filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11306. Annual Assessment.

School districts reporting the presence of English learners shall conduct an annual assessment of the English language development and academic progress of those pupils.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313, 60640 and 60810, Education Code.

HISTORY

1. New section filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11307. Census.

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

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

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

NOTE: Authority cited: Sections 33031 and 62000.2, Education Code. Reference: Sections 313 and 62002, Education Code.

HISTORY

1. New section filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11308. Advisory Committees.

(a) School district advisory committees on programs and services for English learners shall be established in each school district with more than 50 English learners in attendance. School advisory committees on education programs and services for English learners shall be established in each school with more than 20 English learners in attendance. Both school district and school advisory committees shall be established in accordance with Education Code section 62002.5.

(b) The parents or guardians of English learners shall elect the parent members of the school advisory committee (or subcommittee, if appropriate). The parents shall be provided the opportunity to vote in the election. Each school advisory committee shall have the opportunity to elect at least one member to the School District Advisory Committee, except that school districts with more than 30 school advisory committees may use a system of proportional or regional representation.

(c) School District Advisory Committees shall advise the school district governing board on at least the following tasks:

(1) Development of a district master plan for education programs and services for English learners. The district master plan will take into consideration the school site master plans.

(2) Conducting of a district wide needs assessment on a school-by-school basis.

(3) Establishment of district program, goals, and objectives for programs and services for English learners.

(4) Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(5) Administration of the annual language census.

(6) Review and comment on the school district reclassification procedures.

(7) Review and comment on the written notifications required to be sent to parents and guardians pursuant to this subchapter.

(d) School districts shall provide all members of school district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c). Training provided advisory committee members in accordance with this subsection shall be planned in full consultation with the members, and funds provided under this chapter may be used to meet the costs of providing the training to include the costs associated with the attendance of the members at training sessions.

NOTE: Authority cited: Sections 33031 and 62000.2, Education Code. Reference: Sections 313, 62002 and 62002.5, Education Code.

HISTORY

1. New section filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11309. Parental Exception Waivers.

(a) In order to facilitate parental choice of program, all parents and guardians must be informed of the placement of their children in a structured English immersion program and must be notified of an opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally-adopted procedures for requesting a parental exception waiver, and any locally-adopted guidelines for evaluating a parental waiver request.

(b) School districts shall establish procedures for granting parental exception waivers as permitted by Education Code sections 310 and 311 which include each of the following components:

(1) Parents and guardians must be provided with a full written description and upon request from a parent or guardian, a spoken description of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

(2) Pursuant to Education Code section 311(c), parents and guardians must be informed that the pupil must be placed for a period of not less than thirty (30) calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

(3) Pursuant to Education Code sections 311(b) and (c), the school principal and educational staff may recommend a waiver to a parent or guardian. Parents and guardians must be informed in writing of any recommendation for an alternative program made by the school principal and educational staff and must be given notice of their right to refuse to accept the recommendation. The notice shall include a full description of the recommended alternative program and the educational materials to be used for the alternative program as well as a description of all other programs available to the pupil. If the parent or guardian elects to request the alternative program recommended by the school principal and educational staff, the parent or guardian must comply with the requirements of Education Code section 310 and all procedures and requirements otherwise applicable to a parental exception waiver.

(4) Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

(c) All parental exception waivers shall be acted upon by the school within twenty (20) instructional days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the thirty (30)-day placement in an English language classroom. These waivers must be acted upon either no later than ten (10) calendar days after the expiration of that thirty (30)-day English language classroom placement or within twenty (20) instructional days of submission of the parental waiver to the school principal, whichever is later.

(d) In cases where a parental exception waiver pursuant to Education Code sections 311(b) and (c) is denied, the parents and guardians must be informed in writing of the reason(s) for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.

(e) For waivers pursuant to Education Code section 311(a) and for students for whom standardized assessment data is not available, school districts may use equivalent measures as determined by the local governing board.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. Renumbering and amendment of former section 11303 to new section 11309 filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11310. State Board of Education Review of Guidelines for Parental Exception Waivers.

(a) Upon written request of the State Board of Education, school district governing boards shall submit any guidelines or procedures adopted pursuant to Education Code section 311 to the State Board of Education for its review.

(b) Any parent or guardian who applies for a waiver under Education Code section 311 may request a review of the school district's guidelines or procedures by the State Board of Education. The sole purpose of the review shall be to make a determination as to whether those guidelines or procedures comply with the parental exception waiver guidelines set forth in Section 11309.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 305, 310 and 311, Education Code.

HISTORY

1. Renumbering and amendment of former section 11304 to new section 11310 filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11315. Community Based English Tutoring.

In distributing funds authorized by Education Code sections 315 and 316, the Superintendent of Public Instruction shall allocate the funds and local educational agencies shall disburse the funds at their discretion consistent with the following:

(a) The funds made available by Education Code sections 315 and 316 shall be apportioned by the State Superintendent of Public Instruction to local educational agencies offering Community Based English Tutoring based upon the number of pupils identified as English learners in the prior year census.

(b) The governing boards of local educational agencies may disburse these funds at their discretion to carry out the purposes of this section. Local educational agency governing boards shall require providers of adult English language instruction which receive funds authorized by Education Code sections 315 and 316 to maintain evidence that adult program participants have pledged to provide personal English language tutoring to California school pupils with limited English proficiency.

(c) Local educational agencies may use these funds for direct program services, community notification, transportation services, and background checks pursuant to Education Code section 35021.1 related to the tutoring program.

NOTE: Authority cited: Sections 316 and 33031, Education Code. Reference: Sections 315 and 316, Education Code.

HISTORY

1. Renumbering and amendment of former section 11305 to new section 11315 filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

§ 11316. Notice to Parents or Guardians.

All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313 and 48985, Education Code.

HISTORY

1. New section filed 1-8-2003; operative 1-8-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 2).

Subchapter 5. English Language Centers

HISTORY

1. Repealer of Chapter 5 (Sections 11400-11422) filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39). For prior history, see Register 69, No. 51.

Subchapter 6. Summer Schools (Other Than Classes for Adults, Adult Schools, and Evening High Schools)

§ 11470. Application of Chapter.

This chapter applies to all summer schools receiving state reimbursement, except classes for adults, adult schools, and evening high schools.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761, and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. New Chapter 8 (§§ 11470-11474) filed 2-24-70; effective thirtieth day thereafter (Register 70, No. 9).
2. Amendment of NOTE filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
3. Repealer of Chapter 6 (Sections 11440-11444) and renumbering of Chapter 8 (Sections 11470-11475) to Chapter 6 filed 11-7-79; effective thirtieth day thereafter (Register 79, No. 45).
4. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11471. Approval Required.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730-51732, Education Code.

HISTORY

1. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
2. Repealer of section and amendment of NOTE filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11472. Courses Authorized.

In addition to mathematics and science authorized by Education Code section 37253(a), summer school courses may be offered in any of the areas of study specified in Education Code sections 51210(a) through (g) for grades 1 to 6 and 51220(a) through (j) for grades 7 to 12.

NOTE: Authority cited: Section 37253(d), Education Code. Reference: Sections 37253, 51210, 51220 and 51730-51732, Education Code.

HISTORY

1. Repealer filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
2. New section filed 5-16-95 as an emergency; operative 5-16-95 (Register 95, No. 20). A Certificate of Compliance must be transmitted to OAL by 9-13-95 or emergency language will be repealed by operation of law on the following day.
3. Repealed by operation of Government Code section 11346.1(g) (Register 95, No. 39).
4. New section filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).
5. Amendment filed 3-19-96; operative 4-18-96 (Register 96, No. 12).

§ 11473. Level of Difficulty.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. Repealer filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).

§ 11474. Time and Duration.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 37252, 37253, 42239 and 51730-51732, Education Code.

HISTORY

1. Amendment filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
2. Amendment filed 4-13-83; effective thirtieth day thereafter (Register 83, No. 16).
3. Repealer of section and amendment of NOTE filed 9-28-95; operative 9-28-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 39).

§ 11475. Work Experience Education.

NOTE: Authority cited: Sections 33031, 37250, 51731, 51761 and 52355, Education Code. Reference: Sections 37250, 37252, 51730-51732 and 51761, Education Code.

HISTORY

1. New section filed 5-18-72; effective thirtieth day thereafter (Register 72, No. 21).

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§ 11510

§ 11512.5

§ 11517

(1) The majority of the committee membership shall represent the occupation for which instruction is given.

(2) Documentation of advisory committee minutes, with recommendations in regard to the course being offered, shall be on file.

(j) The courses offered in a Regional Occupational Center or Regional Occupational Program shall only be for providing training, upgrading, and retraining in recognized occupations and/or emerging occupations to meet the labor demand as determined and verified by the Regional Occupational Center or Regional Occupational Program.

(k) The course shall not unnecessarily reduce or supplant the vocational education efforts of any participating district but shall become an extension or augmentation of vocational education opportunities and enrollments in the participating districts.

(l) Instruction in the course is being provided by an instructor meeting the requirements pursuant to Education Code Section 52323, the California State Plan for Vocational Education, and providing immediate supervision and control as defined by Section 10091 of this title.

NOTE: Authority cited: Section 52309, Education Code. Reference: Section 52309, Education Code.

HISTORY

1. Amendment and renumbering of Section 11508 to 11504 filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).
2. Repealer of subsection (l) and renumbering of subsection (m) to subsection (l) filed 9-19-79; effective thirtieth day thereafter (Register 79, No. 38).

§ 11505. Counseling and Guidance.

A Regional Occupational Center or a Regional Occupational Program shall provide individual vocational counseling and guidance directly supportive of, and contributory to, the instructional programs that constitute the course offerings of the Regional Center or Regional Occupational Program. The counseling and guidance services funded pursuant to the provisions of Article 1, Chapter 9, Part 28, Division 4, Title 2* of the Education Code shall not be construed as general support for guidance and counseling services for the total school enrollment or for the total vocational education enrollment in a school.

HISTORY

1. Amendment and renumbering of Section 11509 to 11505 filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).

§ 11506. Evaluation.

Each Regional Occupational Center or Regional Occupational Program shall submit to the Department of Education in such detail, at such time, and in such manner as the Department of Education deems necessary, an evaluation of the Regional Occupational Center or Regional Occupational Program. This evaluation shall include but not be limited to the following information:

(a) Analysis of the cost of individual centers, programs, and services.

(b) Enrollments defined in terms of high school students, post-high school students, and adults.

(c) Number of trainees employed in specific entry-level occupations.

(d) Number of trainees continuing training in other institutions.

(e) Dropout rates and placement data.

(f) Activities pursuant to Education Code Sections 52305(c), 52306 and 52307.

HISTORY

1. New subsection (f) filed 4-19-74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11510 to 11506 filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).
3. Amendment of subsection (f) filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).

§ 11507. Administration.

Each Regional Occupational Center or Regional Occupational Program shall be organized and administered in such manner that there will be a clear and separate audit trail of all income and expenditures, of all agreements and contracts, of enrollments, and of all other statistical information pertaining to fiscal and instructional accountability.

HISTORY

1. Renumbering of Section 11511 to 11507 filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).

§ 11508. Establishing and Operating Business, Commercial, Trade, Manufacturing or Construction Activities.

(a) Regional occupational centers and regional occupational programs may establish and operate business, commercial, trade, manufacturing or construction activities which may include the sale of products or services to private or public corporations or companies, or to the general public as authorized in subdivision (c) of Education Code Section 52305.

(b) Where the activities described in subsection (a) of this section include the sale of products or services to private or public corporations or companies, or to the general public, the regional occupational center or regional occupational program shall request prior approval from the State Department of Education. Application for approval shall be submitted on a form prescribed by the Superintendent of Public Instruction and the proposal therein shall comply with all the conditions set forth in Education Code Sections 52306 and 52307.

HISTORY

1. New section filed 4-19-74; effective thirtieth day thereafter (Register 74, No. 16).
2. Renumbering of Section 11512 to 11508 filed 12-7-76; designated effective 7-1-77 (Register 76, No. 50).
3. Amendment of section and repealer of NOTE filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).

Subchapter 7.5. California English Language Development Test

Article 1. General

§ 11510. Definitions.

For the purposes of the test required by Education Code Section 313(a), referred to as the California English Language Development Test, the following definitions shall apply:

(a) An "administration" means a pupil's attempt to take all sections of the California English Language Development Test, including speaking, listening, reading, and writing.

(b) "Annual assessments" are administrations of the California English Language Development Test to enrolled pupils who are currently identified as English learners.

(c) "Annual assessment window" means the period of time designated by the Superintendent of Public Instruction and the State Board of Education for the annual assessments conducted using the California English Language Development Test. Initial assessments, as defined in subdivision (g), may be administered during the annual assessment window.

(d) "Eligible pupil" means one who is enrolled in a California public school in kindergarten or any of grades 1 through 12 with a native language other than English or who is currently identified as an English learner.

(e) "Grade level" means the grade assigned to the pupil by the school district.

(f) "Home language survey" is a form administered by the school district to be completed by the pupil's parent or guardian indicating language use by the pupil or family which, if completed, would fulfill the school district's obligation required by Education Code section 52164.1.

(g) "Initial assessments" are administrations of the California English Language Development Test to pupils who are identified as having a native language other than English, based on the home language survey, and for whom there is no record of English language development assessment results.

(h) "School districts" include school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

(i) "Test materials" are materials necessary for administration of the California English Language Development Test, including but not limited to audio-cassettes, test manuals, pupil test booklets, forms for recording pupil responses and background information, video tapes, answer keys, and scoring rubrics.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306, 313, 52164.1 and 60810, Education Code.

HISTORY

1. New subchapter 7.5 (articles 1–4), article 1 (section 11510) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).
2. Amendment of subsection (f), repealer of subsection (j) and amendment of NOTE filed 4–14–2003; operative 4–14–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

Article 2. Administration

§ 11511. English Language Development Assessment.

(a) Any pupil whose native language is other than English as determined by the home language survey and for whom there is no record of results from an administration of an English language development test, shall be assessed for English language proficiency by using the California English Language Development Test within 30 calendar days of enrollment in the school district.

(b) The English language development of all currently enrolled English learners shall be assessed by administering the California English Language Development Test during the annual assessment window.

(c) The school district shall administer test in accordance with the test publisher's directions, except as provided by Section 11516.5.

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the test publisher by the California Department of Education as part of the contract with the test publisher for the current year.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 37200, Education Code.

HISTORY

1. New article 2 (sections 11511-11514) and section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11511.5. Reporting to Parents.

For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313 and 48985, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11512. District Documentation and Pupil Records.

(a) The school district shall maintain a record of all pupils who participate in each administration of the California English Language Development Test. This record shall include the following information for each administration:

(1) The name of each pupil who took the test.

(2) The grade level of each pupil who took the test.

(3) The date on which the administration of the test was completed for each pupil.

(4) The test results obtained for each pupil.

(b) The school district shall enter in each pupil's record the following information for each administration of the test:

(1) The date referred to by subdivision (a)(3).

(2) The pupil's test results.

(c) The record required by subdivision (a) shall be created and the information required by subdivision (b) of this section shall be entered in each pupil's record prior to the subsequent administration of the California English Language Development Test.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 306(a), 313(b) and 60810(d), Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).

§ 11512.5. Data for Analysis of Pupil Proficiency.

(a) Each school district shall provide the publisher of the California English Language Development Test the following information for each pupil tested for purposes of the analyses and reporting required pursuant to Education Code sections 60810(c) and 60812:

(1) Date of birth;

(2) Date that testing is completed;

(3) Grade level;

(4) Gender;

(5) Native language;

(6) English language fluency, if known;

(7) Special program participation;

(8) Special education and 504 plan status;

(9) Nonstandard test administration;

(10) Ethnicity;

(11) Time enrolled in United States schools; and

(12) District and school mobility.

(b) The information required by subdivision (a) is for the purposes of aggregate analyses and reporting only.

(c) School districts shall provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313, 60810 and 60812, Education Code.

HISTORY

1. New section filed 10–4–2001; operative 11–3–2001 (Register 2001, No. 40).
2. Amendment of subsection (a)(11) and amendment of NOTE filed 4–14–2003; operative 4–14–2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

§ 11513. California English Language Development Test District Coordinator.

(a) Sixty calendar days before the beginning of the annual assessment window of each school year, the superintendent of each school district shall designate from among the employees of the school district a California English Language Development Test district coordinator. The superintendent shall notify the publisher of the California English Language Development Test of the identity and contact information for the California English Language Development Test district coordinator. The California English Language Development Test district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the California English Language Development Test.

(b) The California English Language Development Test district coordinator's responsibilities shall include, but are not limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school test and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of tests and test materials to individual schools and sites.

(4) Maintaining security over the California English Language Development Test and test data using the procedure set forth in Section 11514. The California English Language Development Test district coordinator shall sign the Test Security Agreement set forth in Section 11514 prior to receipt of the test materials.

(5) Overseeing the administration of the California English Language Development Test to eligible pupils.

(6) Overseeing the collection and return of all test materials and test data to the publisher.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all test materials are received from school test sites within the school district in sufficient time to satisfy the requirements of subdivision (10).

(9) Ensuring that all tests and test materials received from school test sites within the school district have been placed in a secure school district location upon receipt of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to the test publisher no more than ten (10) working days after the close of the testing window for the annual assessment, and at the date specified monthly by the test publisher for initial assessments of pupils.

(11) Ensuring that the California English Language Development Tests and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) The California English Language Development Test district coordinator shall certify to the California Department of Education at the time of each shipment of materials to the publisher that the school district has maintained the security and integrity of the test, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the California English Language Development Test in the manner and as otherwise required by the publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11513.5. California English Language Development Test Site Coordinator.

(a) Annually, the superintendent of the school district shall designate a California English Language Development Test site coordinator for each test site, including, but not limited to, each charter school, each court school, and each school or program operated by a school district, from among the employees of the school district. The California English Language Development Test site coordinator, or the site principal or his or her designee, shall be available to the California English Language Development Test district coordinator for the purpose of resolving issues that arise as a result of the administration of the California English Language Development Test.

(b) The California English Language Development Test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site test and test material needs.

(2) Arranging for test administration at the site.

(3) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

(4) Overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing.

(5) Maintaining security over the test and test data as required by Section 11514.

(6) Overseeing the acquisition of tests from the school district and the distribution of tests to the test administrator(s).

(7) Overseeing the administration of the California English Language Development Test to eligible pupils at the test site.

(8) Overseeing the collection and return of all testing materials to the California English Language Development Test district coordinator.

(9) Assisting the California English Language Development Test district coordinator and the test publisher in the resolution of any discrepancies between the number of tests received from the California English Language Development Test district coordinator and the number of tests collected for return to the California English Language Development Test district coordinator.

(10) Overseeing the collection of all pupil data required by Sections 11512 and 11512.5.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.

HISTORY

1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11514. Test Security.

(a) The California English Language Development Test site coordinator shall ensure that strict supervision is maintained over each pupil while the pupil is being administered the California English Language Development Test.

(b) Access to the California English Language Development Test materials is limited to pupils being administered the California English Language Development Test and employees of the school district directly responsible for administration of the California English Language Development Test.

(c) All California English Language Development Test district and test site coordinators shall sign the California English Language Development Test Security Agreement set forth in subdivision (d).

(d) The California English Language Development Test Security Agreement shall be as follows:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
TEST SECURITY AGREEMENT

(1) I will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test' security.

(2) I will keep on file the names of persons having access to tests and test materials. I will require all persons having access to the material to sign the California English Language Development Test Security Affidavit that will be kept on file in the school district office.

(3) I will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates.

By signing my name to this document, I am assuring that I and anyone having access to the test materials will abide by the above conditions.

By: _____

Title: _____

School District: _____

Date: _____

(e) Each California English Language Development Test site coordinator shall deliver the tests and test materials only to those persons actually administering the California English Language Development Test on the date of testing and only upon execution of the California English Language Development Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California English Language Development Test, including but not limited to the California English Language Development Test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the California English Language Development Test Security Affidavit set forth in subdivision (g).

(g) The California English Language Development Test Security Affidavit shall be completed by each test examiner and test proctor:

CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT TEST
SECURITY AFFIDAVIT

I acknowledge that I will have access to the California English Language Development Test for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.
(3) I will keep the test secure until the test is actually distributed to pupils.
(4) I will limit access to the test and test materials by test examinees to the actual testing periods.
(5) I will not permit pupils to remove test materials from the room where testing takes place.
(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.
(7) I will return all test materials to the designated California English Language Development Test site coordinator upon completion of the test.
(8) I will not interfere with the independent work of any pupil taking the test and I will not compromise the security of the test by means including, but not limited to:
(A) Providing eligible pupils with access to test questions prior to testing.
(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure California English Language Development Test booklet or document.
(C) Coaching eligible pupils during testing or altering or interfering with the pupil's responses in any way.
(D) Making answer keys available to pupils.
(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.
(F) Failing to follow test administration directions specified in test administration manuals.
(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.
Signed: _____
Print Name: _____
Position: _____
School: _____
School District: _____
Date: _____
(h) To maintain the security of the California English Language Development Test, all California English Language Development Test district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.
(i) The security of the test materials that have been duly delivered to the school district by the test publisher is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the test publisher.
(j) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district by the test publisher.
NOTE: Authority cited: Section 33031, Education Code. Reference: Section 313, Education Code.
HISTORY
1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Article 3. Accommodations

§ 11516. Timing/Scheduling.
All pupils shall have sufficient time to complete the test as provided in the directions for test administration.
NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810(d), Education Code.
HISTORY
1. New article 3 (sections 11516-11516.5) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

§ 11516.5. Pupils with Disabilities.
Pupils with disabilities shall take the California English Language Development Test with those accommodations for testing that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program or 504 plan that are appropriate and necessary to address the pupil's identified individual needs.
NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60810(d), Education Code.
HISTORY
1. New section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).

Article 4. Apportionment

§ 11517. Apportionment Reporting Schedule.
(a) Each school district shall report to the California Department of Education the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment from November 1, 2002 through June 30, 2003. Thereafter, each school district shall report the unduplicated count of the number of pupils to whom the California English Language Development Test was administered for annual or initial assessment during the twelve-month period prior to June 30 of each year.
(b) The superintendent of each school district shall certify the accuracy of all information submitted to the California Department of Education.
(c) The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within thirty (30) calendar days after June 30 of each year.
NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 313 and 60810, Education Code.
HISTORY
1. New article 3 (section 11517) and section filed 10-4-2001; operative 11-3-2001 (Register 2001, No. 40).
2. Amendment of subsections (a) and (c) and amendment of NOTE filed 4-14-2003; operative 4-14-2003 pursuant to Government Code section 11343.4 (Register 2003, No. 16).

Subchapter 8. High School Proficiency Certificates

Article 1. Certificate of Proficiency

§ 11520. Definitions.
(a) "Parent" as used in Education Code Section 48410(e), relating to verified parental approval, means the natural parent, or adoptive parent or guardian, having legal custody of the pupil.
NOTE: Authority cited: Sections 48410, 48412 and 51426, Education Code.
HISTORY
1. New Article 1 (Sections 11520-11522) filed 11-21-75; effective thirtieth day thereafter (Register 75, No. 47).
2. Amendment of section and NOTE filed 9-23-77; effective thirtieth day thereafter (Register 77, No. 39).
3. Editorial correction to title of Article 1 (Register 79, No. 4).
4. Renumbering of Chapter 10 (Sections 11520-11532) to Chapter 8 filed 11-7-79; effective thirtieth day thereafter (Register 79, N. 45). For prior history of Chapter 10, see Register 74, No. 3.

§ 11521. Placement on Pupil Transcript.
A school district shall, for each pupil who demonstrates proficiency as provided in Education Code Section 48410(e), indicate the pupil's accomplishment and the date of the proficiency certificate award on the pupil's official transcript.
HISTORY
1. Amendment filed 7-18-78; effective thirtieth day thereafter (Register 78, No. 29).

§ 11522. Requirement for Exemption from School Attendance Form.
Each school district shall develop a form which evidences parental consent for exemption from further compulsory school attendance pur-

EXHIBIT B

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

March 22, 2005

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter dated December 13, 2004, the Department of Finance has reviewed the test claim submitted by the Castro Valley Unified School District (claimant) asking the Commission to determine whether specified costs incurred under various statutes are reimbursable state-mandated costs (Claim No. CSM-03-TC-06 "California English Development Test (CELDT)-2"). As a result of our review, it is apparent that the existence of federal requirements, a proposition enacted by the voters of California, and the voluntary acceptance of federal No Child Left Behind (NCLB) funding by potential claimants all result in our conclusion that this claim should be denied in its entirety. We additionally note that claimant has failed to acknowledge the existence of state funding for the CELDT program, or whether or the extent to which such funding is inadequate to cover program costs.

On September 30, 2004, the Commission adopted its Statement of Decision on CELDT Test Claim CSM-00-TC-16, and found that the claimed activities do not impose a new program or higher level of service, and therefore do not impose reimbursable costs mandated by the state. The Commission's decision was based on its finding that the requirements of the proposed activities were in prior and preexisting federal law. In November 2004, additional legislation was chaptered (Chapter 895, AB 2855) that further reinforces the Commission's rationale in this decision, amending subdivision (c) of Government Code Section 17556 to state: "[The Commission shall not find costs mandated by the state if...] The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued."

As the present test claim involves other statutes and regulations related to English-Language assessment and the CELDT, we believe that the rationale for the Commission's decision on CSM-00-TC-16, as reinforced by subsequent legislation, is applicable to the activities included in this test claim as well. As such, the activities included in this test claim do not impose a new program or higher level of service, and therefore do not impose reimbursable costs mandated by the state. The claimant alleges activities such as parent notices, language census, determination of primary language, assessment of language skills, census review and correction, designation of pupils as limited English proficient, reports to the State Department of Education, and reclassification of pupils. These activities, without exception, are essential to the ability of the state and school districts to comply with the federal requirements discussed below. Under the precedent, and using the rationale, set by the Commission in its earlier decision on CSM-00-TC-16, we believe the present claim should be entirely denied as well.

Specifically, quoting from the Commission's Statement of Decision for CSM-00-TC-16, beginning on page 5, which is incorporated herein by reference and available from the Commission's website (at http://www.csm.ca.gov/agendas/093004/item4.pdf): "Title VI of the Civil Rights Act (42 U.S.C. § 2000d) prohibits discrimination under any program or activity receiving federal financial assistance.

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

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

"Federal cases, however, have interpreted section 1703(f) to require testing students' English-language skills. According to *Castaneda v. Pickard* [*5th Cir. 1981, 648 F. 2d 989*], "...proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself." The Castaneda court also devised a three-part test to determine whether a program complies with section 1703(f): ... Finally ... [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

"In *Keyes [Keyes v. School Dist. No. 1, D. Colo. 1983, 576 F. Supp. 1503]*, the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "'flawed by the failure to adopt adequate tests to measure the results of what the district is doing. ...The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy.'

"In 1994, Congress enacted the Improving America's School's Act (IASA) that required an annual assessment of English proficiency." In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. NCLB requires states, by school year 2002-2003, to "provide for an annual assessment of English proficiency ...of all students with limited English proficiency...." (20 U.S.C. § 6311 (b)(7)). One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371)." We note that under prior Commission decisions and case law, a local program cannot be determined to be reimbursable by the state where an entity of local government has made a discretionary decision to participate in a program, regardless of any requirements then resulting from participation in that discretionary

program. Should the Commission somehow find the present test claim to be a reimbursable state-mandated local program, any claimant choosing to, or that has in the past chosen to, receive federal NCLB funding in any year should be prohibited from receiving state reimbursement for activities during any such year.

Quoting again, this time from page 4 of the Commission's aforementioned Statement of Decision: "In 1998, the voters adopted Proposition 227 (§§ 300 – 340, not including § 313). It requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year. The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique. Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English.

"The regulations implementing Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300 – 11316) cover topics such as how to determine whether the pupil is English proficient, duration of services, reclassification, monitoring, documentation, annual assessment, census, advisory committees, parental exception waivers, community-based English tutoring, and notice to parents or guardians." Subdivision (f) of Government Code Section 17556 clearly states that the Commission shall not find costs mandated by the state if: "The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election."

Additionally as a separate argument, in *Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727* the California Supreme Court held that reimbursement is not required where program funding can reasonably be used to cover claimed costs. With respect to the CELDT assessment, the claimant has: (1) failed to note the existence of such program funding, which has been included in the annual state Budget Act since the 1999-00 fiscal year, and (2) failed to indicate that this funding is inadequate to cover claimed costs.

For the reasons noted above, we believe that this claim should be denied in its entirety.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your December 13, 2004, letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Pete Cervinka, Principal Program Budget Analyst, at (916) 445-0328, or Jesse McGuinn, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Jeannie Oropeza

Jeannie Oropeza
Program Budget Manager

Attachment

Attachment A

DECLARATION OF PETE CERVINKA
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-06

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the various statutes sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

March 22, 2005
at Sacramento, CA

J. Dal Porto for
Pete Cervinka

PROOF OF SERVICE

Test Claim Name: California English Development Test 2
Test Claim Number: CSM-03-TC-06

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On March 17, 2005, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Ginny Brummels
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

E-8
Department of Education
Fiscal and Administrative Services Division
Attention: Gerry Shelton
1430 N Street, Suite 2213
Sacramento, CA 95814

Centration, Inc.
Attention: Beth Hunter
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Shields Consulting Group, Inc.
Attention: Steve Shields
1536 36th Street
Sacramento, CA 95816

San Diego Unified School District
Attention: Arthur Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Mandated Cost Systems, Inc.
Attention: Steve Smith
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds, President
P.O. Box 987
Sun City, CA 92586

Mandate Resource Services
Attention: Harmeet Barkschat
5325 Elkhorn Blvd., Suite 307
Sacramento, CA 95842

Spector, Middleton, Young, Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Castro Valley Unified School District
Attention: Jerry Macy
4400 Alma Avenue
Castro Valley, CA 94546

Modesto City School District
Attention: Deborah S. Bailey
426 Locust Street
Modesto, CA 95351

Schools Mandate Group
Attention: David E. Scribner
3113 Catalina Island Road
West Sacramento, CA 95691

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 22, 2005, at Sacramento, California.

Clad Labue for
Jennifer Nelson

EXHIBIT C

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

April 5, 2012

Mr. Keith Petersen
SixTen and Associates
P.O. Box 340430
Sacramento, CA 95834

And Affected State Agencies and Interested Parties (See Mailing List)

RE: **Draft Staff Analysis, Schedule for Comments, and Hearing Date**
California English Language Development Test II, 03-TC-06
Education Code Sections 48985, et al.
Castro Valley Unified School District, Claimant

Dear Mr. Petersen:

The draft staff analysis for the above-named matter is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **April 26, 2012.** You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see http://www.csm.ca.gov/dropbox.shtml on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01(c)(1) of the Commission's regulations.

Hearing

This matter is tentatively set for hearing on **Friday, May 25, 2012,** at 9:30 a.m., in the State Capitol, Room 447, Sacramento, California. The final staff analysis will be issued on or about May 11, 2012. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Please contact Camille Shelton at (916) 323-3562 if you have any questions.

Sincerely,

Heather Halsey
Executive Director

Hearing Date: May 24, 2012
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ITEM ___

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6

Statutes 1977, Chapter 36, Statutes 1978, Chapter 848, Statutes 1980, Chapter 1339, Statutes 1981, Chapter 219, Statutes 1994, Chapter 922

California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, 11517

Register 98, No. 30 (July 24, 1998) pages 75-76, Register 98, No. 33 (Aug. 14, 1998) page 75, Register 99, No. 1 (Jan. 1, 1999) pages 75-76, Register 01, No. 40 (Oct. 5, 2001) pages 77-78.2, Register 03, No. 2 (Jan. 8, 2003) pages 75-76.1
Register 03, No. 16 (April 18, 2003) pages 77-78.2

California English Language Development Test II
03-TC-06

Castro Valley Unified School District, Claimant

EXECUTIVE SUMMARY

Background

This test claim addresses statutes and regulations governing the public instruction of limited English proficient ("LEP") students in California. LEP students are those who do not speak English, or those whose native language is not English and who are not currently able to perform ordinary classroom work in English.

Test Claim Statutes and Regulations

The following statutes and regulations have been pled in this claim:

- Statutes that were adopted as part of the Chacon-Moscone Bilingual-Bicultural Education Act of 1976. This Act provided funding to train bilingual teachers to meet the needs of LEP students through bilingual instruction. Bilingual instruction programs are those in which LEP students, while learning English, receive instruction in academic subjects such as math, science, and social studies in their primary or home language.[1]

  The Act contained a sunset clause that became effective on June 30, 1987. For eleven years following the Act's sunset, the Legislature was unable to gain the necessary consensus for any subsequent legislation regarding bilingual education. However, the Legislature authorized continued funding for the general purpose of bilingual education until 1998, when Proposition 227 was adopted by the voters.

[1] Education Code sections 52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6.

- Regulations adopted to implement Proposition 227, which was enacted by the voters in 1998 to generally reject bilingual instruction and, instead, provide for a system of structured English immersion (English only instruction). These regulations define and clarify the terms adopted in Proposition 227, and implement the process for reviewing parental exception waivers authorized by Proposition 227 to allow a parent to request, or school personnel to recommend, an alternative educational program for the student.
- English Language Learner regulations adopted by the California Department of Education (CDE) in 2003 and placed with the regulations to implement Proposition 227. These clean-up regulations address the census and identification of LEP pupils, assessment of LEP pupils using the California English Language Development Test (CELDT), reclassification of the pupil from English learner to proficient in English, monitoring the progress of the pupils, documentation requirements, and a parent advisory committee.[2]
- Regulations adopted to administer the CELDT, which is used to assess the proficiency of LEP students upon enrollment, and annually thereafter, until the student is reclassified as English proficient.[3]
- Statute and regulations requiring that notices to parents and guardians be provided in English and the primary language of the student.[4]

The law regarding the education for LEP students has a long history. Many federal and state laws have been enacted and interpreted by the courts to require appropriate action on the part of state and local educational agencies to ensure the equal participation and nondiscrimination in the education of LEP students. In addition, federal and state laws have been enacted to provide funding for these services. A summary of the federal law is provided below.

Federal Law

The 14th Amendment to the United States Constitution declares that no state may deny any person the equal protection of the laws. This amendment protects the privileges of all citizens, provides equal protection under the law, and gives Congress the power to enforce the amendment through legislation.

In 1964, Congress passed Title VI of the Civil Rights Act to prohibit discrimination based on race, color, age, creed, or national origin in any federally funded activity or program. In 1968, the federal Department of Health, Education, and Welfare (HEW), which has authority to adopt regulations prohibiting discrimination in federally assisted school systems, issued a guideline interpreting Title VI that "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally

[2] California Code of Regulations, title 5, sections 11300-11316 (regulations implementing Proposition 227 and 2003 clean-up regulations).

[3] California Code of Regulations, title 5, sections 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, and 11517.

[4] Education Code section 48985; California Code of Regulations, title 5, sections 11316 and 11510.

obtained by other students in the system." In 1970, HEW made the guidelines more specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "language deficiencies."

In 1974, the United States Supreme Court decided *Lau v. Nichols*, a case brought by non-English speaking Chinese students challenging the unequal educational opportunities provided by the San Francisco Unified School District under Title VI of the Civil Rights Act.[5] The case presented uncontested facts that more than 2,800 school children of Chinese ancestry attended school in the district and did not speak, understand, read, or write the English language. The school district had not taken any significant steps to deal with the language deficiency of many of those students. The Supreme Court held that students of limited English proficiency who are not provided with special programs to help them learn English were being denied their rights under Title VI of the Civil Rights Act. The court further held that the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students, and that it is not enough to merely provide these students the same facilities, textbooks, teachers, and curriculum. The court did not impose any specific remedy, but agreed that teaching English to the students of Chinese ancestry who do not speak the language is one option, or giving instructions to this group of students in Chinese is another option.

Shortly after *Lau*, Congress passed the Equal Educational Opportunities Act of 1974 (EEOA) as part of the amendments to the Elementary and Secondary Education Act to require state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by students in the instructional program. Failure to provide the "appropriate action" can result in litigation. The EEOA provides that an individual denied an equal educational opportunity under the Act may institute a civil action in a district court of the United States for such relief as may be appropriate.

Many courts have interpreted the EEOA, and have determined that the EEOA requires that a state's language remediation program and practices:

- Be based on sound educational theory or principles;
- Are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Produce results indicating that the language barriers confronting students are actually being overcome.[6]

If a program, after being employed for a period of time sufficient to give the plan a legitimate trial, fails to produce results indicating that the language barriers confronting LEP students are actually being overcome, the program may no longer constitute appropriate action under the EEOA. The courts have further determined that identification, testing, evaluating, and assessing LEP students on their English language proficiency is required to properly identify these students and determine if appropriate action is being provided under the Act.

[5] *Lau v. Nichols* (1974) 414 U.S. 563.

[6] *Castaneda v. Pickard* (1981) 648 F.2d 989, 1009-1010.

In 2002, Congress passed Title III of the No Child Left Behind Act. Title III is entitled the "English Language Acquisition, Language Enhancement, and Academic Achievement Act" and was enacted to provide increased federal grant funding to state and local educational agencies to assist them in helping LEP students attain English language proficiency and meet the same academic standards as their English-speaking peers in all content areas. In order to receive funding under Title III, state and local educational agencies are held accountable for the progress of LEP and immigrant students through annual measurable achievement outcomes, which measures the number of LEP students making sufficient progress in English acquisition, attaining English proficiency, and meeting Adequate Yearly Progress. The amount of funding each state receives is determined by a formula derived from the number of LEP and immigrant students in that state. Title III also requires educational agencies, as a condition of receipt of funds, to inform the parents and guardians of LEP students how they can assist in their child's progress achieving English proficiency.

In 2009, the United States Supreme Court, in *Horne v. Flores*, held that compliance with the provisions of Title III of No Child Left Behind (NCLB) does not necessarily constitute "appropriate action" required under the EEOA.[7] The court found that the federal government's approval of a NCLB plan does not entail the substantive review of a state's program for LEP students or a determination that the programming results in equal educational opportunity for LEP students as required by the EEOA. Nevertheless, participation and compliance with Title III's assessment and reporting requirements provides evidence of the state and local educational agencies' progress and achievement of LEP students for purposes of the EEOA.

Position of the Parties

The claimant contends that all activities required by the plain language of the test claim statutes and regulations constitute reimbursable state-mandated programs.

The Department of Finance (DOF) opposes this test claim on the ground that the activities are mandated by federal law, Proposition 227, and are required as a condition of the voluntary acceptance of federal NCLB funding. Thus, a state-mandated program has not been imposed on school districts.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local governments are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local governments to be eligible for reimbursement, one or more similarly situated local governments must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In

[7] *Horne v. Flores* (2009) 557 U.S. 433.

making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

The following chart provides a brief summary of the claims, the issues raised by the claimant and staff's recommendation.

Claim	Description	Recommendation
Chacon-Moscone Bilingual Education Act (Ed. Code §§52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6)	Established a bilingual education program for LEP students, and required school districts to take a census of all LEP pupils and report the results to the CDE; notify parents or guardians of the results of the assessment; reassess LEP pupils; retain documentation on the assessment of language skills for each pupil; and determine when LEP pupils have developed the language skills necessary to succeed in an English-only classroom and reclassify those pupils.	***Denied***. The statutes have not been operative and did not constitute a state-mandated program during the period of reimbursement for this claim. Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset on June 30, 1987, and ceased to be operative on that date.
Regulations adopted to implement Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310))	Proposition 227 was adopted by the voters in 1998 to establish an English-only program for LEP pupils. The regulations implement the initiative and establish procedures for parental exception waivers.	***Denied***. The regulations do not mandate a new program or higher level of service. The regulations impose activities expressly required by Proposition 227 and the federal EEOA, and additional procedural activities that are part and parcel of the ballot measure mandate.
2003 English Language Learner Regulations (Cal. Code Regs., tit. 5, §§ 11303, 11304, 11305, 11306, 11307, 11308)	These regulations require the census and identification of LEP pupils, initial and annual assessment of LEP pupils using the CELDT, reclassification process to transfer the LEP student from English learner to proficient in English, monitoring the progress of the pupils, documentation requirements, and a parent advisory committee to provide recommendations regarding the instruction of LEP students.	***Denied***. The regulations do not mandate a new program or higher level of service. The activities are either expressly required by prior statutes (Ed. Code, § 313, 62002.5), or the federal EEOA. Any additional procedural activities required are part and parcel of the federal mandate.

CELDT regulations (Cal. Code Regs., tit. 5, §§11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, and 11517)	The regulations administer the testing process.	***Denied***. The regulations do not mandate a new program or higher level of service. The regulations impose the same requirements as prior law in Education Code section 313 and impose activities that are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.
Notices in English and primary language of the student (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11510)	The statute and regulations require that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual census.	***Denied***. This requirement does not impose a new program or higher level of service. The same activity was required by former Education Code section 10926.

Staff Analysis

Staff finds that the statutes and regulations pled in this claim do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution and, thus, reimbursement is not required in this case.

A. Statutes Pled Under Chacon Moscone Bilingual-Bicultural Education Act

Under the bilingual education program, school districts are required to take a census of LEP pupils and report the results to CDE, notify parents or guardians of the assessment results, reassess LEP pupils when there is reasonable doubt regarding the pupil's designation, retain documentation, determine when an LEP student can be reclassified as English proficient.

The activities required by the test claim statutes are not eligible for reimbursement because the statutes have not been operative and, thus, did not constitute a mandated program during the period of reimbursement for this claim. Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset on June 30, 1987, and ceased to be operative on that date.

B. Regulations that Implement Proposition 227

The voters adopted Proposition 227, which added sections 300 –340 (not including section 313) to the Education Code. Proposition 227 requires school districts to instruct LEP students though structured English immersion classes, unless a parental exception waiver is granted. When 20 or

more pupils have been granted parental exception waivers and are enrolled in a given grade, the school district is required to provide bilingual instruction or allow the pupil to transfer to a public school where bilingual education is provided. The proposition also requires school districts to provide parents and guardians a description of all choices and materials available to enable them to make an informed decision about whether to seek a waiver.

This test claim pleads regulations adopted by CDE that implement the Proposition 227 requirements. To the extent that the regulations require the same activities that are expressly required by the Proposition 227 statutes, they do not mandate a new program or higher level of service on school districts and are not eligible for reimbursement.

The regulations also impose the following additional requirements that are not expressly spelled out in the Proposition 227 statutes: (1) providing notices to the parents or guardians; (2) adopting parental waiver exception procedures and guidelines for waivers that go beyond the limited exception provided for pupils with special needs; and (3) providing a written statement of reasons to the parents or guardians in cases where the waiver is denied.

These procedural requirements, however, were adopted to implement Proposition 227 and are part and parcel of the ballot measure mandate of Proposition 227. For purposes of ruling upon a request for reimbursement under article XIII B, section 6, challenged state rules or procedures that are intended to implement an applicable ballot measure law – and whose costs are, in context of the ballot measure, de minimis – are treated as part and parcel of the underlying ballot measure mandate and do not impose a reimbursable state-mandated program pursuant to Government Code section 17556(f).[8] Under this "part and parcel" analysis, the courts have denied claims for reimbursement for the following procedural activities required by the state to implement an existing program mandated by federal law, and the courts have instructed the Commission to use the same analysis for ballot measure mandates: the adoption of rules and regulations, notice provisions, the inspection and retention of documents, maintenance of records, and recording orders and the causes thereof in official records.[9] The activities that implement Proposition 227 fall within the same scope as the additional activities denied by the courts under the "part and parcel" analysis.

Finally, the regulations require school districts to provide appropriate services to students to recoup any academic deficits that may have occurred in other areas of the core curriculum because of the language barrier of the pupil. This activity is mandated by federal law and not eligible for reimbursement under article XIII B, section 6. The courts have determined that the federal EEOA imposes an obligation on educational agencies to provide LEP 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.[10]

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[8] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183.

[9] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 873, footnote 11, and 890.

[10] *Castaneda v. Pickard* (1981) 648 F.2d 989.

Accordingly, staff finds that the regulations adopted to implement Proposition 227 do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

C. English Language Learner Regulations Adopted by the Department of Education in 2003

These clean-up regulations require the census and identification of LEP pupils, initial and annual assessment of LEP pupils using the CELDT, reclassification process to transfer the LEP student from English learner to proficient in English, monitoring the progress of the pupils after reclassification, documentation requirements, and a parent advisory committee to provide recommendations regarding the instruction of LEP students.

As discussed in the analysis, staff finds that these regulations do not impose state-mandated new programs or higher levels of service on school districts because:

1. The census activities are imposed to implement federal EEOA requirements. Any additional procedural requirements imposed by the regulations to implement existing federal law are part and parcel of the underlying federal requirement and are not reimbursable.
2. The initial and annual assessment of LEP pupils and the reclassification procedures required by the test claim regulations were required by prior law in Education Code section 313, and are not new. Education Code section 313 was pled in prior test claim, *CELDT I* (00-TC-16) and denied by the Commission on the ground that the requirements of the statute were previously mandated by federal law, including the EEOA. The Commission's decision in *CELDT I* is a final binding decision of the Commission. The documentation requirements are part and parcel of the federal EEOA.
3. The requirement to monitor the progress of pupils after reclassification is a requirement imposed by the federal EEOA.
4. The requirement to establish a parent advisory committee to provide recommendations regarding the instruction of LEP students was required by prior law and, thus, the activity is not new. Education Code section 62002.5 (which sunset the Chacon-Moscone Bilingual Education Act), kept the provisions requiring advisory committees and school site councils intact, despite the sunset of the remaining bilingual education statutes. The requirement remained continuously in effect until the test claim regulation became effective in 2003.

Accordingly, staff finds that the 2003 regulations adopted by CDE do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

D. CELDT Regulations

In 2001, a prior test claim was filed on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (*CELDT I*, 00-TC-16)) seeking reimbursement for field testing the CELDT, the initial assessment of LEP students, the annual assessment of LEP students, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program is mandated by federal law under Title VI of the Civil Rights Act and the EEOA. The *CELDT I*

test claim, however, did not plead the regulations that were adopted to govern the administration of the test.

CDE adopted the test claim regulations in 2001 to implement Education Code sections 313 and 60810 through 60812 and administer the CELDT. These regulations require school districts to conduct initial and annual assessments of LEP pupils using the test, comply with test security measures, notify parents of the results, maintain test records, provide the test publisher with information regarding each pupil, designate test-site and district coordinators, provide test accommodations for pupils with disabilities, report to CDE the number of pupils to whom the test was administered each year.

Staff finds that the activities required by these regulations do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, but are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.

In addition, the requirement to provide test accommodations to students with disabilities that take the CELDT is mandated by existing federal law under the Individuals with Disabilities Education Act (IDEA). The IDEA requires state and local education agencies to provide services and accommodations for students with disabilities to ensure that a free and appropriate public education is provided. These services include special test-taking accommodations as necessary and determined during the student's individualized education plan (IEP) process.

Accordingly, staff finds that the regulations that implement the CELDT do not mandate a new program or higher level of service.

E. Notice to Parents Provided in English and the Primary Language of the Parent

Staff finds that the requirement to provide notices to parents in their primary language is not new. Former Education Code section 10926, as added in 1976, imposed the same requirement and was continuously in effect until Education Code section 48985 was enacted. Accordingly, staff finds that Education Code section 48985, and the regulations that implement this requirement for Proposition 227 and the CELDT, do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Based on the above analysis, staff concludes that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

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

STAFF ANALYSIS

Claimant

Castro Valley Unified School District

Chronology

09/22/2003	Claimant, Castro Valley Unified School District, filed the test claim with the Commission
09/23/2005	Department of Finance (DOF) filed comments on test claim
01/08/2007	Claimant filed a supplement to test claim to clarify the version of regulations pled
08/18/2011	Commission staff issued letter to California Department of Education (CDE) requesting the final statement of reasons for the 1998 and 2003 regulations
09/28/2011	Commission staff issued second request to CDE for the final statements of reason for the 1998 and 2003 regulations
09/29/2011	CDE submitted the final statements of reason for the regulations

I. BACKGROUND

This test claim addresses statutes and regulations governing the public instruction of limited English proficient (LEP) students in California. LEP students are those who do not speak English or students whose native language is not English and who are not currently able to perform ordinary classroom work in English.[11]

The law regarding the education for these students has a long history. Many federal and state laws have been enacted and interpreted by the courts to require appropriate action on the part of state and local educational agencies to ensure the equal participation and nondiscrimination in education for LEP students. In addition, federal and state laws have been enacted to provide funding for these services. A summary of these laws and the test claim statutes and regulations is provided below.

A. Overview of Federal Law

The 14th Amendment to the United States Constitution declares that no state may deny any person the equal protection of the laws. This amendment protects the privileges of all citizens, provides equal protection under the law, and gives Congress the power to enforce the amendment through legislation.

In 1964, Congress passed Title VI of the Civil Rights Act to prohibit discrimination based on race, color, age, creed, or national origin in any federally funded activity or program. In 1968, the federal Department of Health, Education, and Welfare (HEW), which has authority to adopt regulations prohibiting discrimination in federally assisted school systems, issued a guideline interpreting Title VI that "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system." In 1970, HEW made the guidelines more specific,

[11] See Education Code section 306.

requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "language deficiencies."[12]

In 1974, the United States Supreme Court decided *Lau v. Nichols*, a case brought by non-English speaking Chinese students challenging the unequal educational opportunities provided by the San Francisco Unified School District under Title VI of the Civil Rights Act.[13] The case presented uncontested facts that more than 2,800 school children of Chinese ancestry attended school in the district and did not speak, understand, read, or write the English language. For 1,800 of those students, the school district had not taken any significant steps to deal with the language deficiency.[14] The Supreme Court held that students of limited English proficiency who are not provided with special programs to help them learn English were being denied their rights under Title VI of the Civil Rights Act. The court held that the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students, and that it is not enough to merely provide these students the same facilities, textbooks, teachers, and curriculum. "[F]or students who do not understand English are effectively foreclosed from any meaningful education."[15] The court did not impose any specific remedy, but agreed with petitioners that teaching English to the students of Chinese ancestry who do not speak the language is one option, or giving instructions to this group of students in Chinese is another option.[16] Nevertheless, affirmative steps are required to be taken under Title VI to rectify the language deficiencies.

Shortly after *Lau*, Congress passed the Equal Educational Opportunities Act of 1974 (EEOA) as part of the amendments to the Elementary and Secondary Education Act. The EEOA was enacted pursuant to Congress' enforcement authority under the 14th Amendment to United States Constitution.[17] The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The EEOA defines the term "educational agency" to include both state and local educational agencies.[18] In addition, the Act provides that "an individual denied an equal educational

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[12] See *Lau v. Nichols* (1974) 414 U.S. 563, 566-567 for this history.

[13] *Ibid*.

[14] *Id.* at page 569.

[15] *Id.* at pages 566-568.

[16] *Id*. at page 565.

[17] The EEOA is codified in 20 United States Code, section 1703(f); *Gomez v. Illinois State Board of Education* (1987) 811 F.2d 1030, 1037.

[18] 20 United States Code, section 1720(a) and (b) define state and local educational agencies as those defined in 20 United States Code, section 3381. Under section 3381, a state educational agency includes "the State board of education or other agency or officer primarily responsible for

opportunity … may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate."[19] The EEOA limits court-ordered remedies to those that "are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[20]

Many courts have interpreted cases challenging violations of the EEOA, and have determined that by requiring a state "to take appropriate action to overcome language barriers" without specifying particular actions that a state must take, 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.[21] Thus, the appropriateness of a particular school system's language remediation program challenged under the EEOA is determined by the courts on a case-by-case basis. Nevertheless, the courts have interpreted the EEOA to generally require that the remediation programs and practices

- Be based on sound educational theory or principles;
- Are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Produce results indicating that the language barriers confronting students are actually being overcome.[22]

If a program, after being employed for a period of time sufficient to give the plan a legitimate trial, fails to produce results indicating that the language barriers confronting students are

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the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law." A local educational agency is defined in section 3381 to include "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school."

[19] 20 United States Code, section 1706.

[20] 20 United States Code, section 1712.

[21] *Castaneda v. Pickard* (1981) 648 F.2d 989, 1009. In 1974, Congress also passed the Bilingual Education Act to establish a competitive grant program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. However, the court in *Castaneda* found that Congress, in describing the remedial obligation imposed 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. Rather, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques to meet their obligations under the EEOA. (*Ibid*.)

[22] *Id*. at pages1009-1010.

actually being overcome, the program may no longer constitute appropriate action as far as that school is concerned.[23] The cases interpreting the requirements of the EEOA are discussed more fully in the analysis.

Almost thirty years later, in 2002, Congress passed Title III of the No Child Left Behind Act. Title III is entitled the "English Language Acquisition, Language Enhancement, and Academic Achievement Act" and was enacted to provide increased federal grant funding to state and local educational agencies to assist them in helping LEP students attain English language proficiency and meet the same academic standards as their English-speaking peers in all content areas.[24] In order to receive funding under Title III, state and local educational agencies are held accountable for the progress of LEP and immigrant students through annual measurable achievement outcomes, which measures the number of LEP students making sufficient progress in English acquisition, attaining English proficiency, and meeting Adequate Yearly Progress. The amount of funding each state receives is determined by a formula derived from the number of LEP and immigrant students in that state.[25] Title III also requires educational agencies, as a condition of receipt of funds, to inform the parents and guardians of LEP students how they can assist in their child's progress achieving English proficiency. In 2009, the United States Supreme Court, in *Horne v. Flores*, held that compliance with the provisions of Title III of No Child Left Behind does not necessarily constitute "appropriate action" required under the EEOA. The court found that the federal government's approval of a No Child Left Behind (NCLB) plan does not entail the substantive review of a state's program for LEP students or a determination that the programming results in equal educational opportunity for LEP students as required by the EEOA. Moreover, Title III contains a savings clause, which provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right."[26] Nevertheless, participation and compliance with Title III's assessment and reporting requirements provides evidence of the state and local educational agencies' progress and achievement of LEP students for purposes of the EEOA. [27]

B. Test Claim Statutes and Regulations

California has taken several steps to provide programs for LEP students. These programs have evolved from providing bilingual instruction while the student also learns English, to the current program adopted by the voters in 1998 requiring the use of English-only instruction. The test claim statutes and regulations that implement these programs are described below.

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[23] *Id.* at page 1010.

[24] 20 United States Code, sections 6801-7013; See also, *Horne v. Flores* (2009) 557 U.S. 433, where the United States Supreme Court stated that Title III significantly increased funding for English language learner programs.

[25] "Title III FAQs," California Department of Education.

[26] *Horne, supra*, 557 U.S. 433; 20 United States Code, section 6847.

[27] *Ibid.*

The Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Ed. Code, § 52160 et seq.; §§ 52164, 52164.1-52164.6 have been pled)[28]

This act provided funding to train bilingual teachers to meet the needs of LEP students through bilingual instruction.[29] Bilingual instruction programs are those in which LEP students, while learning English, receive instruction in academic subjects such as math, science, and social studies in their "primary" or "home" language.[30] The courts have explained the program as follows:

> [The program] set forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP [limited English proficient] students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs was to increase fluency in the English language for LEP students. Secondarily, the 'programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, …' (§ 52161.)[31]

The statutes in the Act required school districts to take a census of LEP students each year to determine the number of pupils of limited English proficiency and classify them according to their primary language. The statutes also required reassessment, reporting, and reclassifying the student once they became proficient in English.

The Act contained a sunset clause that became effective on June 30, 1987.[32] For eleven years following the Act's sunset, the Legislature was unable to gain the necessary consensus for any subsequent legislation regarding bilingual education. However, the Legislature authorized continued funding for the general purpose of bilingual education until 1998, when Proposition 227 was adopted by the voters.[33]

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[28] Originally enacted by Statutes 1976, chapter 978 (not pled in test claim, so staff makes no findings on it) the Act was amended by Statutes 1977, chapter 36 and Statutes 1978, chapter 848.

[29] Pursuant to Education Code section 52168, school districts were authorized to claim funds appropriated for the program for the costs incurred for the employment of bilingual-crosscultural teachers and aids, teaching materials, in-service training, reasonable expenses of parent advisory groups, health and auxiliary services for the pupil, and reasonable district administrative expenses (which included costs incurred for the census of pupils, assessments, and parent consultation).

[30] *Valeria G. v. Wilson* (1998) 12 F.Supp.2d 1007, 1012.

[31] "Educating California's Immigrant Children, An Overview of Bilingual Education," California Research Bureau, June 1999, page 16; *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 203-204.

[32] Education Code section 62000.2 (c); Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987.

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

Regulations Implementing Proposition 227 (Cal.Code Regs.,tit.5, § 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310))

On June 2, 1998, the voters of California passed Proposition 227 establishing the English Language Education for Immigrant Children program. The initiative added several statutes to the Education Code that became operative on August 2, 1998[34], and generally rejected bilingual education programs that were in effect in California public schools. The initiative replaced bilingual education programs with an educational system designed to teach LEP students English, and other subjects in English, early in their education.

Proposition 227 was premised on the following findings and declarations:

> The People of California find and declare as follows:
>
> (a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and
>
> (b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and
>
> (c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and
>
> (d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and
>
> (e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.
>
> (f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible.[35]

Proposition 227 requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year. "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children, in which nearly all classroom instruction is in English, but with the curriculum and presentation designed for

[34] Education Code sections 300, 305, 306, 310, 311, 315, 316, 320, 325, 335, and 340.

[35] Education Code section 300.

children who are learning the language.[36] The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.[37] Individual schools in which 20 pupils of a given grade level receive a waiver are required to offer a class in which children are taught English and other subjects through bilingual or other alternative educational techniques.[38]

English-learner pupils are required to be transferred to English-language mainstream classrooms once they have acquired "a good working knowledge of English."[39] In addition, the initiative affords parents a right to sue if their child or children are not provided English-only instruction.[40]

Proposition 227 was immediately challenged in federal court as violating the U.S. Constitution and other federal laws. The court rejected the challenges.[41]

On July 9, 1998, the State Board of Education adopted emergency regulations that later became permanent in November 1998 to provide guidance for school districts on the implementation of Proposition 227.[42] The final statement of reasons for the regulations states the following:

> Specifically, the proposed regulations clarify "school term," "informed belief of the school principal and educational staff," "a good working knowledge of English," and "a reasonable fluency in English;" provide guidance on the educational services to be provided to English language learners; describe the requirements for informing parents and guardians on the placement of their children, and outline the procedures for receiving and administering funds for community based English tutoring to English language learners.

In addition to the statutes enacted by Proposition 227, the final statement of reasons lists federal law and case law as references for the regulations,[43] and further states under "Disclosures" that the "proposed regulations do not impose a mandate on local agencies or school districts."[44]

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[36] Education Code sections 305, 306 (d).

[37] Education Code sections 310-311; *McLaughlin v. State Board of Education, supra*, 75 Cal.App.4th 196, 217.

[38] Education Code section 310.

[39] Education Code section 305. "English language mainstream classroom" means a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English." (Ed. Code, § 306 (c).)

[40] Education Code section 320.

[41] *Valeria v. Wilson, supra,* 12 F.Supp.2d 1007. Petitioners argued that the initiative violated the Equal Educational Opportunities Act, Title VI of the Civil Rights Act, and the Supremacy and Equal Protection Clauses of the U.S. Constitution.

[42] California Code of Regulations, title 5, subchapter 4, "English Language Learner Education," sections 11300-11305. In 2003, section 11303 was renumbered to section 11309; section 11304 was renumbered to section 11310 and amended; and section 11305 was renumbered to section 11315. The claimant has not pled former section 11305 or 11315.

2003 English Language Learner Regulations (Cal.Code Regs.,tit.5, § 11303, 11304, 11305, 11306, 11307, 11308)

The claimant has also pled clean-up regulations adopted by the Board of Education in 2003 that moved all previously-adopted regulations from the bilingual education program that sunset in 1987, to subchapter 4, "English Language Learner Education," where the original Proposition 227 regulations are located. The Board of Education's final statement of reasons for the 2003 regulations states the intent to provide one coherent system of regulations for English learners.

These regulations address the census of LEP pupils, assessment of LEP pupils using the California English Development test (CELDT), reclassification of the pupil from English learner to proficient in English, monitoring the progress of the pupils, and documentation requirements.

The final statement of reasons states that "[t]hese regulations do not impose a mandate on local agencies or school districts."[45]

California English Language Development Test Regulations (Cal.Code Regs, tit. 5, §§ 11510-11517)

From 1997 to 1999, California began developing the CELDT.[46] According to CDE, federal law (Title III of the No Child Left Behind Act and case law) and state law (Education Code sections 313 and 60810 through 60812), require a statewide English language proficiency test that school districts are required to administer upon enrollment of new LEP students and annually to students previously identified as LEP who have not been reclassified as fluent in English.[47] The test is used to comply with Proposition 227 to determine the level of English proficiency of the student.[48] In addition, funding is appropriated to school districts for the CELDT program to identify pupils who are limited English proficient, to determine the level of English language proficiency of LEP pupils, and to assess their progress.[49]

In 2001, a test claim was filed on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (00-TC-16)) seeking reimbursement for field testing the CELDT, the initial assessment of LEP students, the annual assessment of LEP

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[43] Final statement of reasons, page 2, lists the following references: U.S. Code, Title 20, Section 1703(f); *Lau v. Nichols* (Supreme Court 1974) 414 U.S. 563, 94 S.Ct. 786; *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041-1042.

[44] Final Statement of Reasons, page 6.

[45] Final Statement of Reasons, 2003 regulations, page 4.

[46] See Education Code section 60810; Statutes 1997, chapter 936, Statutes 1999, chapter 78.

[47] "California English Language Development Test –CalEdFacts" (www.cde.ca.gov/ta/tg/el/cefceldt.asp).

[48] Education Code section 313.

[49] Education Code section 60810(a)(4) and (d). Funding is appropriated in the State Budget through Item 6110-113-0001, schedule (3), for the CELDT.

students, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program was mandated by federal law through Title VI of the Civil Rights Act the EEOA, which require states and school districts to conduct English language assessments.

This test claim pleads the regulations that administer the CELDT, as added and amended in 2001 and 2003.[50] The regulations govern initial and annual assessments, reporting to parents, reporting test scores, documentation and pupil records, data for analysis of pupil proficiency, the district and test site coordinators' duties, test security, accommodations for pupils with disabilities, alternative assessments for pupils with disabilities, and apportionments to school districts.

Parental Notification (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11510): Education Code section 48985 requires that, for any K-12 school in which 15 percent or more pupils enrolled speak a single primary language other than English, "all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district," including those required by the regulations here, are to be written in the primary language of those pupils, in addition to English.[51] Districts determine the number of pupils whose primary language is not English by a language census given through a home language survey.

II. POSITION OF THE PARTIES

Claimant's Position

Claimant asserts that all of the requirements imposed by the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6, and Government Code section 17514.

Claimant acknowledges state funding of $100 per pupil that is reclassified to English-fluent status. (Former Ed. Code, § 404 (b).)[52] Claimant states this funding would offset the costs of compliance with the test claim statutes and regulations.[53]

State Agency Position

In its March 2005 comments, DOF states that the claim should be denied because of federal requirements, Proposition 227, and the voluntary acceptance of federal NCLB funding by

[50] These regulations were also amended in 2005. The 2005 amended regulations have not been pled and, thus, this analysis does not address the 2005 amendments.

[51] Statutes 1977, chapter 36; Statutes 1981, chapter 219.

[52] Section 404 was repealed by Statutes 2010, chapter 724 (AB1610), effective Oct. 19, 2010. According to the legislative analysis of AB 1610, the repeal provisions: "Combine the English Language Assistance Program (ELAP) funding with Economic Impact Aid (EIA) funding and repeals the ELAP statute. Clarifies that local educational agencies (LEAs) may continue using this funding for English language professional development." Assembly Floor, Concurrence in Senate Amendments, Analysis of AB 1610 (2009-2010 Reg. Sess.) as amended Oct. 7, 2010, page 1.

[53] Exhibit A.

potential claimants. DOF states that the test claim activities are "essential to the ability of the state and school districts to comply with the federal requirements …"[54]

III. DISCUSSION

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[55] Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] …"[56]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[57]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[58]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[59]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [60]

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[54] Exhibit B.

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

[56] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[57] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[58] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

[59] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

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

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[61] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[62] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[63]

ISSUE: Do the test claim statutes mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

A. Chacon-Moscone Bilingual Education Act (§§ 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, Stats. 1978, ch. 848, Stats. 1980, ch. 1339)

The Chacon-Moscone Bilingual Education Act was enacted in 1976 to provide bilingual education to pupils of limited English proficiency and to offer financial support to achieve that purpose.[64] "Bilingual-bicultural education" is defined in the Act as a system of instruction that uses two languages, one of which is English, as a means of instruction. The program consists of daily structured English language development instruction in English (through listening, speaking, reading, and writing), and daily instruction in the primary language of the pupil for the purpose of sustaining achievement in basic subject areas.[65]

1. Requirements Imposed by the Act

Many requirements are imposed by the Act. School districts are required to take an annual census of LEP students within the district and classify them according to their primary language, age, and grade level. The census must be taken by actual count, and not by estimates or samplings, and must include all pupils of limited English proficiency, including migrant and special education pupils. Census results are to be reported to the CDE not later than the 30th day of April of each year. The previous census shall be updated to include new enrollees and to eliminate pupils who are no longer LEP students or who no longer attend a school in the district. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.[66]

The Superintendent of Public Instruction, with the approval of the State Board of Education, is required to prescribe census-taking methods, to include the following:

- A determination of the primary language of each pupil enrolled in the school district.

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

[62] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[63] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[64] Education Code section 52161.

[65] Education Code section 52163.

[66] Education Code section 52164.

- An assessment of the language skills of all pupils whose primary language is other than English as pupils enroll in the district and determine whether such pupils are fluent in English or are of limited English proficiency.
- For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available.[67]

The parent or guardian of the pupil is to be notified of the results of the assessment. The statute also states as follows:

> Any district may elect to follow federal census requirements provided that the language skills described in subdivision (m) of Section 52163 are assessed, and provided that such procedures are consistent with Section 52164, the district shall be exempt from the state census procedures described in subdivisions (a) and (b).[68]

The Department of Education is required to review the results of the census each year, and audit the census if "the information provided … appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate."[69]

School districts are required to reassess pupils whose primary language is other than English when a parent or guardian, teacher, or school site administrator claims that there is reasonable doubt as to the accuracy of the pupil's designation. The school district must notify the parent or guardian of the result of the reassessment.[70]

The school district must retain pertinent information on the assessment of language skills for each pupil whose language is other than English so long as the pupil is enrolled in the district, and must report annually to the CDE on the number of pupils:

- Whose primary language is other than English;
- Who are of limited English proficiency;
- Whose primary language is other than English who are enrolled in classes defined in subdivisions (a) – (f) of Section 52163;
- The number of such pupils who have become bilingual and literate in English and in their primary language, as appropriate; and
- The number of such pupils who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.[71]

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[67] Education Code section 52164.1.

[68] Education Code section 52164.1 (c).

[69] Education Code section 52164.2.

[70] Education Code section 52164.3

[71] Education Code section 52164.5.

Reclassification is the process of reclassifying a pupil from limited-English proficient (or English learner) to proficient in English. School districts are required to establish reclassification criteria if there are pupils of limited English proficiency enrolled. The criteria are used to determine when pupils of limited English proficiency have developed the language skills necessary to succeed in an English-only classroom. The reclassification criteria include:

- Teacher evaluation, including a review of the pupil's curriculum mastery.
- Objective assessment of language proficiency and reading and writing skills.
- Parental opinion and consultation.
- An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.[72]

2. The Act Does Not Constitute a State-Mandated Program During the Period of Reimbursement for This Claim

The activities required by the test claim statutes, however, are not eligible for reimbursement because the statutes have not been operative during the period of reimbursement for this claim.[73] Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset on June 30, 1987, and ceased to be operative on that date.[74]

The purpose of the "sunset" legislation was to provide the Legislature with an opportunity to conduct a comprehensive review of the effectiveness of California's bilingual education programs. (§ 62001, Stats.1986, ch. 211.) As part of the sunset review process, Statutes 1983, chapter 1270 required CDE to review the bilingual education program and report on its appropriateness and effectiveness.[75] This 1983 statute included a June 30, 1985 sunset date (former § 62000), later extended to June 30, 1987,[76] and stated the following legislative intent:

> It is the intent of the Legislature, in enacting this act, to maintain and improve educational program quality while providing greater flexibility at the state and local levels, and to reduce paperwork which does not have direct educational benefit.

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[72] Education Code section 52164.6.

[73] Pursuant to Government Code section 17557, the eligible period of reimbursement for this claim would begin July 1, 2002.

[74] Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987. Education Code section 62000 further provides that the programs sunset "shall cease to be operative on the date specified, unless the Legislature enacts legislation to continue the program."

[75] Former Education Code section 62006 (Stats. 1983, ch. 1270).

[76] Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987, as did Statutes 1986, chapter 211, the source of current section 62000.2.

Although the state's bilingual education program ceased to be operative under the broad terms of these statutes, section 62002 specified that the state funding for the program continued for the general purposes of the program as follows:

> If the Legislature does not enact legislation to continue a program listed in this part, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program. The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative pursuant to this part both with regard to state-to-district and district-to-school disbursements. The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative except as specified in Section 62002.5.[77, 78]

School districts that continued to seek state funds for the program could apply for categorical funding pursuant to Education Code section 64000, and CDE was required to audit the use of state funds by the districts to ensure that the funds were expended for eligible pupils according to the purposes for which the legislation was originally established.[79]

In *McLaughlin v. State Board of Education*, the court discussed the history of the Chacon-Moscone Bilingual-Bicultural Education Act, noting that although the Act lapsed by operation of

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[77] See also Bill Honig "Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2" California State Department of Education, August 26, 1987. This advisory also discusses the existing federal requirements under the EEOA for states and local educational agencies to take appropriate action to eliminate language barriers impeding the participation of LEP students in a district's regular instructional program and, thus, some of the activities included in the sunsetted bilingual education program are still required by federal law. (See pages 16-20.)

[78] Pursuant to section 62002, all relevant statutes and regulations adopted under the bilingual education program were no longer operative after the sunset, "except as specified in Section 62002.5." In Education Code section 62002.5, the Legislature continued the statutory requirement for parent advisory committees and school site councils that were in existence as of January 1, 1979, pursuant to the statutes and regulations of the programs that were sunset. The Chacon-Moscone Bilingual Bicultural Act, in Education Code section 52176, required that each school district with more than 50 pupils of limited English proficiency to establish a district-wide advisory committee on bilingual education. Each school site with more than 20 pupils of limited English proficiency was also required to establish a school site committee to advise the principal and staff on bilingual education as specified. Funding is specifically provided for the advisory committees pursuant to Education Code sections 62002 and 52168(b). This test claim does not plead Education Code section 52176, however, and no findings are made on that statute.

[79] Education Code section 62003; *Department of Finance v. Commission on State Mandates* (2004) 30 Cal.4th 727, 746.

law, bilingual education continued through extended funding until Proposition 227 was passed in 1998. The court further noted that even though the Act lapsed with the sunset of the law, school districts "inexplicably" continued to seek waivers to opt out of the bilingual programs. "Equally inexplicably," the State Board of Education continued to grant waivers from the "defunct" law until March 1998, when the practice was rescinded.[80]

By the plain language of Education Code sections 62000 et seq., any state mandate imposed by the statutes pled in this test claim that are part of the Chacon-Moscone Bilingual-Bicultural Act ended on June 30, 1987. Thus, staff finds that the following test claim statutes do not constitute a state mandated program within the meaning of article XIII B, section 6 of the California Constitution: Education Code sections 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, as enacted or amended by Statutes 1978, chapter 848 and Statutes 1980, chapter 1339.

B. <u>Proposition 227 Regulations</u> (Cal.Code Regs.,tit.5, § 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310))

1. Statutes Enacted by the Voters in Proposition 227

In 1998, the voters adopted Proposition 227 (which added §§ 300 – 340, not including § 313, to the Education Code). The statutes added by the voters require all public school instruction to be conducted in English, and require English-learner pupils to be educated through sheltered English immersion during a temporary transition period not intended to exceed one year. Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English (§ 305).

The requirements of Proposition 227 may be waived by the parent under the following circumstances:

- Children who already know English - the child already knows English and possesses good English language skills, as measured by standardized tests of English vocabulary and comprehension, reading, and writing;
- Older children - the child is at least 10 years old and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or
- Children with special needs - the child has already been placed for a period of not less than 30 days during the school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development.

  A written description of the special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. The existence of special needs shall not compel

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

issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.[81]

Waiver of the requirements of Proposition 227 requires prior written informed consent from the child's parents or guardians to be provided annually.[82] . For the consent to be "informed consent," the parents or guardians are required to be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If the waiver is granted, the child may be transferred to classes where he or she is taught in English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law.

Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer bilingual classes, or allow the pupils with waivers to transfer to a public school in which such a class is offered.[83]

Thus, under Proposition 227, school districts are required to:

1. Instruct LEP students in English through sheltered immersion classes during a temporary transition period not normally intended to exceed one year, unless a parent exception waiver is granted;
2. Transfer the student to mainstream classrooms once they have acquired a good working knowledge of English;
3. Provide a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver;
4. Determine whether a pupil should be granted a parental exception waiver under Education Code section 311.
    a. If the child is 10 years or older, the school principal and educational staff must determine whether an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills.
    b. For pupils with special needs, determine whether the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development. Any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. Provide a written description of the special needs to the parents or guardians. Provide full information to parents or guardians of their right to refuse to agree to a waiver.

[81] Education Code section 311.

[82] Education Code section 310.

[83] Education Code section 310.

5. Offer bilingual education classes when 20 or more pupils have been granted parental exception waivers and are enrolled in a given grade, or allow the pupil to transfer to a public school where bilingual education is provided.

2. Test Claim Regulations Adopted to Implement Proposition 227 Do Not Mandate a New Program or Higher Level of Service

In 1998, CDE adopted regulations to implement Proposition 227. As more fully described below, staff finds that the regulations do not mandate a new program or higher level of service. These regulations were adopted to implement Proposition 227, and many activities are either expressly required by or are necessary to implement the ballot measure initiative. Article XIII B, section 6 requires reimbursement for mandates imposed by the Legislature or any state agency, and not by ballot measure initiatives.[84]

Furthermore, the regulations are intended to comply with federal law requirements imposed the Equal Educational Opportunities Act (EEOA). The EEOA prohibits states and local educational agencies from denying equal educational opportunity to an individual on account of his or her race, color, sex, or national origin. Under the Act, "failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," is considered a violation of federal law.[85] Requirements imposed by federal law do not result in a reimbursable state-mandated program.[86]

- Definitions, Knowledge and Fluency in English, and Duration of Services (§§ 11300, 11301, 11302)

These regulations define some of the terms used in Proposition 227. "School term," as used in Education Code section 330, is defined in section 11300 to clarify when the initiative became operative. "A good working knowledge of English" pursuant to Education Code section 305, and "reasonable fluency in English" pursuant to Education section 306, are also defined in these regulations to mean that "an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the CDE, or any locally developed assessments." The requirement to transfer LEP students to English mainstream classrooms once they have acquired a good working knowledge of English is expressly provided in Proposition 227 and was previously codified in Education Code section 305, and therefore, is not eligible for reimbursement. The remaining language simply clarifies the circumstances and timing of the transfer and does not mandate a new program or higher level of service.

Sections 11301 and 11302 also require school districts to continue to provide additional and appropriate educational services to K-12 English learners for the purposes of overcoming language barriers until the English learners have demonstrated English proficiency and recouped

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[84] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

[85] 20 United State Code, section 1703(f).

[86] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 879-880; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1582; Government Code section 17556(c).

any academic deficits which may have been incurred in other areas of the core curriculum as a result of the language barrier. An English learner may be re-enrolled in a structured English immersion program if the pupil has not achieved a reasonable level of English proficiency, unless the parents or guardians of the pupil object to the extended placement. The requirement to continue additional and appropriate education services to English learners until they have demonstrated English proficiency is mandated by Proposition 227. Proposition 227 requires school districts to instruct the pupil in a structured English immersion program until the pupil has acquired a reasonable level of English proficiency. Thus, this requirement does not mandate a new program or higher level of service.

In addition, the requirement to provide appropriate services to recoup any academic deficits that may have occurred in other areas of the core curriculum because of the language barrier is mandated by federal law and not eligible for reimbursement under article XIII B, section 6. In 1974, Congress enacted the Equal Educational Opportunities Act (EEOA, 20 U.S.C. § 1701 et seq.), which recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. According to the EEOA: "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

In *Castaneda v. Pickard*,[87] the Fifth Circuit Court of Appeal interpreted section 1703(f) of the EEOA when examining English-learner programs of the Raymondville, Texas Independent School District. The court held that the EEOA imposes an obligation on educational agencies to overcome the direct obstacle to learning which the language barrier itself poses, which includes the additional duty to provide LEP 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. In *Castaneda,* which CDE cites as authority for the section 11302 regulation,[88] the court stated the following:

> 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 § 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

[87] *Castaneda, supra,* 648 F. 2d 989.

[88] California Department of Education, Final Statement of Reasons, page 4 (adopted as Register 98, No. 30 (July 23, 1998)). The Final Statement of Reasons states that section 11302 was adopted to "ensure that LEAs understand the federal requirements for teaching English to English learners" and so they do not "misunderstand the intent of Education Code section 305 and provide no additional services for English learners after one year of structured English language immersion even though the pupil is not English proficient."

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.[89]

Accordingly, staff finds that sections 11300, 11301, and 11302 do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- Parental Exception Waivers (Former § 11303, renumbered to § 11309)

Former section 11303 (now codified in section 11309) identifies the process for obtaining a parental exception waiver pursuant to Education Code sections 310 and 311. As bulleted below, that section requires several notices to the parents or guardians, the adoption of parental waiver exception procedures and guidelines that include specific components, a written statement of reasons provided in cases where the waiver is denied, and authority to the parent or guardian to appeal a denied waiver to either the governing body of a school district (if the district has adopted an appeal process) or directly to court. The regulation requires the following activities:

1. Inform all parents and guardians of the placement of their children in a structured English immersion program and of the opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally-adopted guidelines for evaluating a parental waiver request.
2. Establish procedures for granting parental waiver exceptions which includes the following components:
    a. Parents and guardians must be provided with a full written description and, upon request, a spoken description, of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.
    b. Pursuant to Education Code section 311(c), parents and guardians must be informed that the pupil must be placed for a period of not less than 30 calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.
    c. Pursuant to Education Code section 311(b) and (c), parents and guardians must be informed in writing of any recommendation for an alternative program made by the school principal and educational staff and must be given notice of their right to refuse to accept the recommendation. The notice shall include a full description of the recommended alternative program and the educational materials to be used for the alternative program, as well as a description of all other programs available to the pupil. If the parent or guardian elects to request the

[89] *Castaneda, supra,* 648 F.2d 989, 1011.

alternative program recommended, the parent or guardian must comply with the requirements of Education Code 310 and all procedures for obtaining a parental exception waiver.

d. Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

3. Schools are required to act upon all parental exception waivers within 20 days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the 30 day placement in an English language classroom. These waivers must be acted upon either no later than 10 calendar days after the expiration of that 30 day English language classroom placement or within 20 instructional days of submission of the parental waiver to the school principal, whichever is later.

4. In cases where a parental exception waiver is denied, the parents and guardians must be informed in writing of the reasons for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.

Proposition 227 expressly imposes some of these requirements. For example, Education Code sections 310 and 311 require that the parent or guardian be provided with a description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child in order for them to make an informed decision about whether to seek a parental exception waiver. In addition, Education Code section 311(c) requires that the recommendation to place a special needs pupil in an alternative course of educational study be made pursuant to locally adopted guidelines. Moreover, parents and guardians have an existing right pursuant to Education Code section 320, which was added by Proposition 227, to challenge the decisions of a school district on these issues in court. These requirements have been mandated by the voters, and are not considered a mandate of the state within the meaning of article XIII B, section 6. [90]

In addition, the option to allow a parent or guardian to appeal a denied waiver to the local governing body of a school district is not required. School districts are not mandated by the state to adopt appeal procedures or conduct appeals.

However, the following regulatory requirements are not expressly required by the statutes adopted by the voters in Proposition 227: providing notices to the parents or guardians; adopting parental waiver exception procedures and guidelines for waivers that go beyond the limited exception provided for pupils with special needs; and providing a written statement of reasons to the parents or guardians in cases where the waiver is denied are not expressly required by Proposition 227. Nevertheless, staff finds that these excess procedural requirements are not mandates of the state, but are part and parcel of Proposition 227. Thus, these excess activities are not subject to reimbursement pursuant to article XIII B, section 6.

[90] *CSBA, supra,* 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

Government Code section 17556(f) requires the Commission to not find costs mandated by the state when a statute or executive order imposes duties that are necessary to implement a ballot measure approved by the voters in a statewide election. The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure are "necessary to implement" the ballot measure pursuant to Government Code section 17556(f), and do not impose costs mandated by the state when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs, when viewed in context of the program adopted by the voters, are de minimis. In such cases, that excess requirements are considered part and parcel of the underlying ballot measure mandate and are not reimbursable.[91]

The court borrowed this analysis from the California Supreme Court's decision in *San Diego Unified School Dist.* which addressed whether state imposed procedural requirements that exceeded federal due process requirements constituted a federal mandate. The issue in *San Diego Unified School Dist.* was whether procedural due process activities imposed by the test claim statute were reimbursable when a school district sought to expel a student. The court recognized that federal due process law requires school districts to comply with federal procedural steps, such as notice and a hearing, to safeguard the rights of a student when the student is subject to an expulsion from school. The Education Code statute pled in the test claim mandated procedures on school districts to implement federal due process requirements. The test claim statute also required school districts to comply with additional procedures that were not expressly required by federal law; i.e. "primarily various notice, right of inspection, and recording rules."[92]

The court held that all procedures set forth in the test claim statute, including those that exceed federal law, are considered to have been adopted to implement a federal due process mandate and, thus, the costs were not reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17556.[93] The court held that for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[94]

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[91] *CSBA, supra*, 171 Cal.App.4th at p. 1217.

[92] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 873, footnote 11, and 890. As stated in footnote 11 of the court's decision, the excess activities in the *San Diego Unified School Dist.* case included (1) the adoption of rules and regulations, (2) the inclusion of several notices in the notice of expulsion hearing, (3) allowing the pupil or the parent to inspect and obtain copies of documents to be used at the hearing, (4) sending written notice on the rights and obligations of the parents, (5) maintenance of a record of each expulsion, and (6) recording of the expulsion order and the cause thereof in the student's mandatory interim record.

[93] *Id.* at page 888.

[94] *Id.* at page 890.

In reaching this conclusion, the court relied on the holding in *County of Los Angeles*[95] and applied the reasoning in that case as follows:

> In this regard, we find the decision in *County of Los Angeles II, supra,* … to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections – namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that "even in the absence of section 987.9, … counties would be responsible for providing ancillary services under the constitutional guarantees of due process … and under the Sixth Amendment." (32 Cal.App.4th at p. 815 …) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute – requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request – were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. [Citation omitted.] Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute – requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request – were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. [Citation omitted.] Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety – that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds* – constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.
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> We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II,* …, the initial discretionary decision … in turn triggers a federal constitutional mandate … In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *Count of Los Angeles II* concluded, that for purposes of ruling upon a claim for

[95] *County of Los Angeles v. Commission on State Mandate*s (1995) 32 Cal.App.4th 805.

> reimbursement, such incidental procedural requirements, producing at most de minimis added costs, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[96]

The court in *CSBA* has directed the Commission to apply the holding and analysis in *San Diego Unified* to activities required by the state that are intended to implement ballot measure initiatives.[97] And, as applied here, the excess regulatory requirements to provide notices to parents or guardians, to adopt procedures and guidelines for parental exception waivers, and to provide a written statement of reasons to the parents or guardians in cases where the waiver is denied, are part and parcel of the underlying ballot measure mandate of Proposition 227.

The Final Statement of Reasons for these regulations clearly states the intent of the regulation is to implement Proposition 227. The authority and reference for section 11309 of the regulations are the Proposition 227 code sections added by the voters; Education Code sections 310, and 311. Absent this regulation, school districts would still be required to comply with the Proposition 227 requirements to approve parental exception waivers when appropriate and provide a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver. The excess activities simply establish notice to parents regarding the decisions made by the school district and the guidelines to implement the requirements imposed by the initiative.

There is no evidence that the excess requirements here are different in scope than the excess requirements in *San Diego Unified School District* case, which also included the adoption of rules and regulations, various notice requirements, the inclusion of several notices in the notice of expulsion hearing, maintaining a record of each expulsion, and recording the expulsion order and the cause thereof in the student's mandatory interim record.[98]

Therefore, staff finds that the activities required by former section 11303 (renumbered 11309) are necessary to implement the ballot measure mandate imposed by Proposition 227 and, thus, does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- State Board of Education Review of Guidelines for Parental Exception Waivers (Former § 11304, renumbered to § 11310)

Proposition 227 enacted Education Code 311(c), which allows for a parental exception waiver from English-only instruction for students with special needs. Under the statute, the principal or other educational staff can make a determination, based on locally developed guidelines, that an alternative course of educational study would be better suited to a child's overall educational development because of the child's special needs. The determination and written description of the special needs is required to be made pursuant to the guidelines, which are subject to review

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[96] *Id*. at pages 888-889 (Emphasis in original).

[97] *CSBA, supra*, 171 Cal.App.4th at page 1217.

[98] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 873, footnote 11,

by the local board of education and the State Board of Education. The parents have the right to be informed of the determination and their right to refuse to agree to a waiver.

Former section 11304 of the regulations (now codified in section 11310) requires school district governing boards to submit the guidelines or procedures adopted pursuant to Education Code section 311 regarding parental exception waivers to the State Board of Education upon request for its review. Any parent or guardian who applies for a waiver pursuant to Education Code section 311 may request a review of the local guidelines and procedures by the State Board of Education to determine if the guidelines comply with the law.

The purpose of the regulation is stated in the final statement of reasons adopted by CDE as follows:

> Education Code section 311(c) provides that LEAs may establish guidelines for not placing pupils with special needs in English language classrooms. Education Code section 311(c) also indicates that the guidelines may be subject to the review of the State Board of Education. This regulation clarifies for LEAs when they may be required to submit their guidelines to the State Board of Education and the purpose of the review.[99]

Former section 11304 does not impose any new requirements beyond those required by Education Code section 311(c), a statute enacted by the voters through Proposition 227. Thus, staff finds that former section 11304 (renumbered to section 11310) does not impose a state-mandated new program or higher level of service on school districts.

C. 2003 English Language Learner Regulations (Cal.Code Regs.,tit.5, § 11303, 11304, 11305, 11306, 11307, 11308)

Although grouped with the Proposition 227 regulations, these English Language Learner regulations became operative in 2003, five years after Proposition 227 was adopted, and do not cite to statutes enacted by Proposition 227 for their authority. When CDE adopted the regulations, it stated that the English Language learner regulations were found in sections 4304, 4306, 4311, 4312, and 11300-11305, and that sections 4304, 4306, 4311 and 4312 are the provisions remaining from the Chacon-Moscone bilingual education program that sunset June 30, 1987. Thus, CDE renumbered and added regulations "to provide one coherent system of regulations for English learners."[100]

As discussed below, staff finds that these regulations do not impose state-mandated new programs or higher levels of service on school districts. Federal case law interpreting EEOA and California statutes adopted before the regulations impose some of the same requirements as these regulations. While some procedural requirements in these regulations are not expressly set forth in federal law, they are part and parcel and, thus, necessary to implement the federal requirements of EEOA. All regulatory activities are intended to implement the federal law requirement imposed on state and local educational agencies to take appropriate action to overcome language barriers of LEP students that impede their equal participation in the regular

[99] California Department of Education, Final Statement of Reasons, page 5 (regulations adopted as Register 98, No. 30 (July 23, 1998)).

[100] Final Statement of Reasons, regulations adopted in 2003.

instructional program. Challenged state rules or procedures that are intended to implement federal law and, whose costs are considered de-minimis when viewed in the context of the law, are not reimbursable under article XIII B, section 6 of the California Constitution.[101]

Each regulation is discussed below.

1. Initial and Annual Assessments of LEP Students (§§ 11306, 11307(a))

Section 11307(a) of the regulations requires school districts to assess the English language skills of all pupils whose primary language is other than English upon initial enrollment as follows:

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

Section 11306 then requires school districts that report the presence of English learners to conduct annual assessments of the English language development and academic progress of those pupils.

Staff finds that the requirement to assess English language learner students, both initially and annually, for language development and academic progress does not mandate a new program or higher level of service.

In 1999, before the adoption of these regulations, the Legislature added section 313 to the Education Code to supplement Proposition 227.[102] Education Code section 313 requires school districts that have one or more pupils who are English learners to assess each pupil's English language development to determine the level of proficiency upon initial enrollment of each pupil and annually thereafter. The annual assessments are required to continue until the pupil is re-designated as English proficient. In addition, the statute requires that the assessment primarily use the CELDT.

Education Code section 313 was pled in the *CELDT I* test claim (00-TC-16) and denied by the Commission on the ground that the requirements of the statute were previously mandated by federal law. The Commission's decision in *CELDT I* is a final binding decision[103] and is supported by section 4 of the bill that added section 313, which states the following:

> It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[104]

Under federal law, state and local governments are required by the EEOA to take appropriate action to overcome language barriers that impede equal participation by its students in the regular instructional program. (20 U.S.C. § 1703 (f)). The courts have interpreted the EEOA to

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[101] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 608.

[102] Statutes 1999, chapter 678, section 3.

[103] *CSBA, supra*, 171 Cal.App.4th 1183, 1200.

[104] Statutes 1999, chapter 678, section 4.

require proper testing and evaluation to determine the progress of LEP students and the program.[105] In *Keyes v. School Dist. No. 1*, the court held a Denver school district violated the EEOA, in part because of the district's "…failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"[106]

Accordingly, staff finds that the initial and annual assessment of LEP students pursuant to sections 11306 and 11307(a) does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.[107]

2. Process of Reclassifying Pupils from LEP to Proficient in English (§§ 11303, 11304)

As indicated above, Education Code section 305, which was added by Proposition 227 in 1998, requires pupils to be transferred to English mainstream classes once it is determined that the pupil has acquired a good working knowledge of English.

Section 11303 of the regulations promulgates the process used to reclassify a pupil from English learner to proficient in English and requires the following procedural components to be used in the determination:

- Assessment of language proficiency using the CELDT, as provided in Education Code section 60810.
- Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.
- Parental involvement through notice to parents or guardians of the reclassification and placement of the pupil, and an opportunity to participate; and by seeking their opinion and consultation during the reclassification process.

Section 11304 requires school districts to monitor the progress of pupils reclassified to ensure correct classification and placement.

The requirements in section 11303 are not new. In 1999, section 313 was added to the Education Code to supplement Proposition 227 and implement federal law. Section 313 directed CDE to establish procedures for the reclassification of a pupil from English learner to proficient in English, and required that the reclassification process consider the same criteria outlined in section 11303 of the regulations. Education Code section 313 states in relevant part the following:

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

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[105] *Castaneda, supra,* 648 F. 2d 989, 1014.

[106] *Keyes v. School Dist. No. 1* (1983) 576 F. Supp. 1503, 1518.

[107] In addition, the federal NCLB requires an annual assessment of English proficiency of all students with limited English proficiency in order to obtain federal funding under the Act. (20 U.S.C., § 6311(b)(7).)

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

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

(3) Parental opinion and consultation.

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

As previously indicated, Education Code section 313 implements the requirements of federal law under the EEOA. The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by LEP students in the regular instructional program. The courts have determined that proper testing and evaluation of an LEP pupil is required to properly comply with the federal act.[108] The courts have also held that other measures, in addition to achievement test scores, should be considered to determine a programs' effectiveness in remedying language barriers. The court in *Castaneda* stated the following:

> 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 reflect many obstacles to learning other than language. We have no doubt that process of delineating the causes of differences in performance among students may well be a complicated one.[109]

Therefore, section 11303 of the regulations does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Moreover, the requirement imposed by section 11304 of the regulations to monitor the progress of a student after reclassification to ensure correct classification and placement is required by federal law and does not mandate a new program or higher level of service. The court in *Castaneda* determined that a program may still fail to comply with the EEOA if the program used to overcome language barriers for LEP students fails to produce results indicating that the language barriers are "actually being overcome."[110] Thus, there is a continuing duty under federal law to monitor actual results.[111]

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[108] *Castaneda, supra*, 648 F. 2d 989, 1014; *Keyes, supra*, 576 F.Supp 1503, 1518.

[109] *Castaneda, supra*, 648 F.2d at p. 1015, fn. 14.

[110] *Id.* at page 1010.

[111] Title III of NCLB also requires, as a condition of funding, pupil "evaluation" that includes "a description of the progress made by children in meeting challenging State academic content and

Accordingly, staff finds that sections 11303 and 11304 of the Title 5 regulations do not mandate a new program or higher level of service.

3. Documentation of Multiple Criteria Used in Reclassification (§ 11305)

This regulation requires school districts to maintain documentation regarding the assessment and evaluation of LEP students as follows:

> School districts shall maintain documentation of multiple criteria information, as specified in Section 11303 (a) and (d), [Assessment of language proficiency using the CELDT, and evaluation of pupil's performance for academic deficits] and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303 (b) and (c)[Participation by teacher and school personnel and parental involvement.]

Staff finds that section 11305 does not impose a state-mandated activity on school districts, but rather implements the requirements of federal law.

Documenting the assessment and evaluation of a pupil for purposes of reclassification is not expressly mandated by federal law. However, as determined by the California Supreme Court in the *San Diego Unified School Dist.* case, although an activity may not be expressly mandated by federal law, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate" and are not reimbursable.[112]

The reference and authority listed for section 11305 of the regulations are the federal EEOA and federal case law interpreting that Act: *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041-1042. Thus, CDE adopted the regulation to comply with federal law.

Moreover, the excess requirement imposed by section 11305 to maintain documents is the same requirement imposed by the state to comply with federal due process law in *San Diego Unified School Dist*., where reimbursement was denied.[113] There is no evidence that the costs here to perform the same activity, when considered with the requirements of the EEOA as a whole, are anything more than de minimis. Absent the requirement imposed by section 11305 of the regulations to maintain documentation for the assessment and evaluation of a pupil for purposes of reclassification, school districts would still be required by federal law to assess and evaluate the English language proficiency of a student, reclassify the student once proficiency is achieved, continue to monitor the student to ensure that the student remains proficient and can equally participate in the instructional program, and still be subject to potential civil litigation for its determination under the EEOA. Thus, the documentation requirement in section 11305 simply records the actions of compliance with federal law.

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student achievement standards for each of the 2 years after such children are no longer receiving [English learner] services under this part." (20 U.S.C. § 6841 (a)(4).)

[112] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 890.

[113] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 873, footnote 11,

Therefore, staff finds that section 11305 of the title 5 regulations[114] is necessary to implement a federal mandate, and is therefore not a reimbursable state mandate.

4. Census Requirements (§ 11307(b)(c))

Section 11307(b) and (c) require school districts to take a census of LEP students each year and report the results by grade level on a school-by-school basis to CDE by April 30 of each year as follows:

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

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

According to the 2011 language census instructions issued by CDE, the census is taken and reported for the purpose of collecting background and programmatic data on students from non-English-language backgrounds and to collect data on the staff providing services to English learners. The data is collected on the R30-LC form, and is used to produce state and federal reports, and to compute funding for Title III of the No Child Left Behind Act, the Community-based English Tutoring (CBET) program, Economic Impact Aid (EIA) for English learners, and the English Language Acquisition Program (ELAP). The census data is also used to project future English learner enrollments and teachers that provide instructional services to English learners. Data may also serve local needs, such as class load analyses, program design, and to determine school staffing needs.[115] CDE further states that the language census must be submitted because English learners "have federal protections, including the ruling in several federal court cases, such as *Castaneda v. Pickard* & *Gomez v. Illinois State Board of Education*."[116]

The R30-LC form reports the count of all identified English learners enrolled as of a date certain each year. These students are counted and identified based on their initial and annual CELDT scores (which are required to be given pursuant to Education Code section 313 and sections 11306 and 11307(a) of the regulations). In addition, if the reclassification process for annual testers has not been completed by the census date, the students continue to be counted as English learners.[117]

Staff finds that the census requirements imposed by section 11307 do not mandate a new program or higher level of service, but are part and parcel and necessary to implement federal law requirements. Pursuant to the *San Diego Unified* and *County of Los Angeles II* cases, reimbursement is not required when school districts are mandated by federal law to perform a duty. The Legislature or any state agency, to implement the federal law, then passes a law

[114] Register 98, No. 30 (July 24, 1998) pages 75-76; Register 99, No. 1 (Jan. 1, 1999) pages 75-76; Register 03, No. 2 (Jan. 10, 2003) pages 75-76.1.

[115] Instructions for the Spring Language Census (Form R30-LC), Reporting Year: 2011, page 1.

[116] *Id*. at p. 23.

[117] *Ibid.*

setting forth procedures to comply with the federal law and in the process, requires additional procedural duties that are intended to implement the federal law. Absent the state law, school districts are still required to comply with the underlying federal mandate. Under these circumstances, the excess procedural requirements constitute an implementation of federal law and are not reimbursable as a state mandated program. "[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate."[118]

As indicated above, the federal EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by English learner students in the regular instructional program. In *Castaneda*, the court determined that "appropriate action" meant, in part, that the programs used for LEP students must be reasonably calculated to effectively implement the educational theory adopted by the state and local educational agency as the "appropriate action" under the EEOA, that adequate resources must be provided, and that the action taken produces results indicating that the language barriers are actually being overcome. The court stated the following:

> We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite 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 § 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.[119]

In *Gomez v. Illinois State Board of Education*, the court, using the *Castenada* decision, clarified that state educational agencies, and not just local school districts, have a legal

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[118] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 890.

[119] *Castaneda, supra*, 648 F.2d 989, 1010; see also, *Horne v. Flores* (2009) 557 U.S.433, where the court stated that "any educational program, including the "appropriate action" mandated by the EEOA, requires funding" as a means to the end goal of overcoming the language barriers of English learners.

obligation under the EEOA to ensure that LEP students are properly identified and that the needs of these students are met.[120]

Under the facts in *Gomez*, the Illinois State Board of Education adopted regulations requiring every school district in Illinois to identify LEP students by taking a census. When the census identified 20 or more students who speak the same primary language, the local school district was required by the regulation to provide a transitional bilingual education program to those students. When the census disclosed less than 20 such students, the district was not required to conduct any review or supervision of the existence or adequacy of the services for achieving English proficiency. [121] Petitioners alleged that the regulations did not provide consistent guidelines on the identification process. As a result, the local school districts perceived they had unlimited discretion in selecting the methods of identifying such children and avoided the provision of transitional bilingual education requirements by identifying less than 20 LEP students of the same primary language. Thus, the petitioners argued that the State violated the EEOA by failing to promulgate uniform and consistent guidelines for the identification, placement, and training of LEP students.[122] While the court did not reach the merits of the arguments raised by petitioners against the State of Illinois, the court held that the EEOA places the obligation on state educational agencies to take appropriate action by setting general and consistent guidelines for local school districts to identify and provide appropriate educational services to LEP students and ensure that the implementation of the state's English proficiency program is effective.[123]

Here, the state's census requirements imposed by section 11307(b)(c) complies with these federal requirements. The census required by the test claim regulation provides information to state and local educational agencies regarding the number of English language learners to project the future needs of these students; determines appropriate funding for educating English learners; and shows evidence of whether the English only, structured English immersion program mandated by Proposition 227 is effective. The census activities are imposed to implement federal EEOA requirements and any additional procedural requirements imposed to implement existing federal law are considered part and parcel of the underlying federal requirement.

Accordingly, staff finds that the census activities required by section 11307(b)(c) do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

5. Parent Advisory Committees (§ 11308)

Section 11308 requires school districts to set up school advisory and school district advisory committees. School district advisory committees "shall be established in each school district

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[120] *Gomez v. Illinois State Board of Education* (1987) 811 F.2d 1030; see also, *Idaho Migrant Council v. Board of Education* (1981) 647 F.2d 69.

[121] *Gomez, supra,* 811 F.2d 1030, 1033.

[122] *Id.* at pages 1033-1034.

[123] *Id.* at pages 1037, 1042-1043.

with more than 50 English learners in attendance." School advisory committees on programs and services for English learners "shall be established in each school with more than 20 English learners in attendance." School advisory committees consist of parent members elected by the parents or guardians of English learners, and each school advisory committee elects at least one member to the district advisory committee, unless there are more than 30 school advisory committees, in which case the district may use a system of proportional or regional representation.

School district advisory committees are required by section 11308(c) to advise the school district governing board on the following matters:

- Development of a district master plan for education programs and services for English learners;
- Conducting a district wide needs assessment on a school-by-school basis;
- The establishment of district program, goals, and objectives for programs and services for English learners;
- Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements;
- Administration of the annual language census;
- Review and comment on the school district reclassification procedures;
- Review and comment on the written notifications required to be sent to parents and guardians.

In addition, school districts are required by section 11308(d) to provide training materials and training to all school advisory and school district advisory committee members. Funding under the chapter may be used to meet the costs of providing training including the costs associated with the attendance of the members at training sessions.

Staff finds that section 11308 does not impose a new program or higher level of service.

In 1979, the Legislature added sections 62002 and 62002.5 to the Education Code to sunset programs, including the Chacon-Moscone Bilingual Bicultural Education program. The statutes and regulations that implemented the bilingual education program were deemed inoperative by section 62002, "*except as specified in section 62002.5*." In section 62002.5, the Legislature continued the requirement that the advisory committees and school site councils that existed as part of the programs that sunset, continue and maintain the same functions and responsibilities as prescribed by the appropriate law or regulation in effect as of January 1, 1979. Education Code section 62002.5 states in relevant part the following:

> Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to the termination of funding for the programs sunsetted by this chapter. Any school receiving funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunsetting of these programs as provided in this chapter, shall establish a school site council in conformance with the requirements in Section 52012. The functions and responsibilities of such advisory committees

and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979.[124]

Education Code section 52176 was added in 1977 by the Legislature as part of the Chacon-Moscone Bilingual Bicultural Education Act. That statute requires school districts with more than 50 pupils of limited English proficiency, and schoolsites with more than 20 pupils of limited English proficiency, to establish advisory committees. Former section 4312 of the Title 5 regulations, as last amended in 1999 to implement Education Code sections 62002, 62002.5, and 52176, imposed the same requirements on the advisory committees as currently required in section 11308 of the regulations. Former section 4312 stated the following:

> (a) District advisory committees on programs and services for English learners will be established in each school district with more than 50 English learners in attendance. School advisory committees on education programs and services for English learners will be established in each school with more than 20 English learners in attendance. Both district and school advisory committees shall be established in accordance with Sections 52176 and 62002.5 of the Education Code.
>
> (b) The parents or guardians of English learners shall elect the parent members of the school advisory committee (or subcommittee, if appropriate). The parents shall be provided the opportunity to vote in the election. Each school advisory committee shall have the opportunity to elect at least one member to the District Advisory Committee, except that districts with more than 30 school advisory committees may use a system of proportional or regional representation.
>
> (c) District Advisory Committees shall advise the district governing board on at least the following tasks:
>
> (1) Development of a district master plan for education programs and services for English learners. The district master plan will take into consideration the school site master plans.
>
> (2) Conducting of a districtwide needs assessment on a school-by-school basis.
>
> (3) Establishment of district program, goals, and objectives for programs and services for English learners.
>
> (4) Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.
>
> (5) Administration of the annual language census.
>
> (6) Review and comment on the district reclassification procedures established pursuant to Education Code Section 52164.6.
>
> (7) Review and comment on the written notification of initial enrollment required in Section 11303(a).

[124] Statutes 1979, chapter 282; Statutes 1983, chapter 1270.

(d) School districts shall provide all members of district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c). Training provided advisory committee members in accordance with this subsection shall be planned in full consultation with the members, and funds provided under this chapter may be used to meet the costs of providing the training to include the costs associated with the attendance of the members at training sessions.

Pursuant to Education Code section 62002.5, Education Code section 52176 and former section 4312 of the regulations remained continuously in effect despite the sunset of the state's bilingual education statutes until section 11308 became effective in 2003.

Therefore, because the parent advisory committees have been continuously required since 1977, and the sunset statutes provided for their continuance, staff finds that the requirements imposed by section 11308 of the title 5 regulations do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

D. California English Development Test Regulations (§§ 11510-11517)[125]

In 1997, Education Code sections 60810 et seq. required the State Board of Education to approve standards for English language development for pupils whose primary language is other than English. The Superintendent of Public Instruction was also required to develop a test or series of tests to

- Identify pupils who are limited English proficient.
- Determine the level of English proficiency of pupils who are limited English proficient.
- Assess the progress of limited English proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

In 1999, Education Code section 313 was enacted to supplement the Proposition 227 initiative on English language instruction, to require school districts to assess each pupil's English language development upon initial enrollment and annually thereafter until the pupil is reclassified as English proficient. Section 313 states that the assessment shall primarily utilize the test identified in section 60810. Education Code 313 also required CDE to establish procedures for conducting the assessment for the reclassification of a pupil from English learner to English proficient. The test that was developed is the CELDT.

As indicated in the Background, a test claim was filed in 2001 on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (*CELDT I*, 00-TC-16)) seeking reimbursement for field testing the CELDT, the initial assessment of LEP students, the annual assessment of LEP students, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program is mandated by federal law. Title VI of the Civil Rights Act (42 U.S.C. § 2000d), which prohibits discrimination under any program or activity receiving federal financial assistance, and the EEOA require states and school districts to conduct English

[125] Sections 11516, 11516.6, 11517 and the 2005 amendments to these regulations are not part of the test claim. Staff makes no finding on these regulations.

language assessments. The Commission's decision in *CELDT I* (00-TC-16) is a final binding decision and, thus, the parties may not re-litigate in the current claim whether the activities required by Education Code sections 313 and 60810 through 60812 impose a reimbursable state-mandated program.[126] The CELDT I test claim, however, did not plead the regulations that were adopted to govern the administration of the test.

In 2001, CDE adopted regulations to implement Education Code sections 313 and 60810 through 60812.[127] These title 5 regulations impose the following requirements on school districts:

- Assess a pupil whose native language is other than English for English language proficiency with the CELDT within 30 calendar days of enrollment in the school district and during the annual assessment window. (§ 11511 (a) & (b).)
- Administer the CELDT "in accordance with the test publisher's directions, except as provided by Section 11516.5." Section 11516.5 governs administering the test to pupils with disabilities. (§ 11511 (c).)
- If the school district places an order with the publisher of the test that is excessive, the district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. (§ 11511 (d).)
- Notify parents or guardians of the pupil's test results on the CELDT within 30 calendar days following receipt of results of testing from the test publisher. The notification is required to comply with Education Code section 48985. (§ 11511.5.) Education Code section 48985 requires notifications to be in the parent's primary language.
- Maintain a record of pupils who participated in each administration of the CELDT, as specified. (§ 11512.)
- Provide the publisher of the CELDT with information for each pupil tested, as specified. (§ 11512.5.)
- Designate a CEDLT district coordinator, with specified responsibilities. (§ 11513.)
- Designate a CELDT test-site coordinator for each test site, including each charter school, with specified responsibilities. (§ 11513.5.)
- Comply with test security measures, as specified. (§ 11514.)
- Provide accommodations for testing for pupils with disabilities. The accommodations provided are those that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education program plan (IEP). (§ 11516.5.)
- Report to CDE the unduplicated count of the number of pupils to whom the CELDT was administered for annual or initial assessment during the 12 month period prior to June 30 of each year, as specified. (§ 11517.) This section was repealed operative June 9, 2005, Register 2005, No. 23.

[126] *CSBA, supra,* 171 Cal.App.4th 1183, 1201-1202.

[127] These statutes are listed as the authority and reference for the CELDT regulations.

Staff finds that these activities do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, but are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.[128]

The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by students in the instructional programs offered. As stated by the court in *Castaneda,* proper testing and evaluation is essential under the EEOA to determine the progress of students involved in the program and in evaluating the program itself.[129]

The courts have also clarified that the EEOA imposes on state agencies the duty to take appropriate action to ensure that LEP students are properly identified, evaluated, and placed, and to establish uniform guidelines for school districts to follow in such areas. [130] In the *Gomez* case, the petitioners alleged that the state violated the EEOA by not providing proper guidelines regarding the identification and testing of students as follows:

> In addition, because of the absence of proper guidelines, local districts have been found to use as many as 23 different language proficiency tests, 11 standardized English tests, 7 standardized reading tests, and many formal and informal teacher-developed tests. Some of these tests do not accurately measure language proficiency, so that LEP children are not properly identified. This array of tests has also, to the detriment of plaintiffs, resulted in inconsistent results.[131]

The regulations here comply with these principles and do not mandate a new program or higher level of service.

The requirement imposed by the regulations to provide an initial and annual assessment of limited English proficient students is not new, but is expressly mandated by Education Code section 313 and, as described above, by federal law under the EEOA.

Moreover, providing test accommodations to students with disabilities that take the CELDT is mandated by existing federal law under the Individuals with Disabilities Education Act (IDEA). The IDEA requires that state and local education agencies ensure that children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services.[132] These services include special test-taking accommodations, as necessary and determined during the student's individualized education plan (IEP) process. The IDEA further requires that disabled children be "included in general State and district-wide assessment programs, with appropriate accommodations, when necessary."[133]

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[128] The CELDT is also required as a condition of receiving federal funds from Title III of NCLB. (20 U.S.C. § 6311(b).)

[129] *Castaneda, supra,* 648 F. 2d 989, 1014.

[130] *Gomez, supra,* 811 F.2d 1030, 1042.

[131] *Id.* at page 1033.

[132] 20 United States Code section 1400 et seq.

[133] 20 United States Code section 1412(a).

The remaining requirements in the regulations are not expressly mandated by the federal EEOA statutes. However, the activities to coordinate with the test publisher, comply with test security measures, notify parents and guardians of the results, maintain records, designate district and school-site coordinators, and provide a report to the state are necessary to implement the federal requirement in the EEOA for the state to establish, and the state and local educational agencies to implement, uniform guidelines for the proper identification and assessment of limited English proficient students. "[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate."[134] The California Supreme Court has determined that these types of activities, which may exceed the express provisions of federal law, are not reimbursable under article XIII B, section 6 of the California Constitution because the activities are considered part and parcel of the underlying federal mandate.[135]

Accordingly, staff finds that the CELDT regulations (Cal. Code Regs., tit. 5, §§ 11510-11517) do not impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

E. Notice to Parents Provided in English and the Primary Language of the Parent (Ed. Code, § 48985; Cal.Code Regs., tit. 5, §§ 11316, 11511.5)

The claimant has pled Education Code section 48985, as added in 1977 and amended in 1981.[136] The statute requires that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual census. Education Code section 48985, as amended in 1981, stated the following:

> When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

Education Code section 48985 was amended in 2006 to place the quoted language in subdivision (a), and to add subdivisions (b) through (d). The 2006 statute has not been pled in this test claim and, thus, no analysis is provided for subdivisions (b) through (d).[137]

Regulations under the English Language Learner Education and CELDT regulations have been adopted to comply with Education Code section 48985. Section 11316 of the Title 5 regulations

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[134] *San Diego School Dist., supra,* 33 Cal.4th at page 890.

[135] *Id.* at page 889.

[136] Statutes 1977, chapter 36; Statutes 1981, chapter 219.

[137] Statutes 2006, chapter 706.

is placed in the English Language Learner Education chapter of the regulations and provides the following:

> All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

As described earlier in the analysis, the notices referred to in section 11316 of the regulations include the notice required by section 11309 of the regulations regarding the placement of an LEP student in a structured English immersion program and the opportunity for parents or guardians to apply for a parental exception waiver. It also includes the notice required by section 11303 of the regulations regarding the language reclassification process and placement of an LEP student.

Similarly, section 11511.5 of the CELDT regulations requires that CELDT reports to parents or guardians to comply with Education Code section 48985. Section 11511.5 states the following:

> For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

The requirement to provide notices to parents in their primary language, however, is not new. Former Education Code section 10926, as added in 1976, imposed the same requirements as follows:

> When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 5761.3 by the first day of April in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language
>
> Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because this act merely affirms for the state that which has been declared existing law or regulation through action of the federal government.[138]

Accordingly, staff finds that Education Code section 48985 and sections 11316, 11511.5 of the Title 5 regulations do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

IV. CONCLUSION

[138] Statutes 1976, chapter 361.

Based on the above analysis, staff concludes that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

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

Commission on State Mandates

Original List Date: 9/30/2003
Last Updated: 4/6/2012
List Print Date: 04/06/2012
Claim Number: 03-TC-06
Issue: California English Language Development Test - 2

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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648 F.2d 989
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United States Court of Appeals,
Fifth Circuit.
Unit A
Elizabeth and Katherine CASTANEDA, by their father and next friend, Roy C. Castaneda, et al., Plaintiffs-Appellants,
v.
Mrs. A. M. "Billy" PICKARD, President, Raymondville Independent School District, Board of Trustees, et al., Defendants-Appellees.

No. 79-2253.
June 23, 1981.

Plaintiffs, Mexican-American children and their parents who represented a class of others similarly situated, brought action against school district alleging that district engaged in policies and practices of racial discrimination which deprived plaintiffs and their class of rights secured by them by the Constitution and various federal statutes. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., entered judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) remand for purpose of determining whether school district had past history of discrimination and whether it currently operated unitary school system was necessary in order to determine claims that district's ability grouping system of student assignment for grades K-8 was unlawful; (2) bilingual education and language remediation programs offered by school district did not violate the Title VI; and (3) school district's bilingual education and language remediation programs were inadequate with respect to in-service training of teachers for bilingual classrooms and in measuring progress of students in the programs.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 78 1536

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1536 k. Effect of Prima Facie Case; Shifting Burden. 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 78 1424

78 Civil Rights
78III Federal Remedies in General
78k1424 k. Trial in General. 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 345 13(6)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(6) k. Desegregation Plans in General. 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 345 13(21)

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k13 Separate Schools for Racial Groups
345k13(18) Actions
345k13(21) k. Review. 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 78 1070

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1070 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k127.1, 78k127, 78k13.4(1))

Civil Rights 78 1331(5)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(5) k. Employment Practices. 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 78 1395(8)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(8) k. Employment Practices. Most Cited Cases
(Formerly 78k235(3), 78k13.12(3))

Civil Rights 78 1405

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1405 k. Employment Practices. 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 78 1535

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1535 k. In General. 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 78 1060

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1060 k. In General. 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 170B 858

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk855 Particular Actions and Proceedings, Verdicts and Findings
170Bk858 k. Civil Rights Cases. 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 78 1139

78 Civil Rights
78II Employment Practices
78k1139 k. “Pattern or Practice” Claims. Most Cited Cases
(Formerly 78k142, 78k9.10)

Civil Rights 78 1544

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1544 k. In General. 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 78 1544

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1544 k. In General. 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 170B 939

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk937 Necessity for New Trial or Further Proceedings Below
170Bk939 k. Questions Not Passed on Below. Most Cited Cases

Remand was necessary for comparison of employment statistics of school district with ethnic composition of relevant labor market for purpose of determining whether class of Mexican-American students and parents established prima facie case of unlawful discrimination as to school district's hiring of teachers and its hiring or promotion of persons to administrative positions and, if so, whether school district could adequately rebut prima facie case. Equal Educational Opportunities Act of 1974, § 204(d), 20 U.S.C.A. § 1703(d); Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; U.S.C.A.Const. Amend. 14.

[14] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. 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 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. Most Cited Cases

School district's bilingual education and language remediation programs were inadequate with respect to in-service training of teachers for bilingual classrooms and in measuring progress of students in the programs. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

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Michael K. Swan, Jeffrey A. Davis, Houston, Tex., for Pickard, et al.

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Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

RANDALL, Circuit Judge:
Plaintiffs, Mexican-American children and their

parents who represent a class of others similarly situated, instituted this action against the Raymondville, Texas Independent School District (RISD) alleging that the district engaged in policies and practices of racial discrimination against Mexican-Americans which deprived the plaintiffs and their class of rights secured to them by the fourteenth amendment and 42 U.S.C. s 1983 (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d et seq. (1976), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. s 1701 et seq. (1976). Specifically, plaintiffs charged that the school district unlawfully discriminated against them by using an ability grouping system for classroom assignments which was based on racially and ethnically discriminatory criteria and resulted in impermissible classroom segregation, by discriminating against Mexican-Americans in the hiring and promotion of faculty and administrators, and by failing to implement adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs' equal participation in the educational program of the district.[FN1] The original complaint also named the Secretary of the Department of Health, Education and Welfare (HEW) as a defendant and alleged that the department, although charged with responsibility to assure that federal funds are spent in a nondiscriminatory manner and cognizant of the school district's noncompliance with federal law, had failed to take appropriate action to remedy the unlawful practices of the school district or to terminate its receipt of federal funds. By an amended complaint, the plaintiffs also named the Texas Education Agency (TEA) as a defendant and charged that the TEA had failed to fulfill its duty to assure that the class represented by the plaintiffs was not subjected to discriminatory practices through the use of state or federal funds.

> FN1. The pleadings in this case also contained an allegation that the school district had administered the extracurricular programs of its schools with the purpose and effect of denying Mexican-American students an equal opportunity to participate in such activities. The record reveals no evidence on this issue and plaintiffs have not reasserted this claim on appeal.

The case was tried in June 1978; on August 17, 1978 the district court entered judgment in favor of the defendants based upon its determination that the policies and practices of the RISD, in the areas of hiring and promotion of faculty and administrators, ability grouping of students, and bilingual education did not violate any constitutional or statutory rights of the plaintiff class. From that judgment, the plaintiffs have brought this appeal in which they claim the district court erred in numerous matters of fact and law.

Although upon motion of the plaintiffs, HEW was dismissed as a defendant in this suit before trial, the agency remains an important actor in our current inquiry because this private litigation involves many of the same issues considered in an HEW administrative investigation and fund termination proceeding involving RISD. In April 1973, following a visit from representatives of HEW's Office for Civil Rights (OCR), HEW notified RISD that it failed to comply with the provisions of Title VI and administrative regulations issued by the Department to implement Title VI. HEW requested that RISD submit an affirmative plan for remedying these deficiencies. Apparently,***993** RISD and the OCR were unable to negotiate a mutually acceptable plan for compliance and in June 1976, formal administrative enforcement proceedings were instituted in which the OCR sought to terminate federal funding to RISD. RISD requested a hearing on the allegations of noncompliance and in January 1977, a five day hearing was held before an administrative law judge. Thereafter, the judge entered a decision which concluded that RISD was not in violation of Title VI or the administrative regulations and policies issued thereunder. The judge ordered that the suspension of federal funds to the district be lifted. This decision was affirmed in April 1980, by a final decision of the Reviewing Authority of the OCR.

The extensive record of these administrative proceedings, including the transcript of the hearing before the administrative law judge and the judge's decision, was received into the record as evidence in the trial of this case and included in the record on appeal. The defendants have moved to supplement the appellate record by including the decision of the Reviewing Authority. This motion was carried with the appeal. Since the record in this case already includes extensive material from this administrative proceeding, which involved many of the same questions of fact and law as this case, we see no reason why the final administrative determination of those questions should not also be included. The defendants' motion to supplement the appellate record in this cause to in-

clude the final decision of the Reviewing Authority of OCR is, therefore, granted.

Before we turn to consider the specific factual and legal issues raised by the plaintiffs in their appeal of the district court's judgment, we think it helpful to outline some of the basic demographic characteristics of the Raymondville school district. Raymondville is located in Willacy County, Texas. Willacy County is in the Rio Grande Valley; by conservative estimate based on census data, 77% of the population of the county is Mexican-American and almost all of the remaining 23% is "Anglo." The student population of RISD is about 85% Mexican-American.

Willacy County ranks 248th out of the 254 Texas counties in average family income. Approximately one-third of the population of Raymondville is composed of migrant farm workers. Three-quarters of the students in the Raymondville schools qualify for the federally funded free school lunch program. The district's assessed property valuation places it among the lowest ten percent of all Texas counties in its per capita student expenditures.

The district operates five schools. Two campuses, L.C. Smith and Pittman, house students in kindergarten through fifth grade. The student body at L.C. Smith is virtually 100% Mexican-American; Pittman, which has almost twice as many students, has approximately 83% Mexican-American students. There is one junior high school, which has 87% Mexican-American students, and one high school, in which the enrollment is 80% Mexican-American.

I. A THRESHOLD OBSTACLE TO APPELLATE REVIEW

In their brief on appeal, the plaintiffs contend first, that the analysis of the memorandum opinion in which the district court concluded that the challenged policies and practices of the RISD did not violate the fourteenth amendment, Title VI or the Equal Educational Opportunities Act is pervasively flawed by the court's failure to make findings concerning the history of discrimination in the RISD in assessing the plaintiffs' challenges to certain current policies and practices. Plaintiffs contend that these issues were properly raised by the pleadings and that there was ample evidence in the record to support findings that RISD had, in the past, segregated and discriminated against Mexican-American students and that, as yet, RISD has failed to establish a unitary system in which all vestiges of this earlier unlawful segregation have been eliminated because the virtually 100% Mexican-American school, L.C. Smith, is a product of this earlier unlawful policy of segregation. Although the plaintiffs in this case did not challenge the current student***994** assignment practices of the RISD (which are no longer based on attendance zones but rather on a freedom of choice plan) or request relief designed to alter the ethnic composition of the student body at L.C. Smith, the evidence of past segregative practices of RISD was relevant to the legal analysis of two of the claims the plaintiffs did make.

[1] The plaintiffs here challenge the RISD's ability grouping system which is used to place students in particular sections or classes within their grade. We have consistently stated that ability grouping is not per se unconstitutional. In considering the propriety of ability grouping in a system having a history of unlawful segregation, however, we have cautioned that if testing or other ability grouping practices have a markedly disparate impact on students of different races and a significant racially segregative effect, such practices cannot be employed until a school system has achieved unitary status and maintained a unitary school system for a sufficient period of time that the handicaps which past segregative practices may have inflicted on minority students and which may adversely affect their performance have been erased. United States v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978); Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975); McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975); Moses v. Washington Parish School Board, 456 F.2d 1285 (5th Cir. 1972); Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1219 (5th Cir. 1969).

[2] The question whether RISD has a history of unlawful discrimination is also relevant to the analysis of plaintiffs' claim regarding the district's employment practices. In cases involving claims similar to those made here regarding a pattern or practice of discrimination in the employment of faculty and staff, we have held that when such a claim is asserted against a school district having a relatively recent history of discrimination, the burden placed on the defendant school board to rebut a plaintiff's prima facie case is heavier than the burden of rubuttal in the usual em-

ployment discrimination case. In a case involving a school district with a history of discrimination, the defendant must rebut the plaintiff's prima facie case by clear and convincing evidence that the challenged employment decisions were motivated by legitimate nondiscriminatory reasons. Lee v. Conecuh County Board of Education, 634 F.2d 959 (5th Cir. 1981); Lee v. Washington County Board of Education, 625 F.2d 1235, 1237 (5th Cir. 1980); Davis v. Board of School Commissioners, 600 F.2d 470, 473 (5th Cir. 1979); Hereford v. Huntsville Board of Education, 574 F.2d 268, 270 (5th Cir. 1978); Barnes v. Jones County School District, 544 F.2d 804, 807 (5th Cir. 1977). This, of course, is a much heavier burden of rebuttal than that imposed on an employer in the usual employment discrimination case under Texas Department of Community Affairs v. Burdine, - U.S. -, -, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). [FN2]

FN2. In Burdine, the Supreme Court elaborated upon the basic allocation of the burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment which it had enumerated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The Court clarified the defendant's burden of rebuttal by describing it as follows:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.
>
> - U.S. at -, 101 S.Ct. at 1094 (footnotes omitted).

Although the Court's opinion in Burdine clearly disapproves of this circuit's previous practice of requiring the defendant in a Title VII case to prove the existence of legitimate non-discriminatory reasons for a challenged employment decision by a preponderance of the evidence, we do not believe that Burdine affects the burden shifting device we have long employed in the distinctive context of claims alleging discrimination, whether in employment or other areas, by a school district with a history of unlawful segregation. The analysis we have employed in this latter type of case is not derived from McDonnell Douglas; even as we employed the now disapproved "preponderance of the evidence" requirement in most Title VII contexts, we distinguished the situation where a claim of employment discrimination was lodged against a school district which formerly operated a dual school system and imposed the even stiffer "clear and convincing" standard. Lee v. Conecuh County Board of Education, 634 F.2d 959 (5th Cir. 1981). The application of this standard under these circumstances, is consistent with the type of presumptions approved by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (in school district which formerly operated segregated dual system, burden placed on district to establish that continued existence of some one-race schools is not the result of present or past discriminatory action by the district) and Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973) ("finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.") We do not believe the Court in Burdine intended to affect the manner in which this court has applied a presumption similar to that recognized in Swann and Keyes, to place on school districts having a history of unlawful discrimination a more onerous burden of re-

buttal in an employment discrimination case than is usually imposed on defendant in a Title VII case.

[3] Plaintiffs raised the issue of RISD's past discrimination in their pleadings and introduced substantial evidence in support ***995** of this claim in the proceedings before the district court; [FN3] thus, the district court's failure to make findings regarding the history of the district and whether vestiges of past discrimination currently exist in the district cannot be excused on the grounds that these issues were not properly before the court. The absence of findings on these issues seriously handicaps our review of the merits of the ability grouping and employment discrimination claims made by the plaintiffs in this case. With regard to plaintiffs' first two arguments on appeal, our opinion will, therefore, be limited to identifying the factual and legal determinations which, although necessary to a proper analysis of the plaintiffs' claims, were not made by the district court and must be ***996** made upon remand and to reviewing those aspects of the merits of these claims which are not affected by this failure to make certain essential findings.

FN3. The record contains evidence that although Raymondville has always operated only one secondary school facility, attended by both Anglo and Mexican-American students, there was historically, segregation of Mexican-American students at the elementary school level. From school board minutes it appears that in the early decades of this century RISD operated schools on only one campus. There were separate buildings or wings of buildings on this one site for the "Mexican School" and the "American School," both of which provided instruction in the elementary grades, and the secondary school which housed junior high and high school students.

In 1947, overcrowding at the central campus prompted a proposal that RISD operate another elementary school at a different site in northwest Raymondville and to establish attendance zones for elementary students. This proposal met with organized and vocal opposition from the Mexican-American community. The League of United Latin-American Citizens petitioned the board to consider another location for the new school and complained that the proposed site coupled with the new attendance zone policy would result in the establishment of a school attended almost exclusively by Mexican-Americans. The school board nevertheless proceeded to open a school on the northwest Raymondville site. This school, known first as the San Jacinto school and later as the North Ward school, was housed in old military barracks. This school was closed and the L.C. Smith school was built on the same site in 1962. We note that although the northwest campus has apparently been a virtually all-Mexican-American school, it is not clear from the record that the main campus elementary school was ever exclusively, or even primarily, Anglo and it is certainly not so today. It is clear, however, that as a result of the manner in which attendance zones were defined, the Anglo students were concentrated at the main campus elementary school facilities. At that campus, Mexican-American students were apparently instructed in separate classes during the first three elementary grades in an effort to provide English language instruction; classrooms at the main elementary school were integrated beginning with the fourth grade. The record in this case does not contain evidence from which we can determine whether, despite this history, RISD has now fully remedied the effects of these practices and operates a unitary system.

II. ABILITY GROUPING

RISD employs an ability grouping system of student assignment. In the elementary grades and the junior high school, students are placed in a particular ability group (labeled "high," "average" or "low") based on achievement test scores, school grades, teacher evaluations and the recommendation of school counselors. In grades 1-6, once students have been placed in a particular ability group, they are assigned to a specific class for that group by a random manual sorting system designed to assure that each classroom has a roughly equal number of girls and boys. After the junior high school students are grouped by ability,

they are assigned to particular sections of their ability group by computer. Although Raymondville High School offers courses of varying pace and difficulty, students are not assigned to particular ability groups. High school students, with the assistance of their parents and school counselors, choose the subjects they wish to study (subject, of course, to the usual sort of prerequisites and curriculum required for graduation) and are free to select an accelerated, average or slower class. Plaintiffs claim that these ability grouping practices unlawfully segregate the Mexican-American students of the district.

As we noted above, this circuit has consistently taken the position that ability grouping of students is not, per se, unconstitutional. The merits of a program which places students in classrooms with others perceived to have similar abilities are hotly debated by educators; nevertheless, it is educators, rather than courts, who are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved. Thus, as a general rule, school systems are free to employ ability grouping, even when such a policy has a segregative effect, so long, of course, as such a practice is genuinely motivated by educational concerns and not discriminatory motives. However, in school districts which have a past history of unlawful discrimination and are in the process of converting to a unitary school system, or have only recently completed such a conversion, ability grouping is subject to much closer judicial scrutiny. Under these circumstances we have prohibited districts from employing ability grouping as a device for assigning students to schools or classrooms, United States v. Gadsden County School District, supra; McNeal v. Tate County School District, supra. The rationale supporting judicial proscription of ability grouping under these circumstances is two-fold. First, ability grouping, when employed in such transitional circumstances may perpetuate the effects of past discrimination by resegregating, on the basis of ability, students who were previously segregated in inferior schools on the basis of race or national origin. Second, a relatively recent history of discrimination may be probative evidence of a discriminatory motive which, when coupled with evidence of the segregative effect of ability grouping practices, may support a finding of unconstitutional discrimination.

[4] Thus, in a case where the ability grouping practices of a school system are challenged, the court must always consider the history of the school system involved. If the system has no history of discrimination, or, if despite such a history, the system has achieved unitary status and maintained such status for a sufficient period of time that it seems reasonable to assume that any racially disparate impact of the ability grouping does not reflect either the lingering effects of past segregation or a contemporary segregative intent, then no impermissible racial classification is involved and ability grouping may be employed despite segregative effects. However, if the district's history reveals a story of unremedied discrimination, or remedies of a very recent vintage which may not yet be fully effective to erase the effects of past discrimination, then the courts must scrutinize the effects of ability grouping with "punctilious care." McNeal v. Tate County School District,***997** id. at 1020. Even under these circumstances, however ability grouping is not always impermissible. If the statistical results of the ability grouping practices do not indicate "abnormal or unusual" segregation of students along racial lines, the practice is acceptable even in a system still pursuing desegregation efforts. Morales v. Shannon, supra at 414.

[5] Despite the absence of district court findings on the questions whether RISD has a history of discrimination against Mexican-Americans and whether any past discrimination has been fully remedied, we are able to consider the merits of plaintiffs' ability grouping claim insofar as it challenges the practices employed in grades 9-12. We note, first, that although different high school courses in Raymondville may be designed to accommodate students of different abilities or interests, self-selection, by students and parents, plays a very large part in the process by which students end up in a particular course. In light of this fact, we cannot conclude that "ability grouping," insofar as that term refers to the practice of a school in assigning a student to a particular educational program designed for individuals of particular ability or achievement, is, in fact, employed at the high school level.

The district court's failure to make findings concerning the RISD's history does, however, severely handicap our review of the ability grouping practices employed in the central campus elementary school and the junior high school. RISD contends that we should deem these practices unobjectionable because

even if the district court were to find that RISD has a history of unlawful discrimination, the effects of which have not yet been fully and finally remedied, the statistical results of RISD's ability grouping practices, are, like the results of the ability grouping employed in Morales v. Shannon, supra, "not so abnormal or unusual as to justify an inference of discrimination." Id. at 414. We cannot agree. In Morales, the overall student population in the grades where ability grouping was practiced was approximately 60% Mexican-American and 40% Anglo; however, approximately 61% of the students assigned to "high" groups were Anglo. Thus, 1.5 times as many Anglos were assigned to high groups as were enrolled in these grades as a whole. In Raymondville, the statistical results of the ability grouping are definitely more marked. For example, in grades kindergarten through three, during the academic year 1977-78, Anglo students formed approximately 17% of the student population at the central elementary campus; however 41% of the students in "high" ability classes for those grades were Anglo. Thus, there were approximately 2.4 times as many Anglos in high ability classes as there were in these grades as a whole. The figures in the upper grades for this year are comparable. In grades 4 and 5, there were approximately 2.3 times as many Anglos in high ability classes as in these grades as a whole; and in the junior high school grades 6-8, there were approximately 2.6 times as many Anglos in high groups as in the junior high school as a whole.

Statistical results such as these would not be permissible in a school system which has not yet attained, or only very recently attained, unitary status. Thus it is essential to examine the history of the RISD in order to determine the merits of the plaintiffs' claims. On remand, therefore, the district court should reconsider the plaintiffs' allegation that the ability grouping practices of the RISD are unlawful, insofar as grades K-8 are concerned, in light of the conclusions it reaches concerning the history of the district and the question whether it currently operates a unitary school system. If the district court finds that RISD has a past history of discrimination and has not yet maintained a unitary school system for a sufficient period of time that the effects of this history may reasonably be deemed to have been fully erased, the district's current practices of ability grouping are barred because of their markedly segregative effect.

The historical inquiry is not, however, the only one that the district court must make on remand in order to determine the merits of the plaintiffs' claims that RISD's ability ***998** grouping practices are unlawful. The record suggests that in Raymondville "ability grouping" is intertwined with the district's language remediation efforts and this intersection raises questions not present in our earlier cases involving ability grouping. The record indicates that the primary "ability" assessed by the district's ability grouping practices in the early grades is the English language proficiency of the students. Students entering RISD kindergarten classes are given a test to determine whether their dominant language is English or Spanish. Predominantly Spanish speaking children are then placed in groups designated "low" and receive intensive bilingual instruction. "High" groups are those composed of students whose dominant language is English. "Ability groups" for first, second and third grade are determined by three basic factors: school grades, teacher recommendations and scores on standardized achievement tests. These tests are administered in English and cannot, of course, be expected to accurately assess the "ability" of a student who has limited English language skills and has been receiving a substantial part of his or her education in another language as part of a bilingual education program.

Nothing in our earlier cases involving ability grouping circumscribes the discretion of a school district, even one having a prior history of segregation, in choosing to group children on the basis of language for purposes of a language remediation or bilingual education program. Even though such a practice would predictably result in some segregation, the benefits which would accrue to Spanish speaking students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation.[FN4] See McNeal v. Tate County School District, supra at 1020 (ability grouping may be permitted in a school district with a history of segregation "if the district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.")

FN4. We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as

> a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible and thus that these programs would not result in segregation that would permeate all areas of the curriculum or all grade levels.

Language grouping is, therefore, an unobjectionable practice, even in a district with a past history of discrimination. However, a practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is, we think, highly suspect. In a district with a past history of discrimination, such a practice clearly has the effect of perpetuating the stigma of inferiority originally imposed on Spanish speaking children by past practices of discrimination. Even in the absence of such a history, we think that if the district court finds that the RISD's ability grouping practices operate to confuse measures of two different characteristics, i. e., language and intelligence, with the result that predominantly Spanish speaking children are inaccurately labeled as "low ability," the court should consider the extent to which such an irrational procedure may in and of itself be evidence of a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.

III. TEACHERS

Testimony given in both the administrative proceeding and the trial of this civil suit indicates that the relatively small number of Mexican-American teachers and administrators employed by the Raymondville school district is a matter of great concern to Mexican-American students and their parents. Many persons in the community apparently believe that the disparity between the percentage of teachers in the district who are Mexican-American, 27%, and the percentage of students who are ***999** Mexican-American, 88%, is one of the major reasons for the underachievement and high dropout rate of Mexican-American students in Raymondville. Plaintiffs urge that this statistical disparity is both the result of, and evidence of, unlawful discrimination by RISD. The school district insists that it shares this desire to see more Mexican-American teachers employed in Raymondville schools, and argues that the current situation is not the result of unlawful discrimination on its part, but rather a reflection of the fact that certain characteristics of Raymondville, notably the lack of cultural activities and housing, make it difficult to recruit Mexican-American teachers, who are actively sought by many other school districts in Texas. The district court agreed with the RISD's contentions and concluded that the school district did not discriminate against Mexican-Americans in either the hiring or promotion of teachers or administrators. In order to review the merits of that conclusion, we think it appropriate to examine first the precise legal basis for the teacher discrimination claim advanced by the plaintiffs in order to discern the correct legal framework for our review.

[6] At the outset we note that the question whether RISD discriminates in the employment or promotion of teachers or administrators reaches us in a somewhat unusual posture. The class of plaintiffs in this case includes only Mexican-American students and their parents; no RISD employee, former employee or applicant for employment by the district is a party to this suit. Although students and parents are not typically the persons who bring suit to remedy alleged discrimination in the hiring and promotion of teachers and administrators in a school district, we do not believe they lack standing to do so. Plaintiffs premise their claim on the fourteenth amendment, and 42 U.S.C. s 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d and the Equal Educational Opportunity Act, 20 U.S.C. s 1701 et seq. The Equal Educational Opportunities Act (EEOA) explicitly provides in s 1703(d) that "discrimination by an educational agency on the basis of race, color or national origin in the employment of faculty or staff" constitutes a denial of equal educational opportunity. The statute also expressly provides a private right of action for persons denied such an "equal educational opportunity" in s 1706. Thus the class of students here clearly have standing to complain of, and a private cause of action for relief from, alleged discrimination by RISD in the hiring and promotion of teachers and staff under this statute.

With regard to the plaintiffs' rights to assert a claim based upon this type of discrimination under the constitution and Title VI, we note that historically, dual school systems were maintained not only by segregation of students on the basis of race but also through discrimination in hiring and assignment of teachers. Consequently, as part of the remedy ordered in school desegregation cases, we have often included a provision intended to assure that a school district did

not perpetuate unlawful school segregation through discriminatory employment practices.[FN5] Such remedial orders implicitly acknowledge that the Equal Protection Clause, which outlaws discrimination on the basis of race or national origin in public education, requires not only that students shall not themselves be discriminated against on the basis of race by assignment to a particular school or classroom, but that they shall not be deprived of an equal educational opportunity by being forced to receive instruction from a faculty and administration composed of persons selected on the basis of unlawful racial or ethnic criteria.***1000** Thus, we think that the class of plaintiffs here may also assert a cause of action based upon unconstitutional racial discrimination in employment of teachers and administrators under 42 U.S.C. s 1983. In making this claim, the students are not attempting to vindicate the constitutional rights of the teachers involved but only seeking to remedy a denial of equal protection they claim to have suffered as a result of faculty discrimination. They have thus suffered an "injury in fact" and have shown a "sufficient personal stake in the outcome of the controversy" to establish their standing to assert a claim that RISD discriminates in its employment practices. Tasby v. Estes, 634 F.2d 1103 (5th Cir. 1981); Otero v. Mesa Valley School District No. 51, 568 F.2d 1312, 1314 (10th Cir. 1977) (quoting Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1976)).

> FN5. Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1970) which set forth the standard form desegregation order in this circuit, required, inter alia, that:
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> > Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race, color or national origin.
> >
> > Id. at 1218.

With regard to Title VI, although the Supreme Court has never explicitly so held, there is authority in this circuit acknowledging a private right of action under this statute. Bossier Parish School Board v. Lemon, 370 F.2d 847, 852-51 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). In any event, since a majority of the Court has now taken the position that Title VI proscribes the same scope of classifications based on race as does the Equal Protection Clause, University of California Regents v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the question whether plaintiffs have an independent cause of action under that statute is not a significant one in this case.

[7][8] Having concluded that the plaintiffs in this case have standing and a cause of action to complain of discrimination by RISD in the employment of faculty and staff, we turn to examine more carefully the elements of this cause of action and the proof adduced by the plaintiffs in support of their claim. With regard to the plaintiffs' claims based upon Title VI and the Equal Protection Clause, we note that it is now well-established that in order to assert a claim based upon unconstitutional racial discrimination a party must not only allege and prove that the challenged conduct had a differential or disparate impact upon persons of different races, but also assert and prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under Title VI, 42 U.S.C. s 1981 or s 1983. Lee v. Conecuh County Board of Education, 634 F.2d 959 (5th Cir. 1981); Lee v. Washington County Board of Education, 625 F.2d 1235 (5th Cir. 1980); Crawford v. Western Electric Co., Inc., 614 F.2d 1300 (5th Cir. 1980); Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978). By contrast, in an employment discrimination action premised upon Title VII, a party may rely solely upon the disparate impact theory of discrimination recognized in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To establish a cause of action based upon this theory, no intent to discriminate need be shown.

[9] The question of what constitutes "discrimination" in the employment practices of a school district

within the meaning of s 1703(d) of the EEOA, specifically the question whether intent is required in order to establish a cause of action for discrimination under that statute, cannot be so easily answered by reference to established judicial interpretations of the statute. There is little judicial precedent construing this provision. After examining carefully the language and legislative history of the statute, we have, however, reached the conclusion that the discriminatory conduct proscribed by s 1703(d) is coextensive with that prohibited by the fourteenth amendment and Title VI and does not encompass conduct ***1001** which might violate Title VII because, although not motivated by racial factors, it has a disparate impact upon persons of different races. Certain of the subsections of s 1703 which define the practices which constitute a denial of equal educational opportunity, explicitly include only intentional or deliberate acts. For example, s 1703(a) prohibits "deliberate segregation on the basis of race, color or national origin " and s 1703(e) bans transfers of students which have "the purpose and effect" of increasing segregation. The language of 1703(d) refers only to "discrimination" and does not contain such an explicit intent requirement. In considering the EEOA under different circumstances, we have found that some of its provisions "go beyond the acts and practices proscribed prior to the EEOA's passage" and that by its terms, the statute explicitly makes unlawful practices, such as segregation of students on the basis of sex, which may not violate the fourteenth amendment because of the lesser scrutiny given six-based classifications under the Equal Protection Clause, United States v. Hinds County School Board, 560 F.2d 619 (5th Cir. 1977). Although by language in the act explicitly prohibiting segregation on the basis of sex in pupil assignments Congress clearly evidenced an intent that the statute prohibit certain types of conduct not unlawful under the Constitution, we have found no evidence to suggest that the particular subsection which concerns us here, s 1703(d), was designed to encompass a broader variety of employment practices than the provisions of the fourteenth amendment or Title VI. As other courts confronted with the task of interpreting the EEOA have noted, the legislative history of this statute is very sparse, indeed almost non-existent. Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978). The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338-41, 346-48, 352 (codified in scattered sections of 20 U.S.C.). We agree with the Guadalupe court's suggestion that "(t)he interpretation of floor amendments unaccompanied by illuminating debate should adhere closely to the ordinary meaning of the amendment's language." 587 F.2d at 1030. Unlike Title VII there is nothing in the language of s 1703(d) to suggest that practices having only disparate impact, as well as those motivated by a discriminatory animus, were to be prohibited. Title VII, unlike s 1703(d), makes it an unlawful practice for an employer not only to "discriminate" against individuals on the basis of certain criteria but also makes it unlawful "to limit, segregate or classify (persons) in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of race, color, religion, sex or national origin." It is this latter provision, which was interpreted in Griggs to prohibit facially neutral practices having a disparate impact on persons of different races. No similar provision or description of employment practices having a disparate impact was included in the Equal Educational Opportunities Act. Thus, we conclude that the elements of plaintiff's cause of action for discrimination in the hiring and promotion of teachers and administrators under the Equal Educational Opportunities Act are the same as the elements of their claims premised on the fourteenth amendment and s 1983 and Title VI.

[10] Although the question whether RISD unlawfully discriminates against Mexican-Americans in the hiring or promotion of faculty and administrators reaches us in the somewhat unusual posture of a case brought by students, we think the legal analysis of their claim is properly drawn from the approach used to assess the merits of more traditional class action and pattern and practice employment discrimination suits. In civil rights cases generally we have noted that a district court's finding of discrimination or no discrimination is a determination of an ultimate fact; thus, we must make an independent determination of this question. Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1024-25 (5th Cir. 1981); Danner v. U.S. Civil Service ***1002** Commission, 635 F.2d 427 (5th Cir. 1981); Thompson v. Leland Police Dep't., 633 F.2d 1111 (5th Cir. 1980); Shepard v. Beaird-Poulan, Inc., 617 F.2d 87 (5th Cir. 1980); Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980). In undertaking such an independent review, however, we are bound by the subsidiary factual determinations that the district court made in the course of considering the ultimate issue of discrimination, unless these subsidiary findings are clearly erroneous within the

meaning of Fed.R.Civ.P. 52(a). In this case, the district court apparently based its conclusion that RISD did not discriminate against Mexican-Americans in the hiring or promotion of teachers or administrators on subsidiary findings that: (1) RISD currently hires a higher percentage of Mexican-American applicants for teaching positions than Anglo applicants; (2) the school district hires many teachers from nearby universities which have substantial numbers of Mexican-American students; and (3) the school district has a difficult time recruiting Mexican-American teachers because, although its salaries are commensurate with those paid by other schools in the area, Raymondville has very limited housing and cultural activities. Although we do not characterize any of these subsidiary findings as clearly erroneous, we do not believe they are sufficient to support an ultimate finding that RISD does not discriminate against Mexican-Americans in the employment of teachers or administrators.

[11] In class action or pattern and practice employment discrimination suits, the question whether the employer discriminates against a particular group in making hiring decisions requires, as a first and fundamental step, a statistical comparison between the racial composition of the employer's work force and that of the relevant labor market. In many of these cases the nature of the jobs involved suggests that the relevant labor market is coextensive with the general population in the geographical areas from which the employer might reasonably be expected to draw his work force. Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); Markey v. Tenneco Oil Co., 635 F.2d 497 (5th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358, 1364 (5th Cir. 1980). In this case, plaintiffs have relied heavily on the disparity between the percentage of the Raymondville school population consisting of Mexican-Americans (approximately 85%) and the percentage of the faculty in the Raymondville schools who are Mexican-American (27%), in support of their contention that RISD discriminates in its employment decisions. Plaintiffs urge that this statistical disparity coupled with the evidence of a past history of segregation in the Raymondville schools sufficed to make out a prima facie case of discrimination which shifted to the defendants a heavy burden of rebuttal which they failed to meet.

We think the plaintiffs' suggested comparison is not the relevant one. Where, as here, the nature of the employment involved suggests that the pool of people qualified to fill the positions is not likely to be substantially congruent with the general population, the relevant labor market must be separately and distinctly defined. In Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Supreme Court considered the question of how to define the relevant labor pool in a case involving a claim that a school district engaged in a pattern and practice of employment discrimination in the hiring of teachers. The Court disapproved of the comparison, which had been made by the district court, between the racial composition of the district's teacher work force and the student population. Such an approach, the Court admonished, “fundamentally misconceived the role of statistics in employment discrimination cases.” Id. at 308, 97 S.Ct. at 2741-42. The proper comparison in a case involving school teachers was

> between the racial composition of (the district's) teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.
>
> Id.

The district court's memorandum opinion in this case does not indicate that any such ***1003** comparison was made here. The district court did apparently compare the data concerning the ethnic composition of the pool of persons who applied for teaching positions at Raymondville, with the ethnic composition of the persons hired. The court found that a larger percentage of Mexican-American applicants than Anglos was hired. The record also indicates that Mexican-Americans comprise a larger percentage of the teachers hired in RISD than they do of the applicant pool. In the usual hiring discrimination case this type of applicant flow data provides a very good picture of the relevant labor market because it allows one to compare the ethnic composition of an employer's workforce with that of the pool of persons actually available for hire by the employer. Markey, supra, at 499. However, in cases such as this one where there is an allegation that the employer's discriminatory practices infect recruiting, the process by which applications are solicited, such applicant flow data cannot be taken at face value and assumed to constitute an accurate picture of the relevant labor market. Discriminatory recruiting practices may skew the ethnic

composition of the applicant pool. B. L. Schlei and P. Grossman, Employment Discrimination Law, 445 (1976).

[12][13] In a case such as this one, the relevant labor market must first be defined separately from the applicant pool in order to determine the merits of the claim of discrimination in recruiting. A statistically significant disparity between the racial composition of the applicant pool and that of the relevant labor market may create a prima facie case of discrimination in recruiting. Because determination of the relevant labor market, the geographical area from which we might reasonably expect RISD to draw applicants and teachers, and of the ethnic composition of the group of persons qualified for teaching positions in this area, is an essentially factual matter within the special competence of the district court, Hazelwood, supra at 312, 97 S.Ct. at 2744, Markey, supra at 498, we remand the issue of discrimination in teacher hiring to the district court for further findings in accordance with the analysis the Supreme Court delineated in Hazelwood and which we have employed in class action and pattern and practice employment discrimination suits. See, e. g., Phillips v. Joint Legislative Committee, supra at 1024-25; Markey, supra; E.E.O.C. v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978).

With regard to the question whether RISD discriminates in the hiring or promotion of persons to administrative positions in the district, the district court concluded that there was no discrimination in this area. In recent years, the percentage of Mexican-Americans serving in administrative positions in the Raymondville School District has been roughly comparable to the percentage of Mexican-Americans on the faculty. For example in 1976, Mexican-Americans occupied 5 of the 16 administrative positions in the district (24%); in the same year 26% of the district's teachers were Mexican-American. Given the small numbers involved we are not prepared to term this a significant disparity. The record indicates that, as a general rule, the RISD prefers to hire administrative personnel from within the ranks of its current employees; thus the statistical evidence in this case would not seem to support an inference of discrimination in promotion, unless, of course, discrimination in hiring is established. In that case, the district court should, on remand, reconsider the issue of discrimination in promotion as well.

The comparison of the employment statistics of RISD with the ethnic composition of the relevant labor market goes to the determination whether the plaintiff made out a prima facie case of unlawful discrimination. If, on remand, the district court concludes that plaintiffs succeeded in making out a prima facie case, the court should determine the nature and weight of the burden of rebuttal this prima facie case placed on the RISD. As we noted above, that burden may differ depending on the conclusions the district court reaches concerning the district's history. See text supra, at 994-996.

***1004** The district court must, of course, then consider whether RISD adduced evidence sufficient to rebut the plaintiffs' prima facie case, i. e., evidence tending to suggest that the statistical underrepresentation of Mexican-Americans established by the plaintiffs' prima facie case was not the result of intentional discrimination by the school district. We note that RISD has urged that since Mexican-Americans from a majority of the voting population in the school district, are present on the district's board and have, along with the Anglo majority of the board, voted for and approved most of the hiring and promotion decisions which the plaintiffs have challenged here, the district has adequately rebutted any inference of discriminatory intent which might be raised by plaintiffs' prima facie case.

Although there have been Mexican-American members on the RISD board, there is no evidence in the record that Mexican-Americans have ever formed a majority of the board. Further, the school board's role in the teacher employment process appears to be a largely ministerial one. From the minutes of the school board meetings contained in the record, it appears that the school board does not itself receive and review the files of all applicants or involve itself in the recruiting process. The minutes suggest that the superintendent presents a slate of teachers to the board for its formal approval en masse. Thus, the record suggests that the school board has delegated primary responsibility for the recruitment and hiring of teachers and administrators to the superintendent, a position which has always been occupied by an Anglo. This suggests the possibility that the Mexican-Americans on the board may not, in fact, be in a position to exercise much power over the district's employment decisions.

In any event, the Supreme Court has rejected the

argument that this type of "governing majority" theory can, standing alone, rebut a prima facie case of intentional discrimination. In Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court considered a similar argument. Castaneda involved a challenge by a Mexican-American to the grand jury selection procedures employed in Hidalgo County, Texas. The state argued that the plaintiffs' prima facie case of intentional discrimination, which consisted of statistical evidence of a significant underrepresentation of Mexican-Americans on grand juries, was effectively rebutted merely by evidence that Mexican-Americans were an effective political majority in the county and occupied many county offices, including three of the five grand jury commissioners' posts. The state reasoned that these facts made it highly unlikely that Mexican-Americans were being intentionally excluded from the county's grand juries. The Supreme Court, however, held that such a governing majority theory could not, standing alone, discharge the burden placed on the defendants by plaintiffs' prima facie case. This is not, of course, to say that such evidence is not relevant as part of the district's rebuttal, but only that it may not be deemed conclusive.

We express no opinion as to the outcome of the inquiry which we have directed the district court to make. The question of whether the plaintiffs have made out a prima facie case of unlawful discrimination in the employment practices of the district and the question of whether that case, if made out, has been adequately rebutted are reserved to the district court in the first instance.

IV. THE BILINGUAL EDUCATION AND LANGUAGE REMEDIATION PROGRAMS OF THE RAYMONDVILLE SCHOOLS [FN6]

> FN6. The district court's failure to make findings regarding the history of RISD does not impair our review of the merits of plaintiff's claims that inadequacies of the district's language remediation programs render it unlawful because this claim is premised only on Title VI and the EEOA. The plaintiffs in this case do not argue that the current English language disabilities affecting some of the Mexican-American students in Raymondville are the product of past discrimination or that the district is obligated to provide bilingual education or other forms of language remediation as part of a remedy for past discrimination. Cf. United States v. State of Texas, 506 F.Supp. 405 (E.D.Tex.1981).

RISD currently operates a bilingual education program for all students in kindergarten***1005** through third grade.[FN7] The language ability of each student entering the Raymondville program is assessed when he or she enters school. The language dominance test currently employed by the district is approved for this purpose by the TEA. The program of bilingual instruction offered students in the Raymondville schools has been developed with the assistance of expert consultants retained by the TEA and employs a group of materials developed by a regional educational center operated by the TEA. The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade.

> FN7. RISD's program was apparently adopted in compliance with Tex.Ed.Code Ann. s 21.451 (Vernon 1980 Supp.) which required local school districts to provide bilingual programs for students in kindergarten through third grade. The Texas legislature, although requiring and funding bilingual education programs has, nevertheless, provided that English shall be the basic language of instruction in Texas' public schools and that bilingual education may be employed "in those situations when such instruction is necessary to insure that (students acquire) reasonable efficiency in the English language so as not to be educationally disadvantaged." Tex.Ed.Code Ann. s 21.109 (Vernon 1980 Supp.).

Although the program's emphasis is on the development of language skills in the two languages, other cognitive and substantive areas are addressed, e. g., mathematics skills are taught and tested in Spanish as well as English during these years. All of the teachers employed in the bilingual education program of the district have met the minimum state requirements to teach bilingual classes. However, only about half of these teachers are Mexican-American and native Spanish speakers; the other teachers in the program have been certified to teach bilingual classes following a 100 hour course designed by TEA to give

them a limited Spanish vocabulary (700 words) and an understanding of the theory and methods employed in bilingual programs. Teachers in the bilingual program are assisted by classroom aides, most of whom are fluent in Spanish.

[14] RISD does not offer a formal program of bilingual education after the third grade. In grades 4 and 5, although classroom instruction is only in English, Spanish speaking teacher aides are used to assist students having language difficulties which may impair their ability to participate in classroom activities. For students in grades 4-12 having limited English proficiency or academic deficiencies in other areas, the RISD provides assistance in the form of a learning center operated at each school. This center provides a diagnostic/prescriptive program in which students' particular academic deficiencies, whether in language or other areas, are identified and addressed by special remedial programs. Approximately 1,000 of the district's students, almost one-third of the total enrollment, receive special assistance through small classes provided by these learning centers. The district also makes English as a Second Language classes and special tutoring in English available to all students in all grades; this program is especially designed to meet the needs of limited English speaking students who move into the district in grades above 3.[FN8]

> FN8. We think s 1703(f) clearly imposes on an educational agency a duty to take appropriate action to remedy the language barriers of transfer students as well as the obstacles confronting students who begin their education under the auspices of that agency. However, the challenge presented by these transfer students clearly poses a distinctive and difficult problem. Transfer students may bring to their new school varying amounts of previous education in English or another language; a school district may enroll only a few transfer students or may have a rather large revolving population of transient or migrant students who transfer in and out of the system. Factors such as these may be relevant to a determination of whether a school's language remediation program for such students is appropriate under s 1703(f). In this case, neither the pleadings nor the record in this case indicates that the distinctive problems presented and confronted by these students were addressed with the care necessary to determine whether RISD was currently taking "appropriate action" to meet their needs. Therefore we shall express no opinion on this issue in this decision.

***1006** Plaintiffs claim that the bilingual education and language remediation programs offered by the Raymondville schools are educationally deficient and unsound and that RISD's failure to alter and improve these programs places the district in violation of Title VI and the Equal Educational Opportunities Act. The plaintiffs claim that the RISD programs fail to comport with the requirements of the "Lau Guidelines" promulgated in 1975 by the Department of Health, Education and Welfare. Specifically, plaintiffs contend that the articulated goal of the Raymondville program to teach limited English speaking children to read and write in both English and Spanish at grade level is improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development. Under the Lau Guidelines, plaintiffs argue, "pressing English on the child is not the first goal of language remediation." Plaintiffs criticize not only the premise and purpose of the RISD language programs but also particular aspects of the implementation of the program. Specifically, plaintiffs take issue with the tests the district employs to identify and assess limited English speaking children and the qualifications of the teachers and staff involved in the district's language remediation program. Plaintiffs contend that in both of these areas RISD falls short of standards established by the Lau Guidelines and thus has fallen out of compliance with Title VI and the EEOA.

[15][16] We agree with the district court that RISD's program does not violate Title VI. Much of the plaintiffs' argument with regard to Title VI is based upon the premise that the Lau Guidelines are administrative regulations applicable to the RISD and thus should be given great weight by us in assessing the legal sufficiency of the district's programs. This premise is, however, flawed. The Department of HEW, in assessing the district's compliance with Title VI, acknowledged that the Lau Guidelines were inapplicable to an evaluation of the legal sufficiency of the district's language program. The Lau Guidelines were formulated by the Department following the Supreme Court's decision in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). In Lau, the Supreme

Court determined that a school district's failure to provide any English language assistance to substantial numbers of non-English speaking Chinese students enrolled in the district's schools violated Title VI because this failure denied these students "a meaningful opportunity to participate in the educational program" offered by the school district, 414 U.S. at 568, 94 S.Ct. at 789. Lau involved a school district which offered many non-English speaking students no assistance in developing English language skills; in declaring such an omission unlawful, the Court did not dictate the form such assistance must take. Indeed the Court specifically noted that the school district might undertake any one of several permissible courses of language remediation:

> Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others.

Id. at 565, 94 S.Ct. at 787. The petitioners in Lau did not specifically request, nor did the Court require, court ordered relief in the form of bilingual education; the plaintiffs in that case sought only "that the Board of Education be directed to apply its expertise to the problem " Id.

Following the Supreme Court's decision in Lau, HEW developed the "Lau Guidelines" as a suggested compliance plan for school districts which, as a result of Lau, were in violation of Title VI because they failed to provide any English language assistance to students having limited English proficiency. Clearly, Raymondville is not culpable of such a failure. Under these ***1007** circumstances, the fact that Raymondville provides (and long has provided) a program of language remediation which differs in some respects from these guidelines is, as the opinion of the Reviewing Authority for the OCR noted, "not in itself sufficient to rule that program unlawful in the first instance."

The Lau Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The Lau Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's departure from the Lau Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

We must confess to serious doubts not only about the relevance of the Lau Guidelines to this case but also about the continuing vitality of the rationale of the Supreme Court's opinion in Lau v. Nichols which gave rise to those guidelines. Lau was written prior to Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), in which the Court held that a discriminatory purpose, and not simply a disparate impact, must be shown to establish a violation of the Equal Protection Clause, and University of California Regents v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), in which, as we have already noted, a majority of the court interpreted Title VI to be coextensive with the Equal Protection Clause. Justice Brennan's opinion (in which Justices White, Marshall and Blackmun joined) in Bakke explicitly acknowledged that these developments raised serious questions about the vitality of Lau.

> We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, 426 U.S. 229 (96 S.Ct. 2040, 48 L.Ed.2d 597) (1976), which rejected the general propostion that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352, 98 S.Ct. at 2779. Although the Supreme Court in Bakke did not expressly overrule Lau, as we noted above, we understand the clear import of Bakke to be that Title VI, like the Equal Protection Clause, is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races. Whatever the deficiencies of the RISD's program of language remediation

may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

Plaintiffs, however, do not base their legal challenge to the district's language program solely on Title VI. They also claim that the district's current program is unlawful under s 1703(f) of the EEOA which makes it unlawful for an educational agency to fail to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." As we noted above in dissecting the meaning of s 1703(d) of the EEOA, we have very little legislative history from which to glean the Congressional intent behind the EEOA's provisions. Thus, as we did in examining s 1703(d), we shall adhere closely to the plain language of s 1703(f) in defining the meaning of this provision. Unlike subsections (a) and (e) of s 1703, s 1703(f) does ***1008** not contain language that explicitly incorporates an intent requirement nor, like s 1703(d) which we construed above, does this subsection employ words such as "discrimination" whose legal definition has been understood to incorporate an intent requirement. Although we have not previously explicitly considered this question, in Morales v. Shannon, supra, we assumed that the failure of an educational agency to undertake appropriate efforts to remedy the language deficiencies of its students, regardless of whether such a failure is motivated by an intent to discriminate against those students, would violate s 1703(f) and we think that such a construction of that subsection is most consistent with the plain meaning of the language employed in s 1703(f). Thus, although serious doubts exist about the continuing vitality of Lau v. Nichols as a judicial interpretation of the requirements of Title VI or the fourteenth amendment, the essential holding of Lau, i. e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in s 1703(f).[FN9] The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting s 1703(f) intended to go beyond the essential requirement of Lau, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

FN9. In Pennhurst State School v. Halderman, - U.S. -, 101 S.Ct. 1531, 68 L.Ed.2d - (1981), the Supreme Court was called upon to determine the meaning of s 6010(1) and (2) of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. ss 6001-6080, which stated in relevant part that:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's liberty.
>
> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution that (A) does not provide treatment, services, and habilitation which are not appropriate to the needs of such person; or (B) does not meet the following minimum standards
>
> Id. at -, 101 S.Ct. at 1537. Plaintiffs in Pennhurst urged, and the Court of Appeals had agreed, that this section imposed upon states an affirmative obligation to provide "appropriate treatment" for the disabled and created certain substantive rights in their favor and a private right of action to sue for protection of these rights. The Supreme Court disagreed. The Court, at the outset, analyzed the statute to determine whether Congress in enacting it had acted pursuant to s 5 of the fourteenth amendment or pursuant to the Spending Power and cautioned against implying a Congressional intent to act pursuant to s 5 of the fourteenth amendment, especially

> where such a construction would result in the imposition of affirmative obligations on the states. Id. at -, 101 S.Ct. 1538.
>
> Although we are sensitive to the need for restraint recognized by the Court in Pennhurst, it is undisputed in this case, and indeed indisputable, that in enacting the EEOA Congress acted pursuant to the powers given it in s 5 of the fourteenth amendment. The general declaration of policy contained in s 1701 and s 1702 of the EEOA expresses Congress' intent that the Act specify certain guarantees of equal opportunity and identify remedies for violations of these guarantees pursuant to its own powers under the fourteenth amendment without modifying or diminishing the authority of the courts to enforce the provisions of that amendment.

We do not believe that Congress, at the time it adopted the EEOA, intended to require local educational authorities to adopt any particular type of language remediation program. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, 20 U.S.C. s 880b et seq. (1976). The Bilingual Educational Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly embodied a recognition that bilingual education programs were still in experimental stages ***1009** and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), reprinted in (1974) U.S.Code Cong. & Ad.News 4093, 4206.

We note that although Congress enacted both the Biligual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "biligual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in s 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i. e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

[17][18] In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under s 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. This, of course, is not to be done with any eye toward discerning the relative merits of sound but competing bodies of expert educational opinion, for choosing

between sound but competing theories is properly left to the educators and public officials charged with responsibility for directing the educational policy of a school system. The state of the art in the area of language remediation may well be such that respected authorities legitimately differ as to the best type of educational program for limited English speaking students and we do not believe that Congress in enacting s 1703(f) intended to make the resolution of these differences the province of federal courts. The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.

***1010** The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under s 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

With this framework to guide our analysis we now turn to review the district court's determination that the RISD's current language remediation programs were "appropriate action" within the meaning of s 1703(f). Implicit in this conclusion was a determination that the district had adequately implemented a sound program. In conducting this review, we shall consider this conclusion as a determination of a mixed question of fact and law. Therefore we shall be concerned with determining whether this conclusion was adequately supported by subsidiary findings of fact which do not appear clearly erroneous.

In this case, the plaintiffs' challenge to the appropriateness of the RISD's efforts to overcome the language barriers of its students does not rest on an argument over the soundness of the educational policy being pursued by the district, but rather on the alleged inadequacy of the program actually implemented by the district.[FN10] Plaintiffs contend that in three areas essential to the adequacy of a bilingual program curriculum, staff and testing Raymondville falls short. Plaintiffs contend that although RISD purports to offer a bilingual education program in grades K-3, the district's curriculum actually overemphasizes the development of reading and writing skills in English to the detriment of education in other areas such as mathematics and science, and that, as a result, children whose first language was Spanish emerge from the bilingual education program behind their classmates in these other areas. The record in this case does not support plaintiffs' allegation that the educational program for predominantly Spanish speaking students in grades K-3 provides significantly less attention to these other areas than does the curriculum used in the English language dominant classrooms. The bilingual education manual developed by the district outlines the basic classroom schedules***1011** for both Spanish dominant classrooms and English dominant classrooms. These schedules indicate that students in the Spanish language dominant classrooms spend almost exactly the same amount of classroom time on math, science and social studies as do their counterparts in the predominantly English speaking classrooms. The extra time that Spanish language dominant children spend on language development is drawn almost entirely from what might fairly be deemed the "extras" rather than the basic skills components of the elementary school curriculum, e. g., naps, music, creative writing and physical education.

FN10. The district court in its memorandum opinion observes that there was "almost total

> disagreement amongst the witnesses, experts and lay persons, as to the benefits of bilingual education and as to the proper method of implementing a bilingual education program if determined to be in the best interests of the students." Insofar as this statement was intended to suggest that there was uncertainty and disagreement manifested in the record about the effectiveness of the bilingual education program currently conducted in Raymondville, it is certainly correct. However, this statement should not be understood as suggesting that the record in this case presents a dispute about the value of bilingual education programs in general. The issue in this case was not the soundness or efficacy of bilingual education as an approach to language remediation, but rather the adequacy of the actual program implemented by RISD.

Even if we accept this allegation as true, however, we do not think that a school system which provides limited English speaking students with a curriculum, during the early part of their school career, which has, as its primary objective, the development of literacy in English, has failed to fulfill its obligations under s 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period. The language of s 1703(f) speaks in terms of taking action "to overcome language barriers" which impede the "equal participation" of limited English speaking children in the regular instructional program. We believe the statute clearly contemplates that provision of a program placing primary emphasis on the development of English language skills would constitute "appropriate action."

[19][20] Limited English speaking students entering school face a task not encountered by students who are already proficient in English. Since the number of hours in any school day is limited, some of the time which limited English speaking children will spend learning English may be devoted to other subjects by students who entered school already proficient in English. In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand s 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program. We also believe, however, that s 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or to address these problems in sequence, by focusing first on the development of English language skills and then later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period. In short, s 1703(f) leaves schools free to determine the sequence and manner in which limited English speaking students tackle this dual challenge so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system. Therefore, we disagree with plaintiffs' assertion that a school system which chooses to focus first on English language development and later provides students with an intensive remedial program ***1012** to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under s 1703(f).

[21] Although we therefore find no merit in the plaintiffs' claim that RISD's language remediation programs are inappropriate under s 1703 because of the emphasis the curriculum allegedly places on English language development in the primary grades, we are more troubled by the plaintiffs' allegations that the district's implementation of the program has been severely deficient in the area of preparing its teachers

for bilingual education. Although the plaintiffs raised this issue below and introduced evidence addressed to it, the district court made no findings on the adequacy of the teacher training program employed by RISD.[FN11] We begin by noting that any school district that chooses to fulfill its obligations under s 1703 by means of a bilingual education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program. The record in this case indicates that some of the teachers employed in the RISD bilingual program have a very limited command of Spanish, despite completion of the TEA course. Plaintiffs' expert witness, Dr. Jose Cardenas, was one of the bilingual educators who participated in the original design of the 100 hour continuing education course given to teachers already employed in RISD in order to prepare them to teach bilingual classes. He testified that a subsequent evaluation of the program showed that although it was effective in introducing teachers to the methodology of bilingual education and preparing them to teach the cultural history and awareness components of the bilingual education program, the course, was "a dismal failure in the development of sufficient proficiency in a language other than English to qualify the people for teaching bilingual programs." Although the witnesses familiar with the bilingual teachers in the Raymondville schools did not testify quite as vividly to the program's inadequacy, testimony of those involved in the RISD's program suggested that despite completion of the 100 hour course, some of the district's English speaking teachers were inadequately prepared to teach in a bilingual classroom. Mr. Inez Ibarra, who was employed by the district as bilingual supervisor prior to his appointment to the principalship of L. C. Smith School in 1977, testified in the administrative hearing that he had observed the teachers in the bilingual program at Raymondville and that some of the teachers had difficulty communicating in Spanish in the classroom and that there were teachers in the program who taught almost exclusively in English, using Spanish, at most, one day per week. He also described the evaluation program used to determine the Spanish proficiency of the teachers at the end of the 100 hour course. Teachers were required to write a paragraph in Spanish. Since in completing this task, they were permitted to use a Spanish-English dictionary, Ibarra acknowledged that this was not a valid measure of their Spanish vocabulary. Teachers also read orally from a Spanish language text and answered oral questions addressed to them by the RISD certification committee. There was no formal grading of the examination; the certification committee had no guide to measure the Spanish language vocabulary of the teachers based on their performance on the exam. Thus, it may well have been impossible for the committee to determine whether the teachers had mastered even the 700 word vocabulary the TEA had deemed the minimum to enable a teacher to work effectively in a bilingual elementary classroom. Following the examination, the committee would have an informal discussion among themselves and decide whether or not the teacher was qualified. Mr. Ibarra testified that the certification***1013** committee had approved some teachers who were, in his opinion, in need of more training "much more than what they were given."

> FN11. The only reference to the district's in-service teacher training program in the district court's memorandum opinion was an observation that RISD "is training non-Spanish speaking teachers in accordance with a State-administered program." This observation does not constitute a finding that this program was an adequate one, nor a finding that RISD teachers who complete the program are adequately prepared to be effective teachers in a bilingual classroom.

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers. The record in this case strongly suggests that the efforts RISD has made to overcome the language barriers confronting many of the teachers assigned to the bilingual education program are inadequate. On this record, we think a finding to the

contrary would be clearly erroneous. Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students. Although we certainly hope and expect that RISD will attempt to hire teachers who are already qualified to teach in a bilingual classroom as positions become available, we are by no means suggesting that teachers already employed by the district should be replaced or that the district is limited to hiring only teachers who are already qualified to teach in a bilingual program. We are requiring only that RISD undertake further measures to improve the ability of any teacher, whether now or hereafter employed, to teach effectively in a bilingual classroom.

On the current record, it is impossible for us to determine the extent to which the language deficiencies of some members of RISD's staff are the result of the inadequacies inherent in TEA's 100 hour program (including the 700 word requirement which may be an insufficient vocabulary) or the extent to which these deficiencies reflect a failure to master the material in that course. Therefore, on remand, the district court should attempt to identify more precisely the cause or causes of the Spanish language deficiencies experienced by some of the RISD's teachers and should require both TEA and RISD to devise an improved in-service training program and an adequate testing or evaluation procedure to assess the qualifications of teachers completing this program. [FN12]

> FN12. On remand, the district court should, of course, consider any improvements which may have been effected in RISD's in-service training program during the pendency of this litigation.

The third specific area in which plaintiffs claim that RISD programs are seriously deficient is in the testing and evaluation of students having limited English proficiency. Plaintiffs claim first that the language dominance placement test used to evaluate students entering Raymondville schools is inadequate. Although it appears that at the time of the administrative hearing in this case, RISD was not employing one of the language tests approved by the TEA, by the time of the trial in this civil suit RISD had adopted a test approved for this purpose by TEA. None of plaintiffs' expert witnesses testified that this test was an inappropriate one.[FN13] Thus, we do not think ***1014** there is any reason to believe that the district is deficient in the area of initial evaluation of students entering the bilingual program.

> FN13. Dr. Jose Cardenas, plaintiff's principal expert witness on the subject of bilingual education, testified that he had no objection to the tests recommended by TEA for use in assessing students entering a bilingual education program. R. at 291. Mr. Inez Ibarra, employed as principal of the L. C. Smith School at the time of trial in this case and who had previously served as bilingual education supervisor for RISD, testified that RISD had adopted, for use beginning in the academic year 1978-79, the Powell Test for language placement which was "on top of the list" approved by TEA. R. at 366.

A more difficult question is whether the testing RISD employs to measure the progress of students in the bilingual education program is adequate. Plaintiffs, contend, RISD apparently does not deny, and we agree that proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself. In their brief, plaintiffs contend that RISD's testing program is inadequate because the limited English speaking students in the bilingual program are not tested in their own language to determine their progress in areas of the curriculum other than English language literacy skills. Although during the bilingual program Spanish speaking students receive much of their instruction in these other areas in the Spanish language, the achievement level of these students is tested, in part, by the use of standardized English language achievement tests. No standardized Spanish language tests are used. Plaintiffs contend that testing the achievement levels of children, who are admittedly not yet literate in English and are receiving instruction in another language, through the use of an English language achievement test, does not meaningfully assess their achievement, any more than it does their ability, a contention with which we can scarcely disagree.

Valid testing of students' progress in these areas

is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-a-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred. The district court on remand should require both TEA and RISD to implement an adequate achievement test program for RISD in accordance with this opinion. If, following the district court's inquiry into the ability grouping practices of the district, such practices are allowed to continue, we assume that Spanish language ability tests would be employed to place students who have not yet mastered the English language satisfactorily in ability groups.

Finally plaintiffs contend that test results indicate that the limited English speaking students who participate in the district's bilingual education program do not reach a parity of achievement with students who entered school already proficient in English at any time throughout the elementary grades and that since the district's language program has failed to establish such parity, it cannot be deemed “appropriate action” under s 1703(f). Although this question was raised at the district court level, no findings were made on this claim. While under some circumstances it may be proper for a court to examine the achievement scores of students involved in a language remediation program in order to determine whether this group appears on the whole to attain parity of participation with other students, we do not think that such an inquiry is, as yet, appropriate with regard to RISD. Such an inquiry may become proper after the inadequacies in the implementation of the RISD's program, which we have identified, have been corrected and the program has operated with ***1015** the benefit of these improvements for a period of time sufficient to expect meaningful results.[FN14]

FN14. We note also, that even in a case where inquiry into the results of a program is timely, achievement test scores of students should not be considered the only definitive measure of a program's effectiveness in remedying language barriers. Low test scores may well reflect many obstacles to learning other than language. We have no doubt that the process of delineating the causes of differences in performance among students may well be a complicated one.

To summarize, we affirm the district court's conclusion that RISD's bilingual education program is not violative of Title VI; however, we reverse the district court's judgment with respect to the other issues presented on appeal and we remand these issues for further proceedings not inconsistent with this opinion. Specifically, on remand, the district court is to inquire into the history of the RISD in order to determine whether, in the past, the district discriminated against Mexican-Americans, and then to consider whether the effects of any such past discrimination have been fully erased. The answers to these questions should, as we have noted in this opinion, illuminate the proper framework for assessment of the merits of the plaintiffs' claims that the ability grouping and employment practices of RISD are tainted by unlawful discrimination. If the court finds that the current record is lacking in evidence necessary to its determination of these questions, it may reopen the record and invite the parties to produce additional evidence.

The question of the legality of the district's language remediation program under 20 U.S.C. s 1703(f) is distinct from the ability grouping and teacher discrimination issues. Because an effective language remediation program is essential to the education of many students in Raymondville, we think it imperative that the district court, as soon as possible following the issuance of our mandate, conduct a hearing to identify the precise causes of the language deficiencies affecting some of the RISD teachers and to establish a time table for the parties to follow in devising and implementing a program to alleviate these deficiencies. The district court should also assure that RISD takes whatever steps are necessary to acquire validated Spanish language achievement tests for administration to students in the bilingual program at an appropriate time during the 1981-82 academic year.

AFFIRMED in part, REVERSED in part and REMANDED.

C.A.Tex., 1981.
Castaneda v. Pickard
648 F.2d 989

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(Cite as: 811 F.2d 1030)

United States Court of Appeals,
Seventh Circuit.
Jorge GOMEZ, et al., Plaintiffs-Appellants,
v.
ILLINOIS STATE BOARD OF EDUCATION and Ted Sanders, in his official capacity as Illinois State Superintendent of Education, Defendants-Appellees.

No. 85-2915.
Argued April 8, 1986.
Decided Jan. 30, 1987.

Action was brought against Illinois State Board of Education and State Superintendent of Education based on claim that plaintiffs' school districts had not tested them for English language proficiency and had not provided bilingual instruction or compensatory instruction. The United States District Court, Northern District of Illinois, 614 F.Supp. 342, Nicholas J. Bua, J., granted defendants' motion to dismiss with direction that plaintiff file new complaint naming local school officials. Plaintiffs appealed. The Court of Appeals, Eschbach, Senior Circuit Judge, held that: (1) state officials were not immune from suit for violations of Equal Educational Opportunities Act under Eleventh Amendment, and (2) plaintiffs adequately stated claim under Equal Educational Opportunities Act for state officials for failure to establish minimums needed for identifying and placing children with limited English proficiency.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Courts 170B 269

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases

Eleventh Amendment did not foreclose action brought on behalf of students with limited English proficiency who alleged that state officials failed to discharge duties imposed by federal law by failing to promulgate uniform and consistent guidelines for the identification, placement and training of limited English proficiency children. U.S.C.A. Const.Amend. 11.

[2] Federal Courts 170B 265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Federal statute was not required to unequivocally express its intent to abrogate immunity of state from suit, but could do so by its effect, e.g., where any other reading of statute in question would render nugatory express terms of provision. U.S.C.A. Const.Amend. 11.

[3] Federal Courts 170B 265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Congress abrogated states' Eleventh Amendment immunity to suit to extent necessary to effectuate purpose of the Equal Educational Opportunities Act, which was passed pursuant to enforcement authority of equal rights provision of Fourteenth Amendment. U.S.C.A. Const.Amends. 11, 14, § 5; Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[4] Federal Courts 170B 269

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases

Federal Courts 170B 270

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk268 What Are Suits Against States
170Bk270 k. Cities or Other Political Subdivisions, Actions Involving. Most Cited Cases

Definition of "educational agency" under Equal Educational Opportunities Act included both state and local agencies and thus an action to enforce rights under the Act could be maintained against entities which would ordinarily be immune from suit under the Eleventh Amendment. U.S.C.A. Const.Amend. 11; Equal Educational Opportunities Act of 1974, §§ 204(f), 207; 20 U.S.C.A. §§ 1703(f), 1706.

[5] Federal Courts 170B 265

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Congress did not unequivocally abrogate state's Eleventh Amendment immunity when it passed Title VI of the Civil Rights Act where it did not even provide express right of action for private parties and class of potential defendants described in statute was general one. U.S.C.A. Const.Amends. 11, 14, § 5; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

[6] Federal Civil Procedure 170A 1861

170A Federal Civil Procedure
170AXII Continuance
170Ak1861 k. Determination and Order. Most Cited Cases

Attaching affidavits to a motion for reconsideration of dismissal of complaint was not appropriate where motion to dismiss for failure to state a claim upon which relief could be granted was not converted into motion for summary judgment. Fed.Rules Civ.Proc.Rules 12(b), (b)(6), 56, 28 U.S.C.A.

[7] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases

In determining whether state's implementation of policy violates Equal Educational Opportunities Act, court must examine evidence regarding soundness of educational theory or principles upon which challenged program is based, determine whether programs actually used by school system are reasonably calculated to effectively implement education theory adopted by system, and determine whether school's program, although ostensibly premised on legitimate educational theory and adequately implemented initially, failed to obtain results that would indicate that language barriers confronting students were actually being overcome after period of time sufficient to give plan legitimate trial. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[8] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. Most Cited Cases

Procedures required for determining whether educational agencies were adequately assisting students with limited English proficiency under Equal Educational Opportunities Act did not apply only to local school districts, but also to state educational agencies. Equal Educational Opportunities Act of

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1974, § 204(f), 20 U.S.C.A. § 1703(f).

[9] Schools 345 ⚿164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. Most Cited Cases

Spanish-speaking students who alleged that state educational agencies failed to establish the minimums needed for identifying and placing limited English proficiency children stated a cause of action under the Equal Educational Opportunities Act. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[10] Federal Courts 170B ⚿13.30

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.30 k. Schools and Colleges. Most Cited Cases

Amendment to Illinois statute regarding programs for students with limited English proficiency did not render moot action by Spanish-speaking students challenging adequacy of implementation of programs designed to provide limited English proficiency children with equal educational opportunity under Equal Educational Opportunities Act. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); Ill.S.H.A. ch. 122, ¶¶ 2, 14C-3.

[11] Federal Courts 170B ⚿13

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases

Suit challenging adequacy of state educational agency's implementation of program for identifying and placing students with limited English proficiency was not rendered moot by State Board of Education's release of proposed regulations for implementation of state's Transitional Bilingual Education Act, which had not been adopted or tested in practice. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[12] Civil Rights 78 ⚿1395(2)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(2) k. Education. Most Cited Cases
(Formerly 78k235(2), 78k13.12(7))

Claim by nonnative English-speaking students for inadequate implementation of program for identifying and placing students with limited English proficiency did not state claims under the Fourteenth Amendment and Title VI absent allegations of discriminatory intent. U.S.C.A. Const.Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

[13] Civil Rights 78 ⚿1395(2)

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1395 Particular Causes of Action
78k1395(2) k. Education. Most Cited Cases
(Formerly 78k235(2), 78k13.12(7))

Spanish-speaking students adequately stated claim under regulations promulgated pursuant to Civil Rights Act provisions for state educational agency's failure to adequately implement programs to identify and place students with limited English proficiency, even though there were no allegations in complaint that officials acted with discriminatory intent. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

***1032** Norma V. Cantu, Mexican American Legal Defense and Ed. Fund. Inc., San Antonio, Tex., for plaintiffs-appellants.

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(Cite as: 811 F.2d 1030)

Rosalyn B. Kaplan, Asst. Atty. Gen., Chicago, Ill., for defendants-appellees.

Before COFFEY and FLAUM, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge.

The primary question presented in this appeal is whether the district court erred in dismissing the plaintiffs' complaint on the ground that it failed to state a claim under § 204(f) of the Equal Educational Opportunities Act of 1974 (codified at 20 U.S.C. § 1703(f)), the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964. For the reasons stated below, we find that the lower court's dismissal of the complaint under Fed.R.Civ.P. 12(b)(6) was improper and will remand the action for further proceedings consistent with this opinion.

I

On April 16, 1985, the plaintiffs filed in federal district court an action under 42 U.S.C. § 1983 and Fed.R.Civ.P. 23(b)(2) in which they sought injunctive and declaratory relief on behalf of all Spanish-speaking children of limited English proficiency "who have been, are, or will be enrolled in Illinois public schools, and who have been, should have been, or should be assessed as limited English-proficient." Complaint ¶ 6. (In this opinion, children of limited English proficiency will be referred to as "LEP children.") The six named plaintiffs-students enrolled in either the Iroquois West School District No. 10 or the Peoria School District No. 150-are Spanish speaking. Five are LEP children. The sixth has not yet had her English proficiency tested by her local school system. The complaint named as defendants the Illinois State Board of Education ("Board") and the State Superintendent of Education, Ted Sanders ("Superintendent").

In passing on the propriety of the district court's ruling under Fed.R.Civ.P. 12(b)(6), we must accept the well-pleaded factual allegations of the complaint as true. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d ***1033** 1101, 1104 (7th Cir.1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). We are, of course, not bound by the plaintiffs' legal characterization of the facts. *Prudential Life Insurance Co. v. Sipula*, 776 F.2d 157, 159 (7th Cir.1985). Thus, the following fact recitation is drawn from the complaint. In that pleading, the plaintiffs alleged the following:

In general terms, the plaintiffs were injured because the Board and the Superintendent violated both federal and state law by failing to promulgate uniform and consistent guidelines for the identification, placement, and training of LEP children. As a direct result of the defendants' acts or omissions, the plaintiffs have been deprived of an equal education and have suffered economic hardship, undue delays in their educational progress, and in many cases exclusion from any educational opportunities.

Under Ill.Rev.Stat., ch. 122, ¶ 1A-4(C), the Board is responsible for the educational policies and guidelines for public and private schools from pre-school through grade 12. Under *id.* ¶ 14C-3, that state agency must prescribe regulations for local school districts to follow in ascertaining the number of LEP children within a given school district and for classifying these children according to the language in which they possess primary speaking ability and according to their grade level, age, or achievement level. The Board must also prescribe an annual examination for determining the level of the LEP children's oral comprehension, speaking, reading, and writing of English. The Board has received and continues to receive federal funding for the implementation of educational programs designed to benefit LEP children.

The Superintendent is the chief executive officer of the Board. Under Illinois law, the Board has delegated to the Superintendent the authority to act on its behalf. The Superintendent has also been delegated the authority to develop rules necessary to "carry into efficient and uniform effect all laws for establishing and maintaining" public schools in the state including, *inter alia*, "teaching and instruction, curriculum, library, operation, administration and supervision." State Board of Education, *The Illinois Program for Evaluation, Supervision, and Recognition of Schools* (Document No. 1) at i (1977). The Superintendent is specifically charged with establishing rules for the approval and reimbursement of local school districts that provide transitional bilingual educational programs. Ill.Rev.Stat., ch. 122, ¶ 14C-12.

The Board has promulgated regulations requiring every local school district in Illinois to identify LEP children. *Id.* ¶ 14C-1. The identification process is

referred to as a "census." When a census at a particular school building identifies as LEP children 20 or more students who speak the same primary language, the local district is required to provide a transitional bilingual education program. *Id.* ¶ 14C-3. When the census discloses less than 20 such students, the Board does not conduct any review or supervision of the existence or adequacy of whatever services a district might provide to LEP children.

The plaintiffs allege that the Board and the Superintendent have failed to provide local districts with adequate, objective, and uniform guidelines for identifying LEP children. As a result, local districts perceive that they have unlimited discretion in selecting methods of identifying such children and as a result have been able to avoid transitional bilingual education requirements by identifying less than 20 LEP children of the same primary language in a particular building. In addition, because of the absence of proper guidelines, local districts have been found to use as many as 23 different language proficiency tests, 11 standardized English tests, 7 standardized reading tests, and many formal and informal teacher-developed tests. Some of these tests do not accurately measure language proficiency, so that LEP children are not properly identified. This array of tests has also, to the detriment of the plaintiffs, resulted in inconsistent results.

***1034** As a result of the defendants' failure to prescribe the proper guidelines, LEP children throughout the state have been denied the appropriate educational services they are entitled to under federal and state law. Until the proper guidelines are promulgated, the local districts will continue to deny the plaintiffs such services. The Board and the Superintendent have failed, and continue to fail, to support and enforce the statutory and regulatory requirements against those local districts that are not complying with the existing requirements. In addition, the defendants have also failed to withhold federal and state funds from the non-complying districts. They have, in violation of federal law, failed to provide equal educational opportunities to those students in attendance centers with less than 20 LEP children with the same primary language. The Board and the Superintendent have identified, as of March of 1984, 38,364 Spanish-speaking LEP children. Only 33,179 are in transitional bilingual educational programs. Thus, 5,185 students identified as LEP children are being denied adequate educational programs and equal educational opportunities.

According to the complaint, the defendants' actions of failing to provide local districts with proper guidelines for the identification and placement of LEP children and of failing to monitor and enforce the local districts' compliance with the law, violate the plaintiffs' rights under (1) § 204(f) of the Equal Educational Opportunities Act of 1974 ("EEOA"), codified at 20 U.S.C. § 1703(f); (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) Title VI of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000d et seq.) and its regulations, 34 C.F.R. § 100.3 *et seq.*

The plaintiffs, after alleging that they had no adequate remedy at law, sought declaratory and injunctive relief, as well as costs and attorney's fees under 42 U.S.C. § 1988. They requested that the class be certified, but the record before us does not indicate that the district court ever ruled on certification.[FN1] The defendants did not answer the complaint, but filed a motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss for failure to state a claim upon which relief can be granted.

> FN1. Following oral argument and preparation of the draft opinion in this case, the court decided *Glidden v. Chromalloy American Corp.,* 808 F.2d 621 (7th Cir.1986). In *Glidden*, the court held that, under certain circumstances, the lack of a decision on the class certification question deprives a district court's judgment of the requisite finality for appealability under 28 U.S.C. § 1291 (thus depriving this court of jurisdiction over the appeal). However, *Glidden* does not require us to similarly hold that the judgment here appealed from was not final, because the unusual circumstances involved in that case are not present in this case. In *Glidden,* the district court deliberately withheld decision on the certification motion pending appeal of its grant of summary judgment for the defendants and contemplated further proceedings to determine the motion. 808 F.2d at 623. In the words of this court:
>
> > The case is not over in the district court. The court has not identified the parties to

> be bound by the judgment, one of the elementary requirements of finality. The opinion granting summary judgment explicitly contemplates further proceedings to ascertain who shall be bound.... We are confronted with the possibility of two appeals: one on the merits, followed by a second appeal if either party should be dissatisfied with any aspect of the certification of the class (or the refusal to certify a class). A final decision is one wrapping up the case and leaving nothing but execution, ... this "judgment" does not meet that test.
>
> *Id.* at 623.
>
> In the present case, the district court did not retain anything for later decision. While the court's failure to decide the certification question would have presented problems if we had affirmed and the defendants later sought to plead the judgment as *res judicata* to a subsequent suit brought by other members of the putative class (and for this reason we caution the district courts against disposing of putative class actions without deciding whether a class should be certified), resolution of those problems would have to await a subsequent suit, rather than additional proceedings in the present one. The district court dismissed the suit in its entirety, clearly leaving itself with nothing else to decide. While the failure to decide the certification question may have been error, it was not such as to deprive this court of jurisdiction over this appeal.

The district court granted the defendants' motion on July 12, 1985. 614 F.Supp. ***1035** 342. Citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), the lower court held that the Eleventh Amendment barred any relief the plaintiffs sought for violations of Illinois law. It did not pass on the Eleventh Amendment questions regarding violations of federal law, however, but concluded that the defendants had discharged any obligations imposed on them by the EEOA. Specifically, the district court ruled that no particular remedy is set forth in the EEOA for implementing bilingual education, so that a state is free to establish its own program and to delegate to local school districts the primary burden of implementing it. According to the lower court, once a state has passed a statute setting up a transitional bilingual education program and once the state's board of education has drawn up and promulgated guidelines for the program's implementation, the burden of execution shifts to the local districts, and the state agencies have no further obligations.

The court concluded that the Board and the Superintendent had issued "detailed" regulations, so that the defendants had no further duty under Illinois or federal law. Accordingly, any remedy available to the plaintiffs must come from the local districts. The court went on, however, to conclude that the state defendants "are not the proper parties ... under § 1703(f)." 614 F.Supp. at 347. The court, therefore, dismissed the plaintiffs' complaint and directed them to file a new complaint under § 1703(f) against the local school officials in the federal district court in which the districts are located.

The court then turned to a consideration of the remaining claims under both the Equal Protection Clause and Title VI. It concluded that, because "the plaintiffs allege neither purposeful discrimination nor past de jure discrimination in the defendants' attempts to enact transitional bilingual education programs," the allegations of violations of the Equal Protection Clause, § 1983, and Title VI did not state a claim. 614 F.Supp. at 347. The complaint was dismissed in its entirety, and the plaintiffs' motion for reconsideration was denied. This appeal followed.

II

A. Preliminary Matters

Before discussing the merits of the district court's dismissal of the complaint, we must consider two preliminary matters: the effect of the Eleventh Amendment on the plaintiffs' claims for relief and the nature of 12(b)(6) procedures.

1. Eleventh Amendment

The significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III" of the Constitution.[FN2] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984).

Thus, in *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Supreme Court held that the amendment barred a citizen from bringing suit against his own state in federal court, even though the express terms of that constitutional provision did not so provide. This fundamental limitation on federal jurisdiction applies (subject to certain exceptions discussed below) not only when the plaintiff seeks to recover under federal law, *see Papasan v. Allain,* --- U.S. ----, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), but also when he seeks to vindicate a right having its genesis in state law, *see Pennhurst,* 465 U.S. at 117, 104 S.Ct. at 917.

FN2. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The instant case presents several questions relating to the Eleventh Amendment. One was addressed by the lower court. The others were not, presumably because ***1036** of the manner in which that court ruled on the 12(b)(6) motion and because of the defendants' sketchy presentation of these issues below. Nonetheless, because the Eleventh Amendment defense "partakes of the nature of a jurisdictional bar," *Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974), we will consider its applicability in the instant case, even though the district court did not. *See id.; see also Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (Eleventh Amendment defense considered even though not raised in district court); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-67, 65 S.Ct. 347, 352, 89 L.Ed. 389 (1945) (Eleventh Amendment defense considered even though raised for first time in Supreme Court).

a. State Law Violations

[1] The defendants maintain that the interpretation of the Eleventh Amendment set forth in the Supreme Court's recent decision in *Pennhurst, supra,* bars the plaintiffs' action. We, however, must affirm the district court's conclusion that *Pennhurst* does not foreclose this lawsuit, for the simple reason that the plaintiffs are not seeking to vindicate rights based on state law. They alleged only that the defendants failed to discharge the duties imposed by *federal* law under the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and § 204(f) of the EEOA. As we understand the complaint, the plaintiffs have no quarrel with Illinois's Transitional Bilingual Education Act. Thus, the plaintiffs' position is not that they could hold the defendants liable under Illinois law, but rather that they have been injured by the defendants' failure to implement that state enactment to the extent required by *federal* law. *Pennhurst,* therefore, is not controlling.

b. Federal Law Violations

The district court did not expressly analyze the effect Illinois's immunity would have on any of the plaintiffs' federal claims. Nonetheless, because, as noted above, the Eleventh Amendment sets forth a jurisdictional limitation, we will consider the scope of that state's immunity to the extent possible on the record before us.

[2] As a general matter, states and their agencies cannot be sued in federal court unless they consent to suit in unequivocal terms or unless Congress, pursuant to a valid exercise of power (as, for example, when it enacts legislation pursuant to its enforcement authority under § 5 of the Fourteenth Amendment), unequivocally expresses its intent to abrogate that immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985); *Gary A. v. New Trier High School District No. 203,* 796 F.2d 940, 943 (7th Cir.1986). According to the Supreme Court's decision in *Atascadero,* 105 S.Ct. at 3147, "A general authorization for suit in federal court is not the kind of statutory language sufficient to abrogate the Eleventh Amendment." The Court has never held, however, that a statute must expressly provide that it abrogates the states' immunity, and we note that such a requirement would be inconsistent with the Court's Eleventh Amendment jurisprudence. *See, e.g., Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Thus, although a federal enactment must "unequivocally" abrogate immunity, it may do so, not in so many words, but rather by its effect. For example, an abrogation may be found where any other reading of the statute in question would render nugatory the express terms of the provision. *Cf. Radzanower v. Touche*

Ross & Co., 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976) (implied repeal); *Milwaukee County v. Donovan*, 771 F.2d 983, 986 (7th Cir.1985) (Congress has general intent to avoid results that would vitiate purpose of specific legislative provisions, so statute will not be interpreted so as to defeat goals of legislative scheme), *cert. denied*, --- U.S. ----, 106 S.Ct. 2246, 90 L.Ed.2d 692 (1986). We turn now to an examination of the defendants' possible Eleventh Amendment defense to the plaintiffs' claims under ***1037** § 204(f) of the EEOA and Title VI of the Civil Rights Act of 1964.[FN3]

> FN3. Because we find that the plaintiffs' Fourteenth Amendment claim must be dismissed due to the absence of allegations regarding discriminatory intent, *see* § II(D) of this opinion, we need not consider the effect of the Eleventh Amendment on that claim.

i. Equal Educational Opportunities Act

[3] With reference to the EEOA, we agree with the Ninth Circuit's conclusion in *Los Angeles Branch NAACP v. Los Angeles Unified School*, 714 F.2d 946 (9th Cir.1983), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2398, 81 L.Ed.2d 354 (1984), that Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the Act. It should be noted that any other interpretation would render that enactment a dead letter *ab initio*.

There can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment. *See* 20 U.S.C. §§ 1701, 1702; *see also Castaneda v. Pickard*, 648 F.2d 989, 1008 n. 9 (5th Cir.1981). A consideration of the relevant provisions of Title 20 of the United States Code only serves to confirm our conclusions concerning the Act's abrogation of sovereign immunity. Section 204(f) of the EEOA, codified at 20 U.S.C. § 1703(f), provides:

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

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

(emphasis added). Sections 221(a) and (b) of the EEOA, codified at 20 U.S.C. §§ 1720(a) and (b), provide:

(a) The term "educational agency" means a local educational agency or a "*State* educational agency" as defined by [20 U.S.C. § 3381(k)].

(b) The term "local educational agency" means a local educational agency as defined by [20 U.S.C. § 3381(f)].

(emphasis added). Under 20 U.S.C. § 3381(k), a "State educational agency" is defined as:

[T]he *State* board of education or other agency or officer primarily responsible for the *State* supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(emphasis added). Under 20 U.S.C. § 3381(f), a "local educational agency" is defined as follows:

[A] public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

Finally, 20 U.S.C. § 1706 provides that "an individual denied an equal educational opportunity ... may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate."

[4] Although § 1706 does not expressly refer to the states, it is clear from the language set forth above that the obligations of § 1703(f) are imposed on the states and their agencies. Thus, any action under § 1706 to enforce § 1703(f) can only be maintained against entities that would ordinarily be immune under the Eleventh Amendment (unless, of course, the plaintiffs seek a remedy on the local level only). Stated in another manner, the definition of "educational agency" includes both state and local agencies and, without the abrogation***1038** of sovereign im-

munity, state agencies would, in practice, vanish from that definition.

Unlike, for example, 29 U.S.C. §§ 794 and 794a, 20 U.S.C. §§ 1703(f) and 1706 do not simply provide relief against a general class of defendants that may or may not include the states and their agencies. *See Atascadero,* 105 S.Ct. at 3147-49 (29 U.S.C. § 794a, which allows for suit against "any recipient of federal assistance," too general to constitute congressional abrogation of Eleventh Amendment immunity). Nor are these enactments similar to 42 U.S.C. § 1983, which provides for suit only against a state officer, not against the state itself. *See Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (§ 1983 not intended to limit sovereign immunity); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (same). To the contrary, the EEOA expressly contemplates that relief is to be obtained from the state and its agencies. *Cf. Gary A.,* 796 F.2d at 944 n. 6. It is for these reasons, then, that we conclude that Congress intended to abrogate the states' Eleventh Amendment immunity to the extent such immunity would foreclose recovery under that act.

ii. Title VI of the Civil Rights Act of 1964

Our research has produced no decision that directly addresses the question whether Congress abrogated the states' Eleventh Amendment immunity with the passage of Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000d to 2000d-4. However, the Supreme Court's construction in *Atascadero* of similar language in 29 U.S.C. §§ 794 and 794a provides an answer to the effect of Title VI on the Eleventh Amendment. The language for 29 U.S.C. § 794 was modeled after 42 U.S.C. § 2000d. *See Timms v. Metropolitan School District,* 722 F.2d 1310, 1318 n. 4 (7th Cir.1983); *Halderman v. Pennhurst State School & Hospital,* 612 F.2d 84, 107-08 n. 29 (3d Cir.1979). If 29 U.S.C. § 794 was found to be insufficient in *Atascadero* to abrogate the states' Eleventh Amendment protection, then it follows that the substantially similar language of 42 U.S.C. § 2000d is also insufficient. *Cf. Gary A.,* 796 F.2d at 944 (interpretation of 29 U.S.C. § 794 in *Atascadero* compels conclusion that similar language in the Education for All Handicapped Children Act of 1975, codified at 20 U.S.C. §§ 1400-1420, does not abrogate sovereign immunity).

[5] Apart from the similarity in the language of § 794 and § 2000d, we find that there can be no abrogation under § 2000d because, in contrast to 29 U.S.C. § 794a, any right of action the plaintiffs may have under Title VI is an implied one. *See Guardians Association v. Civil Service Commission,* 463 U.S. 582, 593-97, 103 S.Ct. 3221, 3227-30, 77 L.Ed.2d 866 (1983). It is well settled that, when considering an "implied" right of action, we must be chary in our interpretation of the statute that confers such a right, lest we provide for a more comprehensive set of remedies than Congress intended. *Community & Economic Development Ass'n v. Suburban Cook County Area Agency on Aging,* 770 F.2d 662 (7th Cir.1985). In the context of the Eleventh Amendment, it is difficult to understand how we can conclude that Congress unequivocally abrogated the states' immunity defense when the legislature did not even provide an express right of action for private parties and when the class of potential defendants described in the statute is a general one that may or may not include states and their agencies. That the language of the regulations promulgated under Title VI (*see* 34 C.F.R. § 100 (1985)) may be broader than the associated statutory language does not alter the result: although an administrative agency may give an expansive reading to the remedial sections of a particular statutory scheme, it is Congress alone, not the agency, that has the power under § 5 of the Fourteenth Amendment initially to abrogate the states' sovereign immunity.

We, however, note that Illinois may have waived its immunity for the purposes of Title VI. As the Court stated in *Atascadero,* 105 S.Ct. at 3145 n. 1, "A State may ***1039** effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." The exiguous state of the record before us-and absence of any argument from either side on the question-precludes any decision from us on waiver. That issue then must be pursued below on remand.

Of course, our discussion regarding abrogation and waiver of immunity under Title VI applies only to the Board. It would appear initially that the Superintendent might be held accountable for the appropriate declaratory and injunctive relief under *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and its progeny. However, the record does not disclose the nature of the relief the plaintiffs would seek under § 2000d, so a decision from this court now

on the scope of the relief that might be available from this state official would be premature. As with the waiver question, the parties must take up the issues relating to the *Young* doctrine on remand.

2. Rule 12(b)(6)

In view of what transpired below, we will pause to review the function of Rule 12(b)(6) procedures and the scope of the record a court must consider in passing on a motion under that rule. If the Federal Rules of Civil Procedure required that every action filed in district court proceed to trial, the costs generated thereby would be enormous and there would be little benefit in the way of increased accuracy in the results. For many lawsuits, it is obvious well before trial that the defending party is entitled to judgment and that there is no need to expend further the resources of the parties and the court. Thus, the federal rules employ several filters for separating out those suits that should receive plenary consideration from those that should not. Rule 12(b) contains the first set of filters. By moving under subsection (6) of that rule, the defending party maintains that, accepting the plaintiff's allegations as true, the complaint fails to state a claim upon which relief can be granted. At this point in the proceedings, where the plaintiff is a master of his pleading, there is no need to continue the suit if the party initiating the action cannot unilaterally set forth the necessary allegations that entitle him to recovery; thus, judgment should be for the defending party. This is not a decision for the district court to make lightly, however, as the dismissal of the suit under 12(b)(6) could preclude another suit based on any theory that the plaintiff might have advanced on the basis of the facts giving rise to the first action. *American Nurses' Association v. State of Illinois*, 783 F.2d 716, 726-27 (7th Cir.1986).

Thus, in ruling on the 12(b)(6) motion, a district court must accept the well-pleaded allegations of the complaint as true. In addition, the court must view those allegations in the light most favorable to the plaintiff. *Car Carriers*, 745 F.2d at 1106. Similarly, the record under 12(b)(6) is limited to the language of the complaint and to those matters of which the court may take judicial notice. The complaint cannot be amended by the briefs filed by the plaintiff in opposition to a motion to dismiss. *Id.* at 1107. By the same token, the defendant cannot, in presenting its 12(b)(6) challenge, attempt to refute the complaint or to present a different set of allegations. The attack is on the sufficiency of the complaint, and the defendant cannot set or alter the terms of the dispute, but must demonstrate that the plaintiff's claim, as set forth by the complaint, is without legal consequence.

It has been said that the complaint should be dismissed only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations set forth in that pleading. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2233, 81 L.Ed.2d 59 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). However, this formulation has not been taken literally, *Car Carriers*, 745 F.2d at 1106, because it would permit the dismissal of only patently frivolous cases. ***1040** *See American Nurses' Association*, 783 F.2d at 727. Nonetheless, although the articulation of the standard may vary, it is undisputed that the defendant must overcome a high barrier to prevail under Rule 12(b)(6).

The problem in the instant case is that, from our reading of the district court's decision dismissing the complaint, it appears that the court neither accepted the plaintiffs' allegations as true nor viewed the evidence in the light most favorable to the plaintiffs. For example, the court did not directly address the plaintiffs' assertion that, although the Board and the Superintendent had ostensibly issued regulations for the education of LEP children, those measures were ineffective in identifying and placing these students.

[6] We also note that the plaintiffs, after the initial dismissal of the complaint, filed a motion for reconsideration to which they attached affidavits, including a rather lengthy one from F. Howard Nelson, an "independent research consultant and program evaluator." In that document, Mr. Nelson discussed the inadequacies of the Illinois educational system for LEP children. Affidavits, however, are the weapons of summary judgment, not of challenges to the sufficiency of the complaint. *See* Fed.R.Civ.P. 12(b), 12(c), 56. It is understandable that the plaintiffs would attempt to make such a showing given the court's reliance on factual inferences not present in the pleadings. Nonetheless, once the district court dismissed the complaint, the plaintiffs had either to amend the complaint or to appeal the judgment.[FN4] *Cf. Car Carriers*, 745 F.2d at 1111. Attaching affidavits to the motion for reconsideration of the dismissal of the complaint is not appropriate, unless the district

court converts the 12(b)(6) motion into one for summary judgment. That conversion was not accomplished below and, of course, cannot be done here because it would be unduly prejudicial to the parties in view of the paucity of this record.

> FN4. Of course, if the complaint alone had been dismissed, so that the litigation was not terminated, then the dismissal would not be a final appealable order. *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1111 (7th Cir.1984), *cert. denied,* 470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). However, the district court in the instant case clearly dismissed the claims against the defendants with prejudice, because it found that the defendants had discharged their obligations under state and federal law and that they were not the "proper parties." Thus, the litigation initiated with this complaint had been terminated. The district court's observation regarding actions against local districts simply meant that the plaintiffs were invited to initiate a series of suits against a new set of defendants in other federal district courts, not that the initial action would continue in other federal fora.

B. Review of Dismissal of Complaint

1. Equal Educational Opportunities Act of 1974

The relevant provisions of the EEOA are set forth in § II(A)(2)(a) of this opinion and will not be repeated herein. The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965. *See* Pub.L. No. 93-380, 93d Cong., 2d Sess., tit. II, 88 Stat. 484, 514 (codified in scattered sections of 20 U.S.C.). There is virtually no legislative history on the provision, and we agree with the observation of the Fifth Circuit in *Castaneda v. Pickard,* 648 F.2d 989, 1001 (5th Cir.1981), that in interpreting floor amendments unaccompanied by illuminating debate a court must adhere closely to the ordinary meaning of the amendment's language.

Congress has provided us with little guidance for the interpretation of § 1703(f). The term "appropriate action" used in that provision indicates that the federal legislature did not mandate a specific program for language instruction, but rather conferred substantial latitude on state and local educational authorities in choosing their programs to meet the obligations imposed by federal law. But, as noted in *Castaneda,* 648 F.2d at 1009, "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***1041** deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met." In addition, it is clear that § 1703(f) places the obligation on *both* state and local educational agencies to provide equal educational opportunities to their students.

We are, of course, not unmindful of an important institutional limitation that is present even in the absence of the broad language of § 1703(f). Because of the nature of the judicial process, federal courts are poorly equipped to set substantive standards for institutions whose control is properly reserved to other branches and levels of government better able to assess and apply the knowledge of professionals in a given field (here elementary and secondary education). In such a situation, we must formulate legal rules that protect the plaintiffs' interests in obtaining equal educational opportunities (through the elimination of language barriers) and that give guidance to educational agencies in establishing programs to promote those interests. At the same time, we must be careful not to substitute our suppositions for the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies. *See Castaneda,* 648 F.2d at 1009.

It is for these reasons that we believe we should review a state's implementation of § 1703(f) in a manner similar to that which we employ in reviewing an administrative agency's interpretation and implementation of its legislative mandate. *See, e.g., Bowen v. American Hospital Association,* --- U.S. ----, 106 S.Ct. 2101, 2122-23, 90 L.Ed.2d 584 (1986); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 41-44, 103 S.Ct. 2856, 2865-67, 77 L.Ed.2d 443 (1983). Although Congress has provided in § 1703(f) that the spectrum of permissible choice for educational agencies would be broad, that does not mean that the spectrum is without discernible boundaries. This is not a case in which there are no substantive rules to apply, so that there is "neither legal right nor legal wrong." *Achacoso-Sanchez v. INS,* 779 F.2d 1260, 1265 (7th Cir.1985). The term "appropriate action" is not simply precatory, but must be given

content with a mind to the EEOA's allocation of responsibilities between the courts and the schools. The duty remains upon us to interpret and enforce congressional enactments, and we cannot accord such sweeping deference to state and local agencies that judicial review becomes in practice judicial abdication.

We find that, as a general matter, the framework set out in *Castaneda,* 648 F.2d at 1009, provides the proper accommodation of the competing concerns identified above. *See also United States v. Texas,* 680 F.2d 356, 371 (5th Cir.1982). Of course, we do not mean to say that we are adopting without qualification the jurisprudence developed in the Fifth Circuit regarding the interpretation of the EEOA. However, the *Castaneda* decision provides a fruitful starting point for our analysis. The fine tuning must await future cases. We, for example, may find that the *Castaneda* guidelines, when applied to a broad range of cases, provide for either too much or too little judicial review. In the instant case, however, they give the proper initial direction for the inquiry.

[7] First, we must examine carefully the evidence of record regarding the soundness of the educational theory or principles upon which the challenged program is based. The court's responsibility in this regard is to ascertain whether a school system is pursuing a program informed by an educational theory recognized as sound by experts in the field or at least considered a legitimate experimental strategy. *Castaneda,* 648 F.2d at 1009. Our function is not to resolve disputes among the competing bodies of expert educational opinion. So long as the chosen theory is sound, we must defer to the judgment of the educational agencies in adopting that theory, even though other theories may also seem appropriate.

Second, we must determine whether the programs actually used by a school system ***1042** are reasonably calculated to implement effectively the educational theory adopted by the system. After providing substantial leeway for the school system to choose initially its program, we would not be assuring that "appropriate action" was being taken if we found that the school system, after adopting an acceptable theory of instruction, failed to provide the procedures, resources, and personnel necessary to apply that theory in the classroom. *Id.* To the contrary, practical effect must be given to the pedagogical method adopted.

Finally, we must decide whether a school's program, although ostensibly premised on a legitimate educational theory and adequately implemented initially, fails, after a period of time sufficient to give the plan a legitimate trial, to obtain results that would indicate that the language barriers confronting the students are actually being overcome. *Id.* at 1010. In other words, the program can pass the first two thresholds of *Castaneda,* yet may after a time no longer constitute appropriate action for the school system in question, either because the theory upon which it was based did not ultimately provide the desired results or because the authorities failed to adapt the program to the demands that arose in its application. Judicial deference to the school system is unwarranted if over a certain period the system has failed to make substantial progress in correcting the language deficiencies of its students.

[8] The defendants maintain that the *Castaneda* decision applies only to local school districts. We disagree. There is certainly no language in that case to suggest that it is so limited. Indeed, the Fifth Circuit in a subsequent decision applied the *Castaneda* guidelines to an entire state school system. *See Texas,* 680 F.2d at 371-72. There will be, of course, differences in the application of the *Castaneda* analysis depending on whether a state or a local program is at issue. The question is primarily one of the intensity of judicial review. For example, the state school board and its superintendent are obviously not directly involved in the classroom education process. Thus, state educational agencies can only set general guidelines in establishing and assuring the implementation of the state's programs. That does not mean, however, that they have no obligations under the EEOA, for even those general measures must constitute "appropriate action." If a local district is involved, however, then a consideration of what actually occurs in the classroom might be appropriate.

In this case, the first step of the *Castaneda* analysis, *i.e.,* whether the program at issue is based on sound educational theory, is not implicated, because the plaintiffs have no quarrel with the basic "transitional bilingual" education program the state of Illinois has chosen for LEP children. The plaintiffs do maintain, however, that the defendants have failed to meet the second step of *Castaneda,* which relates to implementation. Obviously, then, if the defendants

have failed to satisfy step two, we need not consider step three, because this final step assumes that there has been an adequate initial implementation of the program.

That brings us to the central issue of this dispute: What obligation does § 1703(f) impose on state (as opposed to local) educational agencies for the implementation of programs designed to provide LEP children with an equal educational opportunity? Accepting (as we must) the plaintiffs' allegations as true, the district court's decision means that the defendants need only issue regulations that fail to provide local districts with adequate and uniform guidelines for identifying and placing LEP children in a transitional bilingual education program and that the defendants need not monitor and enforce the implementation of the program chosen by the state's legislature.

[9] We cannot accept such an interpretation of the EEOA. Section 1703(f) could hardly be called detailed, but it does make clear, through the definition of the term "educational agency," that the obligation to take "appropriate action" falls on both state and local educational agencies. We concur in the conclusion of the Ninth Circuit***1043** in *Idaho Migrant Council v. Board of Education,* 647 F.2d 69 (9th Cir.1981), that § 1703(f) requires that state, as well as local, educational agencies ensure that the needs of LEP children are met. The plaintiffs in essence alleged that the defendants have only gone through the motions of solving the problem of language barriers. Although the meaning of "appropriate action" may not be immediately apparent without reference to the facts of the individual case, it must mean something more than "no action." State agencies cannot, in the guise of deferring to local conditions, completely delegate in practice their obligations under the EEOA; otherwise, the term "educational agency" no longer includes those at the state level. Exactly what state educational agencies must do beyond establishing the minimums for the implementation of language remediation programs and enforcing those minimums is not at issue in the instant appeal, because the plaintiffs have done no more than allege that the defendants failed even to establish the minimums needed for identifying and placing LEP children. These allegations, nonetheless, are enough to withstand a 12(b)(6) challenge. Whether the plaintiffs can prove their case is a matter that must be determined on remand, not on appeal. We can only decide at this early stage of the litigation that the plaintiffs have stated a claim and, therefore, that the dismissal of the complaint was improper.[FN5]

FN5. Our holding that the Board may properly be sued for violations of the EEOA is in no way inconsistent with *Board of Education of Peoria v. Illinois State Board of Education,* 810 F.2d 707 (7th Cir.1987), where we held that, under the Illinois State law as incorporated by Fed.R.Civ.P. 17(b), the Board lacked capacity to sue a local school board under 42 U.S.C. §§ 1981 and 1983. We note that capacity to sue and capacity to be sued are not necessarily coterminous. For example, many states have provisions which deprive foreign corporations of the capacity to sue unless they first qualify to do business within the state, yet do not prevent such corporations from defending any action which is brought against them. *See, e.g.,* Ill.Rev.Stat. ch. 32, ¶ 13.70 (Smith-Hurd Supp.1986). In *Peoria Board of Education,* we specifically noted that:

> We do *not* hold that the State Board or any other governmental entity is unaccountable when it contributes to a violation of the constitution or laws of the United States simply because its role in the overall state activity is a limited one.
>
> 810 F.2d at 713 (emphasis in original).
>
> We adhere to the above quoted statement and hold that the State Board may be sued for any violation of the EEOA which it may have committed.

The defendants concede that they are required under Illinois law to issue regulations for the identification and placement of LEP children, but argue that they are not empowered to supervise and enforce the local school districts' compliance with those regulations. It is clear, however, that the Board and the Superintendent are vested with the authority under state law to supervise the local districts and to enforce state regulations. *See, e.g.,* Ill.Rev.Stat. ch. 122, ¶¶ 2-3, 2-3.3, 2-3.6, 2-3.8, 2-3.25, 2-3.26, 2-3.39, 2-3.48, 14C-1 to 3, 14C-12; *see also Lenard v. Board of Education,* 74 Ill.2d 260, 24 Ill.Dec. 163, 167, 384 N.E.2d 1321, 1325 (1979). At oral argument, counsel

for the defendants conceded that the Board and the Superintendent had the power to mandate that local districts provide the proper education for LEP children. We, of course, would be confronted with a very different set of questions if a state did not grant its educational agencies the power to implement state programs even though § 1703(f) required that those agencies take appropriate action to provide equal educational opportunities to their students. That is not, however, the case before us.

[10] We must address two events that occurred after the district court rendered its decision in the instant case. First, we noted above that the plaintiffs in their complaint addressed the defendants' alleged failure to supervise, monitor, and enforce Illinois's transitional bilingual education legislation in those local districts required by state law to establish such programs and that the plaintiffs also complained of the lack of programs for those attendance centers with less than 20 LEP children. When this suit was filed, Ill.Rev.Stat. ch. ***1044** 122, ¶ 14C-3 provided that "[a] school district *may* establish a program in transitional bilingual education with respect to any classification with less than 20 children therein" (emphasis added). The Illinois legislature added the following language on August 1, 1985 (to become effective on that date):

> but should a school district decide not to establish such a program, the school district *shall* provide a locally determined transitional program of instruction which, based upon an individual student language assessment, provides content area instruction in a language other than English to the extent necessary to ensure that each student can benefit from educational instruction and achieve an early and effective transition into the regular school curriculum.

(emphasis added). We reject the defendants' contention that this new legislation moots the plaintiffs' claim relating to those attendance centers with less than 20 LEP children. If anything, this new provision places an additional obligation (along with the general ones imposed by Ill.Rev.Stat. ch. 122, ¶ 2) on the defendants to ensure that students in these attendance centers are receiving a proper education. Indeed, the defendants in their brief to this court have informed us that they will be developing regulations for the implementation of these local programs mandated by the 1985 amendment. We cannot, of course, determine on the record before us the effect this new legislation will have on the actions of the defendants, but we can say that the plaintiffs' claims are not now moot.

[11] That brings us to the second development. On April 4, 1986, the Board released proposed regulations for the implementation of Illinois's Transitional Bilingual Education Act that, if adopted, would replace those in effect when this suit was filed. However, at the time of our decision, these remain only *proposed* regulations. We do not understand then the defendants' argument that this administrative proposal in April of 1986 provides the plaintiffs with the relief they seek. Not only have the proposed regulations not been adopted, but they have never been tested in practice. The defendants could issue administrative pronouncements that, although (in the district court's words) "detailed," have no practical value whatsoever. That the defendants have reconsidered the regulations about which the plaintiffs complain does not mean that the defendants have eliminated the alleged deficiencies in the education of LEP children. On remand, the district court will, of course, consider any new provisions the defendants may promulgate. In any event, a decision from us on this record about the proposed regulations would be premature.

To summarize, we hold that the plaintiffs' allegations relating to § 1703(f) state a claim upon which relief can be granted. The district court's dismissal of the complaint was, therefore, improper and is reversed.

2. Remaining Claims

[12] As the district court noted in its decision, the plaintiffs sought to recover under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. §§ 2000d to 2000d-4.[FN6] The court correctly concluded that, because the plaintiffs did not allege that the defendants acted with a discriminatory intent, the Fourteenth Amendment claim and Title VI statutory claim must fail. *See Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

FN6. 42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be

> excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[13] The plaintiffs, however, also sought to recover under the *regulations* promulgated pursuant to Title VI. *See, e.g.*, 34 C.F.R. § 100.3. Although the voting***1045** of the Justices may be difficult for the reader to discern at first, a majority of the Court in *Guardians Association* concluded that a discriminatory-impact claim could be maintained under those regulations, although not under the statute. *See* 463 U.S. at 607 n. 27, 103 S.Ct. at 3235 n. 27 (White, J.); *id.* at 608 n. 1, 103 S.Ct. at 3235 n. 1 (Powell, J., concurring in the judgment); *see also Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 717, 83 L.Ed.2d 661 (1985); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 n. 9, 104 S.Ct. 1248, 1252 n. 9, 79 L.Ed.2d 568 (1984); *Castaneda v. Pickard*, 781 F.2d 456, 465 n. 11 (5th Cir.1986). Although *Guardians Association* was an employment discrimination case, there is nothing in that decision to indicate that the Court's interpretation of the regulations implementing Title VI was limited to employment decisions. In addition, the regulations are broadly drafted and contain no limiting language. *See Georgia State Conference v. State of Georgia*, 775 F.2d 1403, 1417 n. 19 (11th Cir.1985). Thus, we hold that the portion of the plaintiffs' Title VI claim based on the implementing regulations survives the defendants' 12(b)(6) challenge, even though there was no allegation in the complaint that the defendants acted with a discriminatory intent.

III

For the reasons stated above, the district court's dismissal of the complaint is AFFIRMED in part and REVERSED in part and the action is REMANDED for further proceedings consistent with this opinion.

C.A.7 (Ill.),1987.
Gomez v. Illinois State Bd. of Educ.
811 F.2d 1030, 8 Fed.R.Serv.3d 973, 37 Ed. Law Rep. 1073

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Supreme Court of the United States
Thomas C. HORNE, Superintendent, Arizona Public Instruction, Petitioner,
v.
Miriam FLORES et al.
Speaker of the Arizona House of Representatives, et al., Petitioners,
v.
Miriam Flores et al.

Nos. 08–289, 08–294.
Argued April 20, 2009.
Decided June 25, 2009.

Background: English Language–Learner (ELL) students and their parents filed class action alleging that State of Arizona was violating Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers. The United States District Court for the District of Arizona, Marquez, Senior District Judge, 172 F.Supp.2d 1225, concluded that State and other defendants were violating EEOA, applied declaratory judgment order statewide, 2001 WL 1028369, and, 405 F.Supp.2d 1112, held State in civil contempt for failing to adequately fund ELL programs Arizona and rejected proposed legislation as inadequate. Superintendent of Public Instruction and leaders of Arizona legislature intervened and moved to purge contempt order and for relief from judgments. The District Court denied requested relief, and intervenors appealed. The United States Court of Appeals for the Ninth Circuit, 204 Fed.Appx. 580, remanded for evidentiary hearing. On remand, the District Court, Raner C. Collins, J., 480 F.Supp.2d 1157, denied relief. Intervenors appealed. The Court of Appeals, Berzon, Circuit Judge, 516 F.3d 1140, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:
(1) Superintendent had standing;
(2) Court of Appeals should have inquired whether changed conditions satisfied EEOA;
(3) district court abused its discretion on remand by focusing only on increased funding for ELL programs;
(4) on remand, district court must consider factual and legal challenges that may warrant relief;
(5) State's compliance with No Child Left Behind Act (NCLB) benchmarks did not automatically satisfy EEOA requirements; and
(6) statewide injunction was not warranted.

Reversed and remanded.

Justice Breyer filed dissenting opinion in which Justice Stevens, Justice Souter, and Justice Ginsburg joined.

West Headnotes

[1] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

By simply requiring a State to take appropriate action to overcome language barriers in order to comply with the Educational Opportunities Act (EEOA), without specifying particular actions that a State must take, 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. Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703.

[2] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

The threshold issue of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases

To establish standing under Article III, a plaintiff must present an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged action, and redressable by a favorable ruling. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[4] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

In all standing inquiries, the critical question is whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] Schools 345 47

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k47 k. State boards and officers. Most Cited Cases

Arizona's Superintendent of Public Instruction had Article III standing to seek relief from judgments of federal district court, which had issued declaratory and injunctive relief and had cited state for civil contempt in connection with action brought against state under Equal Educational Opportunities Act (EEOA); although Superintendent answered to State Board of Education, which in turn answered to the Governor, Governor had directed an appeal, Superintendent was named defendant in the case, district court's declaratory judgment held him to be in violation of EEOA, and injunction ran against him. U.S.C.A. Const. Art. 3, § 2, cl. 1; Equal Educational Opportunities Act of 1974, § 202 et seq., 20 U.S.C.A. § 1701 et seq.

[6] Federal Courts 170B 462

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk462 k. Determination and disposition of cause. Most Cited Cases

Because Arizona's Superintendent of Public Instruction had standing under Article III to seek relief from judgments of federal district court, which had issued declaratory and injunctive relief and had cited state for civil contempt in connection with action brought against state under Equal Educational Opportunities Act (EEOA), Supreme Court would not consider whether leaders of Arizona legislature also had standing to do so. U.S.C.A. Const. Art. 3, § 2, cl. 1; Equal Educational Opportunities Act of 1974, § 202 et seq., 20 U.S.C.A. § 1701 et seq.

[7] Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

Rule providing for relief from judgment or order on grounds that applying judgment or order prospectively is no longer equitable may not be used to challenge the legal conclusions on which a prior judgment or order rests, but

the rule provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 2397.4

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.4 k. Amending, opening, or vacating. Most Cited Cases

Federal Civil Procedure 170A 2657.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2657.1 k. In general. Most Cited Cases

Injunction 212 1620

212 Injunction
212V Actions and Proceedings
212V(I) Continuing, Modifying, or Terminating
212k1618 Modifying or Staying Injunction
212k1620 k. Authority and discretion of court. Most Cited Cases
(Formerly 212k210)

Injunction 212 1636

212 Injunction
212V Actions and Proceedings
212V(I) Continuing, Modifying, or Terminating
212k1628 Motions and Proceedings
212k1636 k. Evidence and affidavits. Most Cited Cases
(Formerly 212k210)

The party seeking relief from judgment or order on grounds that applying judgment or order prospectively is no longer equitable bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[9] Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

Injunction 212 1611

212 Injunction
212V Actions and Proceedings
212V(I) Continuing, Modifying, or Terminating
212k1611 k. In general. Most Cited Cases
(Formerly 212k210)

Rule providing for relief from judgment or order on grounds that applying judgment or order prospectively is no longer equitable serves a particularly important function in institutional reform litigation; injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances, such as changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights, that warrant reexamination of the original judgment, institutional reform injunctions often raise sensitive federalism concerns, and the dynamics of institutional reform litigation differ from those of other cases. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[10] Constitutional Law 92 2470

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2470 k. In general. Most Cited Cases

Constitutional Law 92 2540

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2540 k. In general. Most Cited Cases

Injunction 212 1247

212 Injunction
212IV Particular Subjects of Relief
212IV(E) Governments, Laws, and Regulations in General
212k1247 k. Injunctions against government officials in general. Most Cited Cases
(Formerly 212k75, 212k74)

Institutional reform injunctions bind state and local officials to the policy preferences of their predecessors and may thereby improperly deprive future officials of their designated legislative and executive powers.

[11] Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

In recognition of the features of institutional reform decrees, courts must take a flexible approach to motions for relief from such decrees on grounds that applying judgment or order prospectively is no longer equitable; a flexible approach allows courts to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[12] Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

In applying required flexible approach to motions for relief from institutional reform decrees, courts must remain attentive to the fact that federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation. Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[13] Federal Civil Procedure 170A 2397.2

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.2 k. Form and requisites; validity. Most Cited Cases

If a federal consent decree is not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers.

[14] Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

Critical question, on motion for relief from district court's declaratory judgment order that State of Arizona was violating the Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers of English Language–Learner (ELL) students, was whether the objective of the declaratory judgment order, namely satisfaction of the EEOA's appropriate action standard, had been achieved; if a durable remedy has been implemented, continued enforcement of the order would not only be unnecessary, but improper. Equal Educational Opportunities Act of 1974, § 202 et seq., 20 U.S.C.A. § 1701 et seq.; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[15] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

On motion for relief from district court's declaratory judgment order holding that State of Arizona was violating Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers of English Language-Learner (ELL) students, and from subsequent injunctive orders, Court of Appeals should have applied a flexible standard that would seek to return control to state and local officials as soon as EEOA violation was remedied, inquiring broadly into whether changed

conditions provided evidence of an ELL program that complied with the EEOA, rather than using stricter standard, paying insufficient attention to federalism concerns, and improperly concerning itself only with determining whether increased ELL funding complied with the original declaratory judgment order, on grounds that order had not been appealed; because different state actors had taken contrary positions as to district court's orders, federalism concerns were elevated, and by confining scope of its analysis to that of the original order, Court of Appeals insulated the policies embedded in the order, specifically its incremental funding requirement for ELL programs, from challenge and amendment. Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[16] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

When the objects of institutional reform decree requiring State to comply with Equal Educational Opportunities Act (EEOA) requirement to take appropriate action to overcome language barriers of English Language–Learner (ELL) students have been achieved, responsibility for discharging the State's obligations must be returned promptly to the State and its officials. Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703.

[17] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

District court abused its discretion when, on remand from Court of Appeals with instructions to engage in a broad and flexible analysis of motion brought by Arizona Superintendent of Public Instruction and leaders of Arizona legislature for relief from district court's prior declaratory judgment order, which held that State of Arizona was violating Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers of English Language–Learner (ELL) students, district court asked only whether State had satisfied the original declaratory judgment order through increased incremental funding for ELL programs. Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[18] Action 13 3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory rights of action. Most Cited Cases

Schools 345 45

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k45 k. Administration of school affairs in general. Most Cited Cases

The No Child Left Behind Act (NCLB) did not provide a private right of action. No Child Left Behind Act of 2001, § 901, 20 U.S.C.A. § 7902.

[19] Action 13 3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory rights of action. Most Cited Cases

Without statutory intent, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

[20] Schools 345 45

345 Schools
345II Public Schools
345II(C) Government, Officers, and District Meetings
345k45 k. Administration of school affairs in general. Most Cited Cases

No Child Left Behind Act (NCLB) was enforceable only by the agency charged with administering it. No Child Left Behind Act of 2001, § 901, 20 U.S.C.A. § 7902.

[21] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

Funding was merely one tool that may be employed to achieve the objective of the Educational Opportunities Act (EEOA) of taking appropriate action to overcome language barriers. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[22] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

When considering, on remand, motion brought by Arizona Superintendent of Public Instruction and leaders of Arizona legislature for relief from district court's prior declaratory judgment order, which held that State of Arizona was violating Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers of English Language–Learner (ELL) students in one school district, district court must examine at least four important factual and legal changes that could constitute significantly changed circumstance warranting the granting of relief from the judgment on grounds that continued enforcement of order would be inequitable, including the State's adoption of a new ELL instructional methodology applying a structured English immersion (SEI) approach, Congress' enactment of No Child Left Behind Act (NCLB), structural and management reforms in the school district, and an overall increase in the education funding available in the school district; changes may establish that school district was no longer in violation of the EEOA and, to the contrary, was taking appropriate action to remove language barriers in its schools even without having satisfied the original order. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); No Child Left Behind Act of 2001, § 301, 20 U.S.C.A. §§ 6812(1), 6821–6826, 6847; Fed.Rules Civ.Proc.Rule 60(b)(5), 28 U.S.C.A.

[23] Injunction 212 1627

212 Injunction
212V Actions and Proceedings
212V(I) Continuing, Modifying, or Terminating
212k1623 Terminating, Vacating, or Dissolving Injunction
212k1627 k. Particular cases. Most Cited Cases
(Formerly 212k210)

Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

State's compliance with No Child Left Behind Act (NCLB) benchmarks did not automatically satisfy requirements of Equal Educational Opportunities Act (EEOA) that State take appropriate action to overcome language barriers, so as to warrant relief from federal district court's order that state increase its funding of English Language Learners (ELL) programs to comply with EEOA. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); No Child Left Behind Act of 2001, § 301, 20 U.S.C.A. §§ 6823, 6847.

[24] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

Educational Opportunities Act's (EEOA) requirement that States take appropriate action to remove language barriers did not require the equalization of results between native and nonnative speakers on tests administered in English. Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703.

[25] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils

345k164 k. Curriculum and courses of study. Most Cited Cases

Educational Opportunities Act's (EEOA) requirement that States take appropriate action to remove language barriers did not necessarily require any particular level of funding, and to the extent that funding was relevant, the EEOA did not require that the money come from any particular source. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[26] Injunction 212 1317

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1312 Public Elementary and Secondary Education
212k1317 k. School funding and financing; taxation. Most Cited Cases
(Formerly 212k78)

Schools 345 11

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k11 k. School system, and establishment or discontinuance of schools and local educational institutions in general. Most Cited Cases

Concern that failure to extend statewide a district court's order requiring State of Arizona to increase its funding of English Language Learners (ELL) programs in one school district, in order to comply with Equal Educational Opportunities Act (EEOA) requirement of taking appropriate action to overcome language barriers, would violate Arizona Constitution's requirement of a general and uniform public school system, did not provide a valid basis for a statewide federal injunction requiring increased funding for ELL programs; concern raised question of Arizona law, to be determined by Arizona authorities. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); A.R.S. Const. Art. 11, § 1(A).

***2584** *Syllabus* [FN*]

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

A group of English Language–Learner (ELL) students and their parents (plaintiffs) filed a class action, alleging that Arizona, its State Board of Education, and the Superintendent of Public Instruction (defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). In 2000, the Federal District Court entered a declaratory judgment, finding an EEOA violation in Nogales because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual costs of ELL instruction in Nogales. The District Court subsequently extended relief***2585** statewide and, in the years following, entered a series of additional orders and injunctions. The defendants did not appeal any of the District Court's orders. In 2006, the state legislature passed HB 2064, which, among other things, increased ELL incremental funding. The incremental funding increase required District Court approval, and the Governor asked the state attorney general to move for accelerated consideration of the bill. The State Board of Education, which joined the Governor in opposing HB 2064, the State, and the plaintiffs are respondents here. The Speaker of the State House of Representatives and the President of the State Senate (Legislators) intervened and, with the superintendent (collectively, petitioners), moved to purge the contempt order in light of HB 2064. In the alternative, they sought relief under Federal Rule of Civil Procedure 60(b)(5). The District Court denied their motion to purge the contempt order and declined to address the Rule 60(b)(5) claim. The Court of Appeals vacated and remanded for an evidentiary hearing on whether changed circumstances warranted Rule 60(b)(5). On remand, the District Court denied the Rule 60(b)(5) motion, holding that HB 2064 had not created an adequate funding system. Affirming, the Court of Appeals concluded that Nogales had not made sufficient progress in its ELL programming to warrant relief.

Held:

1. The superintendent has standing. To establish Article III standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly

traceable to the defendant's challenged action; and redressable by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Here, the superintendent was a named defendant, the declaratory judgment held him in violation of the EEOA, and the injunction runs against him. Because the superintendent has standing, the Court need not consider whether the Legislators also have standing. Pp. 2592 – 2593.

2. The lower courts did not engage in the proper analysis under Rule 60(b)(5). Pp. 2593 – 2606.

(a) Rule 60(b)(5), which permits a party to seek relief from a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867, serves a particularly important function in "institutional reform litigation," *id.*, at 380, 112 S.Ct. 748. Injunctions in institutional reform cases often remain in force for many years, during which time changed circumstances may warrant reexamination of the original judgment. Injunctions of this sort may also raise sensitive federalism concerns, which are heightened when, as in these cases, a federal-court decree has the effect of dictating state or local budget priorities. Finally, institutional reform injunctions bind state and local officials to their predecessors' policy preferences and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins*, 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855. Because of these features of institutional reform litigation, federal courts must take a "flexible approach" to Rule 60(b)(5) motions brought in this context, *Rufo, supra*, at 381, 112 S.Ct. 748, ensuring that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when circumstances warrant, *Frew, supra*, at 442, 124 S.Ct. 899. Courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal***2586** law] or ... flow from such a violation." *Milliken* v. *Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745. Thus, a critical question in this Rule 60(b)(5) inquiry is whether the EEOA violation underlying the 2000 order has been remedied. If it has, the order's continued enforcement is unnecessary and improper. Pp. 2595 – 2600.

(b) The Court of Appeals did not engage in the Rule 60(b)(5) analysis just described. Pp. 2595 – 2596.

(i) Its Rule 60(b)(5) standard was too strict. The Court of Appeals explained that situations in which changed circumstances warrant Rule 60(b)(5) relief are "likely rare," and that, to succeed, petitioners had to show that conditions in Nogales had so changed as to "sweep away" the District Court's incremental funding determination. The Court of Appeals also incorrectly reasoned that federalism concerns were substantially lessened here because the State and the State Board of Education wanted the injunction to remain in place. Pp. 2596 – 2598.

(ii) The Court of Appeals' inquiry was also too narrow, focusing almost exclusively on the sufficiency of ELL incremental funding. It attributed undue significance to petitioners' failure to appeal the District Court's 2000 order and in doing so, failed to engage in the flexible changed circumstances inquiry prescribed by *Rufo*. The Court of Appeals' inquiry was, effectively, an inquiry into whether the 2000 order had been satisfied. But satisfaction of an earlier judgment is only one of Rule 60(b)(5)'s enumerated bases for relief. Petitioners could obtain relief on the independent basis that prospective enforcement of the order was "no longer equitable." To determine the merits of this claim, the Court of Appeals should have ascertained whether the 2000 order's ongoing enforcement was supported by an ongoing EEOA violation. Although the EEOA requires a State to take "appropriate action," it entrusts state and local authorities with choosing how to meet this obligation. By focusing solely on ELL incremental funding, the Court of Appeals misapprehended this mandate. And by requiring petitioners to demonstrate "appropriate action" through a particular funding mechanism, it improperly substituted its own policy judgments for those of the state and local officials entrusted with the decisions. Pp. 2595 – 2598.

(c) The District Court's opinion reveals similar errors. Rather than determining whether changed circumstances warranted relief from the 2000 order, it asked only whether petitioners had satisfied that order through increased ELL incremental funding. Pp. 2598 – 2599.

(d) Because the Court of Appeals and the District Court misperceived the obligation imposed by the EEOA and the breadth of the Rule 60(b)(5) inquiry, this case must be remanded for a proper examination of at least four factual and legal changes that may warrant relief. Pp. 2600 – 2606.

(i) After the 2000 order was entered, Arizona moved

from a "bilingual education" methodology of ELL instruction to "structured English immersion" (SEI). Research on ELL instruction and findings by the State Department of Education support the view that SEI is significantly more effective than bilingual education. A proper Rule 60(b)(5) analysis should entail further factual findings regarding whether Nogales' implementation of SEI is a "changed circumstance" warranting relief. Pp. 2600 – 2601.

(ii) Congress passed the No Child Left Behind Act of 2001 (NCLB), which represents another potentially significant "changed circumstance." Although compliance with NCLB will not necessarily ***2587** constitute "appropriate action" under the EEOA, NCLB is relevant to petitioners' Rule 60(b)(5) motion in four principal ways: It prompted the State to make significant structural and programming changes in its ELL programming; it significantly increased federal funding for education in general and ELL programming in particular; it provided evidence of the progress and achievement of Nogales' ELL students through its assessment and reporting requirements; and it marked a shift in federal education policy. Pp. 2601 – 2604.

(iii) Nogales' superintendent instituted significant structural and management reforms which, among other things, reduced class sizes, improved student/teacher ratios, and improved the quality of teachers. Entrenched in the incremental funding framework, the lower courts failed to recognize that these changes may have brought Nogales' ELL programming into compliance with the EEOA even without sufficient incremental funding to satisfy the 2000 order. This was error. Because the EEOA focuses on the quality of educational programming and services to students, not the amount of money spent, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant ELL programming in ways other than through increased incremental funding. A proper Rule 60(b)(5) inquiry should recognize this and should ask whether, as a result of structural and managerial improvements, Nogales is now providing equal educational opportunities to ELL students. Pp. 2604 – 2605.

(iv) There was an overall increase in education funding available in Nogales. The Court of Appeals foreclosed the possibility that petitioners could show that this overall increase was sufficient to support EEOA-compliant ELL programming. This was clear legal error. The EEOA's "appropriate action" requirement does not necessarily require a particular level of funding, and to the extent that funding is relevant, the EEOA does not require that the money come from a particular source. Thus, the District Court should evaluate whether the State's general education funding budget, in addition to local revenues, currently supports EEOA-compliant ELL programming in Nogales. Pp. 2605 – 2606.

3. On remand, if petitioners press their objection to the injunction as it extends beyond Nogales, the lower courts should consider whether the District Court erred in entering statewide relief. The record contains no factual findings or evidence that any school district other than Nogales failed to provide equal educational opportunities to ELL students, and respondents have not explained how the EEOA can justify a statewide injunction here. The state attorney general's concern that a "Nogales only" remedy would run afoul of the Arizona Constitution's equal-funding requirement did not provide a valid basis for a statewide *federal* injunction, for it raises a state-law question to be determined by state authorities. Unless the District Court concludes that Arizona is violating the EEOA statewide, it should vacate the injunction insofar as it extends beyond Nogales. Pp. 2606 – 2607.

516 F.3d 1140, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.
Kenneth W. Starr, Los Angeles, CA, for petitioners.

***2588** Sri Srinivasan, Washington, DC, for respondents.

Nicole A. Saharsky, for United States as amicus curiae, by special leave of the Court, supporting respondents.

Rick Richmond, Christopher C. Chiou, Steven A. Haskins, Kyle T. Cutts, Kirkland & Ellis LLP, Los Angeles, CA, David J. Cantelme, D. Aaron Brown, Paul R. Neil, Cantelme & Brown, PLC, Phoenix, AZ, Kenneth W. Starr, Counsel of Record, Kirkland & Ellis LLP, Los Angeles, CA, Ashley C. Parrish, Kirkland & Ellis LLP, Washington, D.C., for petitioners.

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Terry Goddard, Attorney General, Mary O'Grady, Solicitor General, Susan P. Segal, Assistant Attorney General, Office of the Arizona Attorney General, Phoenix, Arizona, Robert H. McKirgan, Lawrence A. Kasten, David D. Garner, Kimberly Anne Demarchi, Counsel of Record, Lewis and Roca LLP, Phoenix, Arizona, for respondents State of Arizona and Arizona State Board of Education.

Walter Dellinger, Harvard Supreme Court and Appellate Clinic, Cambridge, MA, Timothy M. Hogan, Joy E. Herr–Cardillo, Arizona Center for Law in the Public Interest, Phoenix, AZ, Ski Srinivasan, Counsel of Record, Irving L. Gornstein, Ryan W. Scott, Justin Florence, admitted only in Massachusetts, O'Melveny & Myers LLP, Washington, D.C., for respondents Miriam Flores and Rosa Rzeslawski.

For U.S. Supreme Court Briefs, See:2009 WL 453244 (Pet.Brief)2009 WL 453245 (Pet.Brief)2009 WL 740764 (Resp.Brief)2009 WL 819476 (Resp.Brief)2009 WL 977961 (Reply.Brief)2009 WL 977962 (Reply.Brief)

Justice ALITO delivered the opinion of the Court.

These consolidated cases arise from litigation that began in Arizona in 1992 when a group of English Language–Learner (ELL) students in the Nogales Unified School District (Nogales) and their parents filed a class action, alleging that the State was violating the Equal Educational Opportunities Act of 1974 (EEOA), § 204(f), 88 Stat. 515, 20 U.S.C. § 1703(f), which requires a State "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." In 2000, the District Court entered a declaratory judgment with respect to Nogales, and in 2001, the court extended the order to apply to the entire State. Over the next eight years, petitioners repeatedly sought relief from the District Court's orders, but to no avail. We granted certiorari after the Court of Appeals for the Ninth Circuit affirmed the denial of petitioners' motion for relief under Federal Rule of Civil Procedure 60(b)(5), and we now reverse the judgment of the Court of Appeals and remand for further proceedings.

As we explain, the District Court and the Court of Appeals misunderstood both the obligation that the EEOA imposes on States and the nature of the inquiry that is required when parties such as petitioners seek relief under Rule 60(b)(5) on the ground that enforcement of a judgment is "no longer equitable." Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the ***2589** EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument.

I

A

In 1992, a group of students enrolled in the ELL program in Nogales and their parents (plaintiffs) filed suit in the District Court for the District of Arizona on behalf of "all minority 'at risk' and limited English proficient children ... now or hereafter, enrolled in the Nogales Unified School District ... as well as their parents and guardians." 172 F.Supp.2d 1225, 1226 (2000). The plaintiffs sought a declaratory judgment holding that the State of Arizona, its Board of Education, and its Superintendent of Public Instruction (defendants) were violating the EEOA by providing inadequate ELL instruction in Nogales.[FN1]

FN1. We have previously held that Congress may validly abrogate the States' sovereign immunity only by doing so (1) unequivocally and (2) pursuant to certain valid grants of constitutional authority. See, *e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). With respect to the second requirement, we have held that statutes enacted pursuant to § 5 of the Fourteenth Amendment must provide a remedy that is "congruent and proportional" to the injury that Congress intended to address. See *City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Prior to *City of Boerne*, the Court of Appeals for the Ninth Circuit held that the EEOA, which was enacted pursuant to § 5 of the Fourteenth Amendment, see 20 U.S.C. §§ 1702(a)(1), (b), validly abrogates the States' sovereign immunity. See *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 950–951 (1983); see also *Flores v. Arizona*, 516 F.3d, 1140, 1146, n. 2 (C.A.9 2008) (relying on *Los Angeles NAACP*). That issue is not before us in these cases.

[1] The relevant portion of the EEOA states:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> .....
>
> "(f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703 (emphasis added).

By simply requiring a State "to take appropriate action to overcome language barriers" without specifying particular actions that a State must take, "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." *Castaneda v. Pickard*, 648 F.2d 989, 1009 (C.A.5 1981).

In August 1999, after seven years of pretrial proceedings and after settling various claims regarding the structure of Nogales' ELL curriculum, the evaluation and monitoring of Nogales' students, and the provision of tutoring and other compensatory instruction, the parties proceeded to trial. In January 2000, the District Court concluded that defendants were violating the EEOA because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual funding needed to cover the costs of ELL instruction in Nogales. 172 F.Supp.2d, at ***2590** 1239. Defendants did not appeal the District Court's order.

B

In the years following, the District Court entered a series of additional orders and injunctions. In October 2000, the court ordered the State to "prepare a cost study to establish the proper appropriation to effectively implement" ELL programs. 160 F.Supp.2d 1043, 1047. In June 2001, the court applied the declaratory judgment order statewide and granted injunctive relief accordingly. No. CIV. 92–596TUCACM, 2001 WL 1028369, *2 (June 25, 2001). The court took this step even though the certified class included only Nogales students and parents and even though the court did not find that any districts other than Nogales were in violation of the EEOA. The court set a deadline of January 31, 2002, for the State to provide funding that "bear[s] a rational relationship to the actual funding needed." *Ibid.*

In January 2005, the court gave the State 90 days to "appropriately and constitutionally fun[d] the state's ELL programs taking into account the [Rule's] previous orders." No. CIV. 92–596–TUC–ACM, p. 5, App. 393. The State failed to meet this deadline, and in December 2005, the court held the State in contempt. Although the legislature was not then a party to the suit, the court ordered that "the legislature has 15 calendar days after the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order. Everyday thereafter ... that the State fails to comply with this Order, [fines] will be imposed until the State is in compliance." 405 F.Supp.2d 1112, 1120. The schedule of fines that the court imposed escalated from $500,000 to $2 million per day. *Id*., at 1120–1121.

C

The defendants did not appeal any of the District Court's orders, and the record suggests that some state officials supported their continued enforcement. In June 2001, the state attorney general acquiesced in the statewide extension of the declaratory judgment order, a step that the State has explained by reference to the Arizona constitutional requirement of uniform statewide school funding. See Brief for Appellee State of Arizona et al. in No. 07–15603 etc. (CA9), p. 60 (citing Ariz. Const., Art. 11, § 1(A)). At a hearing in February 2006, a new attorney general opposed the superintendent's request for a stay of the December 2005 order imposing sanctions and fines, and filed a proposed distribution of the accrued fines.

In March 2006, after accruing over $20 million in fines, the state legislature passed HB 2064, which was designed to implement a permanent funding solution to the problems identified by the District Court in 2000. Among other things, HB 2064 increased ELL incremental funding (with a 2–year per-student limit on such funding) and created two new funds—a structured English immersion fund and a compensatory instruction fund—to cover additional costs of ELL programming. Moneys in both newly created funds were to be offset by available federal moneys. HB 2064 also instituted several programming and structural changes.

The Governor did not approve of HB 2064's funding provisions, but she allowed the bill to become law without her signature. Because HB 2064's incremental ELL funding increase required court approval to become effective, the Governor requested the attorney general to move for accelerated consideration by the District Court. In doing so, she explained that " '[a]fter nine months of meetings

and three vetoes, it is time to take this matter ***2591** to a federal judge. I am convinced that getting this bill into court now is the most expeditious way ultimately to bring the state into compliance with federal law.' " *Flores v. Arizona*, 516 F.3d 1140, 1153, n. 16 (C.A.9 2008). The State Board of Education joined the Governor in opposing HB 2064. Together, the State Board of Education, the State of Arizona, and the plaintiffs are respondents here.

With the principal defendants in the action siding with the plaintiffs, the Speaker of the State House of Representatives and the President of the State Senate (Legislators) filed a motion to intervene as representatives of their respective legislative bodies. App. 55. In support of their motion, they stated that although the attorney general had a "legal duty" to defend HB 2064, the attorney general had shown "little enthusiasm" for advancing the legislature's interests. *Id.*, at 57. Among other things, the Legislators noted that the attorney general "failed to take an appeal of the judgment entered in this case in 2000 and has failed to appeal any of the injunctions and other orders issued in aid of the judgment." *Id.*, at 60. The District Court granted the Legislators' motion for permissive intervention, and the Legislators and superintendent (together, petitioners here) moved to purge the District Court's contempt order in light of HB 2064. Alternatively, they moved for relief under Federal Rule of Civil Procedure 60(b)(5) based on changed circumstances.

In April 2006, the District Court denied petitioners' motion, concluding that HB 2064 was fatally flawed in three respects. First, while HB 2064 increased ELL incremental funding by approximately $80 per student, the court held that this increase was not rationally related to effective ELL programming. Second, the court concluded that imposing a 2–year limit on funding for each ELL student was irrational. Third, according to the court, HB 2064 violated federal law by using federal funds to "supplant" rather than "supplement" state funds. No. CV–92–596–TUC–RCC, pp. 4–8 (Apr. 25, 2006), App. to Pet. for Cert. in No. 08–294, pp. 176a, 181a–182a. The court did not address petitioners' Rule 60(b)(5) claim that changed circumstances rendered continued enforcement of the original declaratory judgment order inequitable. Petitioners appealed.

In an unpublished decision, the Court of Appeals for the Ninth Circuit vacated the District Court's April 2006 order, the sanctions, and the imposition of fines, and remanded for an evidentiary hearing to determine whether Rule 60(b)(5) relief was warranted. 204 Fed.Appx. 580 (2006).

On remand, the District Court denied petitioners' Rule 60(b)(5) motion. 480 F.Supp.2d 1157, 1167 (D.Ariz.2007). Holding that HB 2064 did not establish "a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction," *id.*, at 1165, the court gave the State until the end of the legislative session to comply with its orders. The State failed to do so, and the District Court again held the State in contempt. No. CV 92–596 TUC–RCC (Oct. 10, 2007), App. 86. Petitioners appealed.

The Court of Appeals affirmed. 516 F.3d 1140. It acknowledged that Nogales had "made significant strides since 2000," *id.*, at 1156, but concluded that the progress did not warrant Rule 60(b)(5) relief. Emphasizing that Rule 60(b)(5) is not a substitute for a timely appeal, and characterizing the original declaratory judgment order as centering on the adequacy of ELL incremental funding, the Court of Appeals explained that relief would be appropriate only if petitioners had shown "either that there are no longer incremental costs associated with ELL programs in Arizona" or that Arizona had altered its ***2592** funding model. *Id.*, at 1169. The Court of Appeals concluded that petitioners had made neither showing, and it rejected petitioners' other arguments, including the claim that Congress' enactment of the No Child Left Behind Act of 2001 (NCLB), 115 Stat. 1702, as added, 20 U.S.C. § 6842 *et seq.*, constituted a changed legal circumstance that warranted Rule 60(b)(5) relief.

We granted certiorari, 555 U.S. ——, 129 S.Ct. 893, 172 L.Ed.2d 768 (2009), and now reverse.

II

[2][3][4] Before addressing the merits of petitioners' Rule 60(b)(5) motion, we consider the threshold issue of standing—"an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. *Id.*, at 560–561, 112 S.Ct. 2130. Here, as in all standing inquiries, the critical question is whether at least one petitioner has "alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Institute*, 555 U.S. 488, ——, 129 S.Ct. 1142, 1148–49, 173 L.Ed.2d

1 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (internal quotation marks omitted)).

[5] We agree with the Court of Appeals that the superintendent has standing because he "is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of the EEOA, and the current injunction runs against him." 516 F.3d, at 1164 (citation omitted). For these reasons alone, he has alleged a sufficiently " 'personal stake in the outcome of the controversy' " to support standing. *Warth*, *supra*, at 498, 95 S.Ct. 2197; see also *United States v. Sweeney*, 914 F.2d 1260, 1263 (C.A.9 1990) (rejecting as "frivolous" the argument that a party does not have "standing to object to orders specifically directing it to take or refrain from taking action").

Respondents' only argument to the contrary is that the superintendent answers to the State Board of Education, which in turn answers to the Governor, and that the Governor is the only Arizona official who "could have resolved the conflict within the Executive Branch by directing an appeal." Brief for Respondent Flores et al. 22. We need not consider whether respondents' chain-of-command argument has merit because the Governor has, in fact, directed an appeal. See App. to Reply Brief for Petitioner Superintendent 1 ("I hereby direct [the State attorney general] to file a brief at the [Supreme] Court on behalf of the State of Arizona adopting and joining in the positions taken by the Superintendent of Public Instruction, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate").

[6] Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.[FN2] See, *e.g., Arlington Heights v. Metropolitan* ***2593*** *Housing Development Corp.*, 429 U.S. 252, 264, and n. 9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"). Accordingly, we proceed to the merits of petitioners' Rule 60(b)(5) motion.

FN2. We do not agree with the conclusion of the Court of Appeals that "the Superintendent's standing is limited" to seeking vacatur of the District Court's orders "only as they run against him." 516 F.3d, at 1165. Had the superintendent sought relief based on satisfaction of the judgment, the Court of Appeals' conclusion might have been correct. But as discussed *infra*, at 15–16, petitioners' Rule 60(b)(5) claim is not based on satisfaction of the judgment. Their claim is that continued enforcement of the District Court's orders would be inequitable. This claim implicates the orders in their entirety, and not solely as they run against the superintendent.

III

A

[7][8] Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). The party seeking relief bears the burden of establishing that changed circumstances warrant relief, *id.*, at 383, 112 S.Ct. 748, but once a party carries this burden, a court abuses its discretion "when it refuses to modify an injunction or consent decree in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

[9] Rule 60(b)(5) serves a particularly important function in what we have termed "institutional reform litigation." [FN3] *Rufo*, *supra*, at 380, 112 S.Ct. 748. For one thing, injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment.

FN3. The dissent is quite wrong in contending that these are not institutional reform cases because they involve a statutory, rather than a constitutional claim, and because the orders of the District Court do not micromanage the day-to-day operation of the schools. *Post*, at 2621 (opinion of BREYER, J.). For nearly a decade, the orders of a federal district court have substantially restricted the ability of the State of Arizona to make basic decisions regarding educational policy, appropri-

> ations, and budget priorities. The record strongly suggests that some state officials have welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process. See *supra*, at 2590 – 2591. Because of these features, these cases implicate all of the unique features and risks of institutional reform litigation.

Second, institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education. See *Missouri v. Jenkins,* 515 U.S. 70, 99, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution" (citations omitted)); *United States v. Lopez,* 514 U.S. 549, 580, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring).

Federalism concerns are heightened when, as in these cases, a federal court ***2594** decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. See *Jenkins, supra,* at 131, 115 S.Ct. 2038 (THOMAS, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds").

Finally, the dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. See, *e.g.*, McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal Forum 295, 317 (noting that government officials may try to use consent decrees to "block ordinary avenues of political change" or to "sidestep political constraints"); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1294–1295 ("Nominal defendants [in institutional reform cases] are sometimes happy to be sued and happier still to lose"); R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 170 (2003) ("Government officials, who always operate under fiscal and political constraints, 'frequently win by losing' " in institutional reform litigation).

[10] Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins,* 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004). See also *Northwest Environment Advocates v. EPA,* 340 F.3d 853, 855 (C.A.9 2003) (Kleinfeld, J., dissenting) (noting that consent decrees present a risk of collusion between advocacy groups and executive officials who want to bind the hands of future policymakers); *Ragsdale v. Turnock,* 941 F.2d 501, 517 (C.A.7 1991) (Flaum, J., concurring in part and dissenting in part) ("[I]t is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches"); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal Forum 19, 40 ("Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination").

States and localities "depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew, supra,* at 442, 124 S.Ct. 899. Where "state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents," they are constrained in their ability to fulfill their duties as democratically-elected officials. American Legislative Exchange Council, Resolution on the Federal Consent Decree Fairness Act (2006), App. to Brief for American Legislative Exchange Council et al. as *Amici Curiae* 1a–4a.

[11][12][13] It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief. But in recognition of the features of institutional reform decrees, we have held that courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees. *Rufo,* 502 U.S., at ***2595** 381, 112 S.Ct. 748. A flexible approach allows courts to ensure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when the circumstances warrant. *Frew, supra,* at 442, 124 S.Ct. 899. In applying this flexible approach, courts must remain attentive to the fact that "federal-court decrees

exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Milliken* v. *Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). "If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers." *Frew, supra,* at 441, 124 S.Ct. 899.

[14] For these reasons, a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory judgment order—*i.e.*, satisfaction of the EEOA's "appropriate action" standard—has been achieved. See 540 U.S., at 442, 124 S.Ct. 899. If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper. See *Milliken, supra,* at 282, 97 S.Ct. 2749. We note that the EEOA itself limits court-ordered remedies to those that "are *essential* to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added).

B

[15] The Court of Appeals did not engage in the Rule 60(b)(5) analysis just described. Rather than applying a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied, the Court of Appeals used a heightened standard that paid insufficient attention to federalism concerns. And rather than inquiring broadly into whether changed conditions in Nogales provided evidence of an ELL program that complied with the EEOA, the Court of Appeals concerned itself only with determining whether increased ELL funding complied with the original declaratory judgment order. The court erred on both counts.

1

The Court of Appeals began its Rule 60(b)(5) discussion by citing the correct legal standard, see 516 F.3d, at 1163 (noting that relief is appropriate upon a showing of " 'a significant change either in factual conditions or in law' "), but it quickly strayed. It referred to the situations in which changed circumstances warrant Rule 60(b)(5) relief as "likely rare," *id*., at 1167, and explained that, to succeed on these grounds, petitioners would have to make a showing that conditions in Nogales had so changed as to "sweep away" the District Court's incremental funding determination, *id*., at 1168. The Court of Appeals concluded that the District Court had not erred in determining that "the landscape was not so *radically* changed as to justify relief from judgment without compliance." *Id*., at 1172 (emphasis added).[FN4]

FN4. The dissent conveniently dismisses the Court of Appeals' statements by characterizing any error that exists as "one of tone, not of law," and by characterizing our discussion as reading them out of context. *Post,* at 2628 – 2629. But we do read these statements in context—in the context of the Court of Appeals' overall treatment of petitioners' Rule 60(b)(5) arguments—and it is apparent that they accurately reflect the Court of Appeals' excessively narrow understanding of the role of Rule 60(b)(5).

[16] Moreover, after recognizing that review of the denial of Rule 60(b)(5) relief ***2596** should generally be "somewhat closer in the context of institutional injunctions against states 'due to federalism concerns,' " the Court of Appeals incorrectly reasoned that "federalism concerns are substantially lessened here, as the state of Arizona and the state Board of Education wish the injunction to remain in place." *Id*., at 1164. This statement is flatly incorrect, as even respondents acknowledge. Brief for Respondent State of Arizona et al. 20–21. Precisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated. And precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical. "[W]hen the objects of the decree have been attained"—namely, when EEOA compliance has been achieved—"responsibility for discharging the State's obligations [must be] returned promptly to the State and its officials." *Frew,* 540 U.S., at 442, 124 S.Ct. 899.

2

In addition to applying a Rule 60(b)(5) standard that was too strict, the Court of Appeals framed a Rule 60(b)(5) inquiry that was too narrow—one that focused almost exclusively on the sufficiency of incremental funding. In large part, this was driven by the significance the Court of Appeals attributed to petitioners' failure to appeal the District Court's original order. The Court of Appeals explained that "the central idea" of that order was that without sufficient ELL incremental funds, "ELL programs would necessarily be inadequate." 516 F.3d, at 1167–1168. It felt bound by this conclusion, lest it allow petitioners to "reopen matters made final when the Declaratory Judgment was not appealed." *Id*., at 1170. It repeated this refrain throughout its opinion, emphasizing that the "interest in finality must be given great weight," *id*., at 1163, and

explaining that petitioners could not now ask for relief "on grounds that could have been raised on appeal from the Declaratory Judgment and from earlier injunctive orders but were not," *id*., at 1167. "If [petitioners] believed that the district court erred and should have looked at all funding sources differently in its EEOA inquiry," the court wrote, "they should have appealed the Declaratory Judgment." *Id*., at 1171.

In attributing such significance to the defendants' failure to appeal the District Court's original order, the Court of Appeals turned the risks of institutional reform litigation into reality. By confining the scope of its analysis to that of the original order, it insulated the policies embedded in the order—specifically, its incremental funding requirement—from challenge and amendment.[FN5] But those policies were supported by the very officials who could have appealed them—the state defendants—and, as a result, were never subject to true challenge.

> FN5. This does not mean, as the dissent misleadingly suggests, see *post*, at 2618 – 2619, that we are faulting the Court of Appeals for declining to decide whether the District Court's original order was correct in the first place. On the contrary, as we state explicitly in the paragraph following this statement, our criticism is that the Court of Appeals did not engage in the changed-circumstances inquiry prescribed by *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992). By focusing excessively on the issue of incremental funding, the Court of Appeals was not true to the *Rufo* standard.

Instead of focusing on the failure to appeal, the Court of Appeals should have conducted the type of Rule 60(b)(5) inquiry prescribed in *Rufo*. This inquiry makes no reference to the presence or absence of a timely appeal. It takes the original judgment as a given and asks only whether "a significant change either in factual ***2597** conditions or in law" renders continued enforcement of the judgment "detrimental to the public interest." *Rufo*, 502 U.S., at 384, 112 S.Ct. 748. It allows a court to recognize that the longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes.

The Court of Appeals purported to engage in a "changed circumstances" inquiry, but it asked only whether changed circumstances affected ELL funding and, more specifically, ELL incremental funding. Relief was appropriate, in the court's view, only if petitioners "demonstrate[d] either that there [we]re no longer incremental costs associated with ELL programs in Arizona or that Arizona's 'base plus incremental costs' educational funding model was so altered that focusing on ELL-specific incremental costs funding has become irrelevant and inequitable." 516 F.3d, at 1169.

This was a Rule 60(b)(5) "changed circumstances" inquiry in name only. In reality, it was an inquiry into whether the deficiency in ELL incremental funding that the District Court identified in 2000 had been remedied. And this, effectively, was an inquiry into whether the original order had been satisfied. Satisfaction of an earlier judgment is *one* of the enumerated bases for Rule 60(b)(5) relief—but it is not the only basis for such relief.

Rule 60(b)(5) permits relief from a judgment where "[i] the judgment has been satisfied, released or discharged; [ii] it is based on an earlier judgment that has been reversed or vacated; *or* [iii] applying it prospectively is no longer equitable." (Emphasis added.) Use of the disjunctive "or" makes it clear that each of the provision's three grounds for relief is independently sufficient and therefore that relief may be warranted even if petitioners have not "satisfied" the original order. As petitioners argue, they may obtain relief if prospective enforcement of that order "is no longer equitable."

To determine the merits of this claim, the Court of Appeals needed to ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here, the EEOA). See *Milliken*, 433 U.S., at 282, 97 S.Ct. 2749. It failed to do so.

As previously noted, the EEOA, while requiring a State to take "appropriate action to overcome language barriers," 20 U.S.C. § 1703(f), "leave[s] state and local educational authorities a substantial amount of latitude in choosing" how this obligation is met. *Castaneda*, 648 F.2d, at 1009. Of course, any educational program, including the "appropriate action" mandated by the EEOA, requires funding, but funding is simply a means, not the end. By focusing so intensively on Arizona's incremental ELL funding, the Court of Appeals misapprehended the EEOA's mandate. And by requiring petitioners to demonstrate "appropriate action" through a particular funding mechanism, the Court of Appeals improperly substituted its own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are

properly entrusted. Cf. *Jenkins*, 515 U.S., at 131, 115 S.Ct. 2038 (THOMAS, J., concurring) ("Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems").

C

[17] The underlying District Court opinion reveals similar errors. In an August 2006 remand order, a different Ninth Circuit panel had instructed the District Court to hold an evidentiary hearing "regarding whether changed circumstances required modification of the original court ***2598** order or otherwise had a bearing on the appropriate remedy." 204 Fed.Appx., at 582. The Ninth Circuit panel observed that "federal courts must be sensitive to the need for modification [of permanent injunctive relief] when circumstances change." *Ibid.* (internal quotation marks omitted).

[18][19][20] The District Court failed to follow these instructions. Instead of determining whether changed circumstances warranted modification of the original order, the District Court asked only whether petitioners had satisfied the original declaratory judgment order through increased incremental funding. See 480 F.Supp.2d, at 1165 (explaining that a showing of "mere amelioration" of the specific deficiencies noted in the District Court's original order was "inadequate" and that "*compliance* would require a funding system that rationally relates funding available to the actual costs of all elements of ELL instruction" (emphasis added)). The District Court stated: "It should be noted that the Court finds the same problems today that it saw last year, because HB 2064 is the same, the problems themselves are the same." [FN6] *Id.*, at 1161. The District Court thus rested its postremand decision on its preremand analysis of HB 2064. It disregarded the remand instructions to engage in a broad and flexible Rule 60(b)(5) analysis as to whether changed circumstances warranted relief. In taking this approach, the District Court abused its discretion.

> FN6. In addition to concluding that the law's increase in incremental funding was insufficient and that 2–year cutoff was irrational, both the District Court and the Court of Appeals held that HB 2064's funding mechanism violates NCLB, which provides in relevant part: "A State shall not take into consideration payments under this chapter ... in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children." 20 U.S.C. § 7902. See 480 F.Supp.2d, at 1166 (HB 2064's funding mechanism is "absolutely forbidden" by § 7902); 516 F.3d, at 1178 ("HB 2064 ... violates [§ 7902] on its face"). Whether or not HB 2064 violates § 7902, see Brief for United States as *Amicus Curiae* 31–32, and n. 8 (suggesting it does), neither court below was empowered to decide the issue. As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F.3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286–287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). Thus, NCLB is enforceable only by the agency charged with administering it. See *id.*, at 289–290, 121 S.Ct. 1511; see also App. to Brief for Respondent State of Arizona et al. 1–4 (letter from U.S. Department of Education to petitioner superintendent concerning the legality *vel non* of HB 2064).

D

The dissent defends the narrow approach of the lower courts with four principal conclusions that it draws from the record. All of these conclusions, however, are incorrect and mirror the fundamental error of the lower courts—a fixation on the issue of incremental funding and a failure to recognize the proper scope of a Rule 60(b)(5) inquiry.

First, the dissent concludes that "the Rule 60(b)(5) 'changes' upon which the District Court focused" were not limited to changes in funding, and included " 'changed teaching methods' " and " 'changed administrative systems.' " *Post*, at 2613. The District Court did note a range of changed circumstances, concluding that as a result of these changes, Nogales was "doing substantially better." 480 F.Supp.2d, at 1160. But it neither focused on these changes nor made up-to-date factual findings. To the contrary, the District Court explained that "it would be ***2599** premature to make an assessment of some of these changes." *Ibid.* Accordingly, of the 28 findings of fact that the court proceeded to make, the first 20 addressed funding directly and exclusively. See *id.*, at 1161–1163. The last eight addressed funding indirectly—discussing reclassification rates because of their relevance to HB 2064's funding restrictions for ELL and reclassified students. See *id.*, at 1163–1165. None of the District Court's findings of fact addressed either " 'changed teaching methods' " or " 'changed administrative systems.' "

The dissent's second conclusion is that " 'incremental funding' costs ... [were] the basic contested issue at the 2000 trial and the sole basis for the District Court's finding of a statutory violation." *Post,* at 2613. We fail to see this conclusion's relevance to this Rule 60(b)(5) motion, where the question is whether any change in factual or legal circumstances renders continued enforcement of the original order inequitable. As the dissent itself acknowledges, petitioners "pointed to three sets of changed circumstances [in their Rule 60(b)(5) motion] which, in their view, showed that the judgment and the related orders were no longer necessary." *Post,* at 2613. In addition to "increases in the amount of funding available to Arizona school districts," these included "changes in the method of English-learning instruction," and "changes in the administration of the Nogales school district." *Ibid.*

Third, the dissent concludes that "the type of issue upon which the District Court and Court of Appeals focused"—the incremental funding issue—"lies at the heart of the statutory demand for equal educational opportunity." *Post,* at 2614. In what we interpret to be a restatement of this point, the dissent also concludes that sufficient funding ("*the 'resource' issue*") and the presence or absence of an EEOA violation ("*the statutory subsection (f) issue*") "*are one and the same*." *Post,* at 2614 (emphasis in original). "In focusing upon the one," the dissent asserts, "the District Court and Court of Appeals were focusing upon the other." *Ibid.*

[21] Contrary to the dissent's assertion, these two issues are decidedly not "*one and the same.*" [FN7] *Ibid.* Nor is it the case, as the dissent suggests, that the EEOC targets States' provision of resources for ELL programming.[FN8] *Post,* at ***2600** 2614. What the statute forbids is a failure to take "appropriate action to overcome language barriers." 20 U.S.C. § 1703(f). Funding is merely one tool that may be employed to achieve the statutory objective.

> FN7. The extent to which the dissent repeats the errors of the courts below is evident in its statement that "[t]he question here is whether the State has shown that its new *funding program* amounts to a 'change' that satisfies subsection (f)'s requirement." *Post,* at 2628 (emphasis added). The proper inquiry is not limited to the issue of funding. Rather, it encompasses the question whether the State has shown any factual or legal changes that establish compliance with the EEOA.

> FN8. The dissent cites two sources for this proposition. The first—*Castaneda v. Pickard,* 648 F.2d 989 (C.A.5 1981)—sets out a three-part test for "appropriate action." Under that test, a State must (1) formulate a sound English language instruction educational plan, (2) implement that plan, and (3) achieve adequate results. See *id.*, at 1009–1010. Whether or not this test provides much concrete guidance regarding the meaning of "appropriate action," the test does not focus on incremental funding or on the provision of resources more generally.
>
> The second source cited by the dissent—curiously—is a speech given by President Nixon in which he urged prompt action by Congress on legislation imposing a moratorium on new busing orders and on the Equal Educational Opportunities Act of 1972. See *post,* at 2614 (citing Address to the Nation on Equal Educational Opportunity and Busing, 8 Weekly Comp. of Pres. Doc. 590, 591 (1972)). In the speech, President Nixon said that schools in poor neighborhoods should receive the "financial support ... that we know can make all the difference." *Id.,* at 593. It is likely that this statement had nothing to do with the interpretation of EEOA's "appropriate action" requirement and instead referred to his proposal to "direc[t] over $21/2 billion in the next year mainly towards improving the education of children from poor families." *Id.,* at 591. But in any event, this general statement, made in a presidential speech two years prior to the enactment of the EEOA, surely sheds little light on the proper interpretation of the statute.

Fourth, the dissent concludes that the District Court did not order increased ELL incremental funding and did not dictate state and local budget priorities. *Post,* at 2615. The dissent's point—and it is a very small one—is that the District Court did not set a specific amount that the legislature was required to appropriate. The District Court did, however, hold the State in contempt and impose heavy fines because the legislature did not provide sufficient funding. These orders unquestionably imposed important restrictions on the legislature's ability to set budget priorities.

E

[22] Because the lower courts—like the dissent—misperceived both the nature of the obligation imposed by the EEOA and the breadth of the inquiry called for under Rule 60(b)(5), these cases must be remanded for a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of NCLB, structural and management reforms in Nogales, and increased overall education funding.

1

At the time of the District Court's original declaratory judgment order, ELL instruction in Nogales was based primarily on "bilingual education," which teaches core content areas in a student's native language while providing English instruction in separate language classes. In November 2000, Arizona voters passed Proposition 203, which mandated statewide implementation of a "structured English immersion" (SEI) approach. See App. to Pet. for Cert. in No. 08–294, p. 369a. Proposition 203 defines this methodology as follows:

> " 'Sheltered English immersion' or 'structured English immersion' means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language .... Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English." Ariz.Rev.Stat. Ann. § 15–751(5) (West 2009).

In HB 2064, the state legislature attended to the successful and uniform implementation of SEI in a variety of ways.[FN9] It created an "Arizona English language learners task force" within the State Department of Education to "develop and adopt research based models of structured English immersion programs for use by ***2601** school districts and charter schools." § 15–756.01(C). It required that all school districts and charter schools select one of the adopted SEI models, § 15–756.02(A), and it created an "Office of English language acquisition services" to aid school districts in implementation of the models. § 15–756.07(1). It also required the State Board of Education to institute a uniform and mandatory training program for all SEI instructors. § 15–756.09.

FN9. By focusing on the adequacy of HB 2064's funding provisions, the courts below neglected to address adequately the potential relevance of these programming provisions, which became effective immediately upon enactment of the law.

Research on ELL instruction indicates there is documented, academic support for the view that SEI is significantly more effective than bilingual education. [FN10] Findings of the Arizona State Department of Education in 2004 strongly support this conclusion.[FN11] In light of this, a proper analysis of petitioners' Rule 60(b)(5) motion should include further factual findings regarding whether Nogales' implementation of SEI methodology—completed in all of its schools by 2005—constitutes a "significantly changed circumstance" that warrants relief.

FN10. See Brief for American Unity Legal Defense Fund et al. as *Amici Curiae* 10–12 (citing sources, including New York City Board of Education, Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990–1994 (1994); K. Torrance, Immersion Not Submersion: Lessons from Three California Districts' Switch From Bilingual Education to Structured Immersion 4 (2006)).

FN11. See Ariz. Dept. of Ed., The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: A Large–Scale Comparison 3 (Draft July 2004) ("In the general statewide comparison of bilingual and SEI programs [in 2002–2003], those students in SEI programs significantly outperformed bilingual students in 24 out of 24 comparisons .... Though students in SEI and bilingual programs are no more than three months apart in the primary grades, bilingual students are more than a year behind their SEI counterparts in seventh and eighth grade").

2

Congress' enactment of NCLB represents another potentially significant "changed circumstance." NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of

progress toward the attainment of those standards. 20 U.S.C. § 6311(b)(2). NCLB conditions the continued receipt of funds on demonstrations of "adequate yearly progress." *Ibid.*

As relevant here, Title III (the English Language Acquisition, Language Enhancement, and Academic Achievement Act) requires States to ensure that ELL students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." § 6812(1). It requires States to set annual objective achievement goals for the number of students who will annually progress toward proficiency, achieve proficiency, and make "adequate yearly progress" with respect to academic achievement, § 6842(a), and it holds local schools and agencies accountable for meeting these objectives, § 6842(b).

Petitioners argue that through compliance with NCLB, the State has established compliance with the EEOA. They note that when a State adopts a compliance plan under NCLB—as the State of Arizona has—it must provide adequate assurances***2602** that ELL students will receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same ... standards as all children are expected to meet." § 6812(2). They argue that when the Federal Department of Education approves a State's plan—as it has with respect to Arizona's—it offers definitive evidence that the State has taken "appropriate action to overcome language barriers" within the meaning of the EEOA. § 1703(f).

[23] The Court of Appeals concluded, and we agree, that because of significant differences in the two statutory schemes, compliance with NCLB will not necessarily constitute "appropriate action" under the EEOA. 516 F.3d, at 1172–1176. Approval of a NCLB plan does not entail substantive review of a State's ELL programming or a determination that the programming results in equal educational opportunity for ELL students. See § 6823. Moreover, NCLB contains a saving clause, which provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." § 6847.

This does not mean, however, that NCLB is not relevant to petitioners' Rule 60(b)(5) motion. To the contrary, we think it is probative in four principal ways.[FN12] First, it prompted the State to institute significant structural and programming changes in its delivery of ELL education,[FN13] leading the Court of Appeals to observe that "Arizona has significantly improved its ELL infrastructure." 516 F.3d, at 1154. These changes should not be discounted in the Rule 60(b)(5) analysis solely because they do not require or result from increased funding. Second, NCLB significantly increased federal funding for education in general and ELL programming in particular. [FN14] These funds should not be disregarded just because they are not state funds. Third, through its assessment and reporting requirements, NCLB provides evidence of the progress and achievement of Nogales' ELL students. [FN15] ***2603** This evidence could provide persuasive evidence of the current effectiveness of Nogales' ELL programming.[FN16]

FN12. Although the dissent contends that the sole argument raised below regarding NCLB was that compliance with that Act necessarily constituted compliance with the EEOA, the Court of Appeals recognized that NCLB is a relevant factor that should be considered under Rule 60(b)(5). It acknowledged that compliance with NCLB is at least "somewhat probative" of compliance with the EEOA. 516 F.3d, at 1175, n. 46. The United States, in its brief as *amicus curiae* supporting respondents, similarly observed that, "[e]ven though Title III participation is not a complete defense under the EEOA, whether a State is reaching its own goals under Title III may be relevant in an EEOA suit." Brief for United States as *Amicus Curiae* 24. And the District Court noted that, "[b]y increasing the standards of accountability, [NCLB] has to some extent significantly changed State educators approach to educating students in Arizona." 480 F.Supp.2d, at 1160–1161.

FN13. Among other things, the State Department of Education formulated a compliance plan, approved by the U.S. Department of Education. The State Board of Education promulgated statewide ELL proficiency standards, adopted uniform assessment standards, and initiated programs for monitoring school districts and training structured English immersion teachers. See 516 F.3d, at 1154; see also Reply Brief for Petitioner Superintendent 29–31.

FN14. See Brief for Petitioner Superintendent 22, n. 13 ("At [Nogales], Title I monies increased from $1,644,029.00 in 2000 to $3,074,587.00 in

2006, Title II monies from $216,000.00 in 2000 to $466,996.00 in 2006, and Title III monies, which did not exist in 2000, increased from $261,818.00 in 2003 to $322,900.00 in 2006").

FN15. See, *e.g.*, App. to Pet. for Cert. in No. 08–289, pp. 310–311 (2005–2006 testing data for ELL students, reclassified ELL students, and non-ELL students on statewide achievement tests); *id*., at 312 (2005–2006 data regarding Nogales' achievement of the State's annual measurable accountability objectives for ELL students).

FN16. The Court of Appeals interpreted the testing data in the record to weigh against a finding of effective programming in Nogales. See 516 F.3d, at 1157 (noting that "[t]he limits of [Nogales'] progress ... are apparent in the AIMS test results and reclassification test results"); *id*., at 1169–1170 (citing "the persistent achievement gaps documented in [Nogales'] AIMS test data" between ELL students and native speakers). We do not think the District Court made sufficient factual findings to support its conclusions about the effectiveness of Nogales' ELL programming, and we question the Court of Appeals' interpretation of the data for three reasons. First, as the Court of Appeals recognized, the absence of longitudinal data in the record precludes useful comparisons. See *id*., at 1155. Second, the AIMS tests—the statewide achievement tests on which the Court of Appeals primarily relied and to which the dissent cites in Appendix A of its opinion—are administered in English. It is inevitable that ELL students (who, by definition, are not yet proficient in English) will underperform as compared to native speakers. Third, the negative data that the Court of Appeals highlights is balanced by positive data. See, *e.g.*, App. 97 (reporting that for the 2005–2006 school year, on average, reclassified students did as well as, if not better than, native English speakers on the AIMS tests).

Fourth and finally, NCLB marks a shift in federal education policy. See Brief for Petitioner Speaker of the Arizona House of Representatives et al. 7–16. NCLB grants States "flexibility" to adopt ELL programs they believe are "most effective for teaching English." § 6812(9). Reflecting a growing consensus in education research that increased funding alone does not improve student achievement,[FN17] NCLB expressly refrains from dictating funding levels. Instead, it focuses on the demonstrated progress of students through accountability reforms.[FN18] The original declaratory judgment order, in contrast, withdraws the authority of state and local officials to fund and implement ELL programs that best suit Nogales' needs, and measures effective programming solely in terms of adequate incremental funding. This conflict with Congress' determination of federal policy may constitute a significantly changed circumstance, warranting relief. See *Railway Employees v. Wright*, 364 U.S. 642, 651, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) (noting that a court decree should be modified when "a change in law ***2604** brings [the decree] in conflict with statutory objectives").

FN17. See, *e.g.*, Hanushek, The Failure of Input–Based Schooling Policies, 113 Economic J. F64, F69 (2003) (reviewing U.S. data regarding "input policies" and concluding that although such policies "have been vigorously pursued over a long period of time," there is "no evidence that the added resources have improved student performance"); A. LeFevre, American Legislative Exchange Council, Report Card on American Education: A State–by–State Analysis 132–133 (15th ed.2008) (concluding that spending levels alone do not explain differences in student achievement); G. Burtless, Introduction and Summary, in Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success 1, 5 (1996) (noting that "[i]ncreased spending on school inputs has not led to notable gains in school performance").

FN18. Education literature overwhelmingly supports reliance on accountability-based reforms as opposed to pure increases in spending. See, *e.g.*, Hanushek & Raymond, Does School Accountability Lead to Improved Student Performance? 24 J. Pol'y Analysis & Mgmt. 297, 298 (2005) (concluding that "the introduction of accountability systems into a state tends to lead to larger achievement growth than would have occurred without accountability"); U.S. Chamber of Commerce, Leaders and Laggards: A State–by–State Report Card on Educational Effectiveness 6, 7–10 (2007) (discussing various factors other than inputs—such as a focus on academic standards and accountability—that

have a significant impact on student achievement); S. Fuhrman, Introduction, in Redesigning Accountability Systems for Education 1, 3–9 (S. Fuhrman & R. Elmore eds.2004); S. Hanushek et al., Making Schools Work: Improving Performance and Controlling Costs 151–176 (1994).

3

Structural and management reforms in Nogales constitute another relevant change in circumstances. These reforms were led by Kelt Cooper, the Nogales superintendent from 2000 to 2005, who "adopted policies that ameliorated or eliminated many of the most glaring inadequacies discussed by the district court." 516 F.3d, at 1156. Among other things, Cooper "reduce [d] class sizes," "significantly improv[ed] student/teacher ratios," "improved teacher quality," "pioneered a uniform system of textbook and curriculum planning," and "largely eliminated what had been a severe shortage of instructional materials." *Id*., at 1156–1157. The Court of Appeals recognized that by "[u]sing careful financial management and applying for 'all funds available,' Cooper was able to achieve his reforms with limited resources." *Id*., at 1157. But the Court of Appeals missed the legal import of this observation—that these reforms might have brought Nogales' ELL programming into compliance with the EEOA even without sufficient ELL incremental funding to satisfy the District Court's original order. Instead, the Court of Appeals concluded that to credit Cooper's reforms would "penaliz [e]" Nogales "for doing its best to make do, despite Arizona's failure to comply with the terms of the judgment," and would "absolve the state from providing adequate ELL incremental funding as required by the judgment." *Id*., at 1168. The District Court similarly discounted Cooper's achievements, acknowledging that Nogales was "doing substantially better than it was in 2000," but concluding that because the progress resulted from management efforts rather than increased funding, its progress was "fleeting at best." 480 F.Supp.2d, at 1160.

Entrenched in the framework of incremental funding, both courts refused to consider that Nogales could be taking "appropriate action" to address language barriers even without having satisfied the original order. This was error. The EEOA seeks to provide "equal educational opportunity" to "all children enrolled in public schools." § 1701(a). Its ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them. Accordingly, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant programming by means other than increased funding—for example, through Cooper's structural, curricular, and accountability-based reforms. The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities. [FN19] Cooper even testified that, without the structural changes he imposed, "additional money" would not "have made any difference to th[e] students" in Nogales. Addendum to Reply Brief for Petitioner Speaker of the Arizona House of Representatives et al. 15.

FN19. See, *e.g.*, M. Springer & J. Guthrie, Politicization of the School Finance Legal Process, in School Money Trials 102, 121 (W. West & P. Peterson eds.2007); E. Hanushek & A. Lindseth, Schoolhouses, Courthouses, and Statehouses: Solving the Funding–Achievement Puzzle in America's Public Schools 146 (2009).

[24] The Court of Appeals discounted Cooper's reforms for other reasons as well. It explained that while they "did ameliorate many of the specific examples of resource shortages that the district court identified in 2000," they did not "result in such success as to call into serious question [Nogales'] need for increased incremental***2605** funds." 516 F.3d, at 1169. Among other things, the Court of Appeals referred to "the persistent achievement gaps documented in [Nogales'] AIMS test data" between ELL students and native speakers, *id.*, at 1170, but any such comparison must take into account other variables that may explain the gap. In any event, the EEOA requires "appropriate action" to remove language barriers, § 1703(f), not the equalization of results between native and nonnative speakers on tests administered in English—a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older ELL students.

The Court of Appeals also referred to the subpar performance of Nogales' high schools. There is no doubt that Nogales' high schools represent an area of weakness, but the District Court made insufficient factual findings to support a conclusion that the high schools' problems stem from a failure to take "appropriate action," and constitute a violation of the EEOA. [FN20]

FN20. There are many possible causes for the performance of students in Nogales' high school ELL programs. These include the difficulty of teaching English to older students (many of whom, presumably, were not in English-speaking schools as younger students) and problems, such

as drug use and the prevalence of gangs. See Reply Brief for Petitioner Speaker of the Arizona House of Representatives et al. 14–15; Reply Brief for Petitioner Superintendent 16–17; App. 116–118. We note that no court has made particularized findings as to the effectiveness of ELL programming offered at Nogales' high schools.

The EEOA's "appropriate action" requirement grants States broad latitude to design, fund, and implement ELL programs that suit local needs and account for local conditions. A proper Rule 60(b)(5) inquiry should recognize this and should ask whether, as a result of structural and managerial improvements, Nogales is now providing equal educational opportunities to ELL students.

4

A fourth potentially important change is an overall increase in the education funding available in Nogales. The original declaratory judgment order noted five sources of funding that collectively financed education in the State: (1) the State's "base level" funding, (2) ELL incremental funding, (3) federal grants, (4) regular district and county taxes, and (5) special voter-approved district and county taxes called "overrides." 172 F.Supp.2d, at 1227. All five sources have notably increased since 2000.[FN21] Notwithstanding these increases, the Court of Appeals rejected petitioners' claim that overall education funds were sufficient to support EEOA-compliant programming in Nogales. The court reasoned that diverting base-level education funds would necessarily hurt other state educational programs, and was not, therefore, an " 'appropriate' step." 516 F.3d, at 1171. In so doing, it foreclosed the possibility that petitioners could establish changed circumstances warranting relief through an overall increase in education funding available in Nogales.

FN21. The Court of Appeals reported, and it is not disputed, that "[o]n an inflation-adjusted statewide basis, including all sources of funding, support for education has increased from $3,139 per pupil in 2000 to an estimated $3,570 per pupil in 2006. Adding in all county and local sources, funding has gone from $5,677 per pupil in 2000 to an estimated $6,412 per pupil in 2006. Finally, federal funding has increased. In 2000, the federal government provided an additional $526 per pupil; in 2006, it provided an estimated $953." 516 F.3d, at 1155.

[25] This was clear legal error. As we have noted, the EEOA's "appropriate action" requirement does not necessarily require any particular level of funding, and ***2606** to the extent that funding is relevant, the EEOA certainly does not require that the money come from any particular source. In addition, the EEOA plainly does not give the federal courts the authority to judge whether a State or a school district is providing "appropriate" instruction in other subjects. That remains the province of the States and the local schools. It is unfortunate if a school, in order to fund ELL programs, must divert money from other worthwhile programs, but such decisions fall outside the scope of the EEOA. Accordingly, the analysis of petitioners' Rule 60(b)(5) motion should evaluate whether the State's budget for general education funding, in addition to any local revenues,[FN22] is currently supporting EEOA-compliant ELL programming in Nogales.

FN22. Each year since 2000, Nogales voters have passed an override. Revenues from Nogales' override have increased from $895,891 in 2001 to $1,674,407 in 2007. App. to Pet. for Cert. in No. 08–294, p. 431a.

Because the lower courts engaged in an inadequate Rule 60(b)(5) analysis, and because the District Court failed to make up-to-date factual findings, the analysis of the lower courts was incomplete and inadequate with respect to all of the changed circumstances just noted. These changes are critical to a proper Rule 60(b)(5) analysis, however, as they may establish that Nogales is no longer in violation of the EEOA and, to the contrary, is taking "appropriate action" to remove language barriers in its schools. If this is the case, continued enforcement of the District Court's original order is inequitable within the meaning of Rule 60(b)(5), and relief is warranted.

IV

[26] We turn, finally, to the District Court's entry of statewide relief. [FN23] The Nogales district, which is situated along the Mexican border, is one of 239 school districts in the State of Arizona. Nogales students make up about one-half of one per cent of the entire State's school population. [FN24] The record contains no factual findings or evidence that any school district other than Nogales failed (much less continues to fail) to provide equal educational opportunities to ELL students. See App. to Pet. for Cert. in No. 08–294, pp. 177a–178a. Nor have respondents explained how the EEOA could justify a statewide injunction when the only violation claimed or proven was limited to a single district. See *Jenkins*, 515 U.S., at 89–90, 115 S.Ct. 2038; *Milliken*, 433 U.S., at 280, 97 S.Ct. 2749. It is not

even clear that the District Court had jurisdiction to issue a statewide injunction when it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief.

> FN23. The dissent contends that this issue was not raised below, but what is important for present purposes is that, for the reasons explained in the previous parts of this opinion, these cases must be remanded to the District Court for a proper Rule 60(b)(5) analysis. Petitioners made it clear at oral argument that they wish to argue that the extension of the remedy to districts other than Nogales should be vacated. See Tr. of Oral Arg. 63 ("Here the EEOA has been transmogrified to apply statewide. That has not been done before. It should not have been done in the first instance but certainly in light of the changed circumstances"); see also *id.*, at 17–18, 21, 26. Accordingly, *if* petitioners raise that argument on remand, the District Court must consider whether there is any legal or factual basis for denying that relief.

> FN24. See Ariz. Dept. of Ed., Research and Evaluation Section, 2008–2009 October Enrollment by School, District and Grade 1, 17, http:// www. ade. state. az. us/ researchpolicy/ AZEnroll/ 2008– 2009/ Octenroll 2009 schoolbygrade. pdf (as visited June 18, 2009, and available in Clerk of Court's case file).

***2607** The only explanation proffered for the entry of statewide relief was based on an interpretation of the Arizona Constitution. We are told that the former attorney general "affirmatively urged a statewide remedy because a 'Nogales only' remedy would run afoul of the Arizona Constitution's requirement of 'a general and uniform public school system.' " Brief for Respondent Flores et al. 38 (quoting Ariz. Const., Art. 11, § 1(A) (some internal quotation marks omitted)).

This concern did not provide a valid basis for a statewide *federal* injunction. If the state attorney general believed that a federal injunction requiring increased ELL spending in one district necessitated, as a matter of state law, a similar increase in every other district in the State, the attorney general could have taken the matter to the state legislature or the state courts. But the attorney general did not do so. Even if she had, it is not clear what the result would have been. It is a question of state law, to be determined by state authorities, whether the equal funding provision of the Arizona Constitution would require a statewide funding increase to match Nogales' ELL funding, or would leave Nogales as a federally compelled exception. By failing to recognize this, and by entering a statewide injunction that intruded deeply into the State's budgetary processes based solely on the attorney general's interpretation of state law, the District Court obscured accountability for the drastic remedy that it entered.

When it is unclear whether an onerous obligation is the work of the Federal or State Government, accountability is diminished. See *New York v. United States*, 505 U.S. 144, 169, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Here, the District Court "improperly prevent[ed] the citizens of the State from addressing the issue [of statewide relief] through the processes provided by the State's constitution." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, ——, 129 S.Ct. 1436, 1445, 173 L.Ed.2d 333 (2009) (slip op., at 12). Assuming that petitioners, on remand, press their objection to the statewide extension of the remedy, the District Court should vacate the injunction insofar as it extends beyond Nogales unless the court concludes that Arizona is violating the EEOA on a statewide basis.

There is no question that the goal of the EEOA—overcoming language barriers—is a vitally important one, and our decision will not in any way undermine efforts to achieve that goal. If petitioners are ultimately granted relief from the judgment, it will be because they have shown that the Nogales School District is doing exactly what this statute requires—taking "appropriate action" to teach English to students who grew up speaking another language.

* * *

We reverse the judgment of the Court of Appeals and remand the cases for the District Court to determine whether, in accordance with the standards set out in this opinion, petitioners should be granted relief from the judgment.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

The Arizona Superintendent of Public Instruction, the President of the Arizona Senate, and the Speaker of the Arizona House of Representatives (petitioners here) brought a Federal Rule of Civil Procedure 60(b)(5) motion in a Federal District Court asking the court to set aside a

judgment (and accompanying orders) that the court had entered in the year 2000. The judgment held that the State of Arizona's plan for funding its English Language***2608** Learner program was arbitrary, and therefore the State had failed to take "appropriate action to overcome language barriers that impede equal participation by its" Spanish-speaking public school students "in its instructional programs." 20 U.S.C. § 1703(f); *Castaneda v. Pickard,* 648 F.2d 989, 1010 (C.A.5 1981) (interpreting "appropriate action" to include the provision of "necessary" financial and other "resources"). The moving parties argued that "significant change[s] either in factual conditions or in law," *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), entitled them to relief. The State of Arizona, the Arizona Board of Education, and the original plaintiffs in the case (representing students from Nogales, Arizona) opposed the superintendent's Rule 60(b)(5) motion. They are respondents here.

The District Court, after taking evidence and holding eight days of hearings, considered all the changed circumstances that the parties called to its attention. The court concluded that some relevant "changes" had taken place. But the court ultimately found those changes insufficient to warrant setting aside the original judgment. The Court of Appeals, in a carefully reasoned 41–page opinion, affirmed that district court determination. This Court now sets the Court of Appeals' decision aside. And it does so, it says, because "the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for [English-learning] instruction instead of *fairly considering* the broader question, whether, as a result of important changes during the intervening years, the State was fulfilling its obligation" under the Act "by other means." *Ante,* at 2588 (emphasis added).

The Court reaches its ultimate conclusion—that the lower courts did not "*fairly consider*" the changed circumstances—in a complicated way. It begins by placing this case in a category it calls "institutional reform litigation." *Ante,* at 2593. It then sets forth special "institutional reform litigation" standards applicable when courts are asked to modify judgments and decrees entered in such cases. It applies those standards, and finds that the lower courts committed error.

I disagree with the Court for several reasons. For one thing, the "institutional reform" label does not easily fit this case. For another, the review standards the Court enunciates for "institutional reform" cases are incomplete and, insofar as the Court applies those standards here, they effectively distort Rule 60(b)(5)'s objectives. Finally, my own review of the record convinces me that the Court is wrong regardless. *The lower courts did "fairly consider" every change in circumstances that the parties called to their attention.* The record more than adequately supports this conclusion. In a word, I fear that the Court misapplies an inappropriate procedural framework, reaching a result that neither the record nor the law adequately supports. In doing so, it risks denying schoolchildren the English-learning instruction necessary "to overcome language barriers that impede" their "equal participation." 20 U.S.C. § 1703(f).

I

A

To understand my disagreement with the Court, it is unfortunately necessary to examine the record at length and in detail. I must initially focus upon the Court's basic criticism of the lower courts' analysis, namely that the lower courts somehow lost sight of the forest for the trees. In the majority's view, those courts—as well as this dissent—wrongly focused upon a subsidiary matter, "incremental" English-learning program "funding," rather than ***2609** the basic matter, whether "changes" had cured, or had come close to curing, the violation of federal law that underlay the original judgment. *Ante,* at 2588. In the Court's view, it is as if a district court, faced with a motion to dissolve a school desegregation decree, focused only upon the school district's failure to purchase 50 decree-required school buses, instead of discussing the basic question, whether the schools had become integrated without need for those 50 buses.

Thus the Court writes that the lower courts focused so heavily on the original decree's "incremental funding" requirement that they failed to ask whether "the State was fulfilling its obligation under" federal law "by other means." *Ibid.* And the Court frequently criticizes the Court of Appeals for having "focused almost exclusively on the sufficiency of incremental funding," *ante,* at 2596; for "confining the scope of its analysis to" the "incremental funding requirement," *ante,* at 2596; for having "asked only whether changed circumstances affected [English-learning] funding and, more specifically ... incremental funding," *ante,* at 2597; for inquiring only "into whether the deficiency in ... incremental funding that the District Court identified in 2000 had been remedied," *ibid.;* and (in case the reader has not yet gotten the point) for "focusing so intensively on Arizona's incremental ... funding," *ante,* at 2597. The Court adds that the District

Court too was wrong to have "asked only whether petitioners had satisfied the original declaratory judgment order through increased incremental funding." *Ante,* at 2598.

The problem with this basic criticism is that the State's provision of adequate resources to its English-learning students, *i.e.,* what the Court refers to as "incremental funding," has always been the basic contested issue in this case. That is why the lower courts continuously focused attention directly upon it. In the context of this case they looked directly at the forest, not the trees. To return to the school desegregation example, the court focused upon the heart of the matter, the degree of integration, and not upon the number of buses the school district had purchased. A description of the statutory context and the history of this case makes clear that the Court cannot sensibly drive a wedge (as it wishes to do) between what it calls the "incremental funding" issue and the uncured failure to comply with the requirements of federal law.

1

The lawsuit filed in this case charged a violation of subsection (f) of § 204 of the Equal Educational Opportunities Act of 1974, 88 Stat. 515, 20 U.S.C. § 1703(f). Subsection (f) provides:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by
>
> .....
>
> "(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The provision is part of a broader Act that embodies principles that President Nixon set forth in 1972, when he called upon the Nation to provide "equal educational opportunity to every person," including the many "poor" and minority children long "doomed to inferior education" as well as those "*who start their education under language handicaps*." See Address to the Nation on Equal Educational Opportunity and Busing, 8 Weekly Comp. of Pres. Doc. 590, 591 (emphasis added) (hereinafter Nixon Address).

***2610** In 1974, this Court wrote that to provide all students "with the same facilities, textbooks, teachers, and curriculum" will "effectively *foreclos[e]" those "students who do not understand English ... from any meaningful education,*" making a "mockery of public education." *Lau v. Nichols,* 414 U.S. 563, 566, 94 S.Ct. 786, 39 L.Ed.2d 1 (emphasis added). The same year Congress, reflecting these concerns, enacted subsection (f) of the Act—a subsection that seeks to "remove language ... barriers" that impede "true equality of educational opportunity." H.R.Rep. No. 92–1335, p. 6 (1972).

2

In 1981, in *Castaneda v. Pickard,* 648 F.2d 989, the Court of Appeals for the Fifth Circuit interpreted subsection (f). It sought to construe the statutory word "appropriate" so as to recognize both the obligation to take account of "the need of limited English speaking children for language assistance" and the fact that the "governance" of primary and secondary education ordinarily "is properly reserved to ... state and local educational agencies." *Id.,* at 1008, 1009.

The court concluded that a court applying subsection (f) should engage in three inquiries. *First,* the court should "ascertain" whether the school system, in respect to students who are not yet proficient in English, "is pursuing" an English-learning program that is "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Ibid. Second,* that court should determine "whether the programs and practices actually used by [the] school system are reasonably calculated to implement effectively the educational theory adopted by the school," which is to say that the school system must "*follow through with practices, resources and personnel necessary to transform*" its chosen educational theory "*into reality.*" *Id.,* at 1010 (emphasis added). *Third,* if practices, resources, and personnel are adequate, the court should go on to ascertain whether there is some indication that the programs produce "results," *i.e.,* that "the language barriers confronting students are actually being overcome." *Ibid.*

Courts in other Circuits have followed *Castaneda*'s approach. See, *e.g., Gomez v. Illinois State Bd. of Educ.,* 811 F.2d 1030, 1041 (C.A.7 1987); *United States v. Texas,* 680 F.2d 356, 371 (C.A.5 1982); *Valeria G. v. Wilson,* 12 F.Supp.2d 1007, 1017–1018 (N.D.Cal.1998). No Circuit Court has denied its validity. And no party in this case contests the District Court's decision to use *Castaneda*'s three-part standard in the case before us.

3

The plaintiffs in this case are a class of English Language Learner students, *i.e.*, students with limited proficiency in English, who are enrolled in the school district in Nogales, a small city along the Mexican border in Arizona in which the vast majority of students come from homes where Spanish is the primary language. In 1992, they filed the present lawsuit against the State of Arizona, its Board of Education, and the superintendent, claiming that the State had violated subsection (f), not by failing to adopt proper English-learning programs, but by failing "to provide *financial and other resources* necessary" to make those programs a practical reality for Spanish-speaking students. App. 7, ¶ 20 (emphasis added); see *Castaneda, supra*, at 1010 (second, *i.e.*, "resource," requirement). In particular, they said, "[t]he cost" of programs that would allow those students to learn effectively, say, to read English at a ***2611** proficient level, "far exceeds the only financial assistance the State theoretically provides." App. 7, ¶ 20(a).

The students sought a declaration that the State had "systematically ... failed or refused to provide fiscal as well as other resources sufficient to enable" the Nogales School District and other "similarly situated [school] districts" to "establish and maintain" successful programs for English learners. *Id.*, at 10, ¶ 28. And they sought an appropriate injunction requiring the provision of such resources. The state defendants answered the complaint. And after resolving disagreements on various subsidiary issues, see *id*., at 19–30, the parties proceeded to trial on the remaining disputed issue in the case, namely whether the State and its education authorities "*adequately fund and oversee*" their English-learning program. 172 F.Supp.2d 1225, 1226 (D.Ariz.2000) (emphasis added).

In January 2000, after a three-day bench trial, the District Court made 64 specific factual findings, including the following:

(1) The State assumes that its school districts need (and will obtain from local and statewide sources) funding equal to a designated "base level amount" per child—reflecting the funding required to educate a "typical" student, 516 F.3d 1140, 1147 (C.A.9 2008)—along with an additional amount needed to educate each child with special educational needs, including those children who are not yet proficient in English. 172 F.Supp.2d, at 1227–1228.

(2) In the year 2000, the "base level amount" the State assumed necessary to educate a typical child amounted to roughly $3,174 (in year 2000 dollars). *Id.*, at 1227.

(3) A cost study conducted by the State in 1988 showed that, at that time, English-learning programming cost school districts an additional $424 per English-learning child. *Id.*, at 1228. Adjusted for inflation to the year 2000, the extra cost per student of the State's English-learning program was $617 per English-learning child.

(4) In the year 2000, the State's funding formula provided school districts with only $150 to pay for the $617 in extra costs per child that the State assumed were needed to pay for its English-learning program. *Id.*, at 1229.

The record contains no suggestion that Nogales, or any other school district, could readily turn anywhere but to the State to find the $467 per-student difference between the amount the State assumed was needed and the amount that it made available. See *id.*, at 1230. Nor does the record contain any suggestion that Nogales or any other school district could have covered additional costs by redistributing "base level," typical-child funding it received. (In the year 2000 Arizona, compared with other States, provided the third-lowest amount of funding per child. U.S. Dept. of Education, Institute of Education Sciences, National Center for Education Statistics, T. Snyder, S. Dillow, & C. Hoffman, Digest of Education Statistics 2008, Ch. 2, Revenues and Expenditures, Table 184, http:// nces. ed. gov/ pubs 2009/ 2009020. pdf (hereinafter 2008 Digest) (all Internet materials as visited June 23, 2009, and available in Clerk of Court's case file).)

Based on these, and related findings, the District Court concluded that the State's method of paying for the additional costs associated with English-learning education was "arbitrary and capricious and [bore] no relation to the actual funding needed." 172 F.Supp.2d, at 1239. The court added that the State's provision of financial resources was "not reasonably calculated to effectively implement" the English-learning program chosen by the State. *Ibid.* Hence, the State had failed to take "appropriate***2612** action" to teach English to non-English-speaking students, in that it had failed (in *Castaneda*'s words) to provide the "practices, resources, and personnel" necessary to make its chosen educational theory a "reality." *Id.*, at 1238–1239; see also § 1703(f); *Castaneda*, 648 F.2d, at 1010.

The District Court consequently entered judgment in the students' favor. The court later entered injunctions (1)

requiring the State to "prepare a cost study to establish the proper appropriation to effectively implement" the State's own English-learning program, and (2) requiring the State to develop a funding mechanism that would bear *some* "*reasonabl[e]*" or "*rational* relatio[n] to the actual funding needed" to ensure that non-English-speaking students would "achieve mastery" of the English language. See, *e.g.*, 160 F.Supp.2d 1043, 1045, 1047 (D.Ariz.2000); No. CV–92–596–TUCACM, 2001 WL 1028369, *2 (D.Ariz., June 25, 2001) (emphasis added).

The State neither appealed nor complied with the 2000 declaratory judgment or any of the injunctive orders. When, during the next few years, the State failed to produce either a study of the type ordered or a funding program rationally related to need for financial resources, the court imposed a series of fines upon the State designed to lead the State to comply with its orders. 405 F.Supp.2d 1112, 1120 (D.Ariz.2005).

In early 2006, the state legislature began to consider HB 2064, a bill that, among other things, provided for the creation of a "Task Force" charged to develop "cost-efficient" methods for teaching English. The bill would also increase the appropriation for teaching English to students who needed to learn it (though it prohibited the spending of any increase upon any particular student for more than two years). In March 2006, the petitioners here (the Arizona Superintendent of Public Instruction, the President of Arizona's Senate, and the Speaker of its House of Representatives) asked the District Court (1) to consider whether HB 2064, as enacted, would satisfy its judgment and injunctive orders, (2) to forgive the contempt fine liability that the State had accrued, and (3) to dissolve the injunctive orders and grant relief from the 2000 judgment. Motion of Intervenors to Purge Contempt, Dissolve Injunctions, Declare the Judgment and Orders Satisfied, and Set Aside Injunctions as Void, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 422, pp. 1–2 (hereinafter Motion to Purge).

The dissolution request, brought under Rule 60(b)(5), sought relief in light of changed circumstances. *The "significant changed circumstances" identified amounted to changes in the very circumstances that underlay the initial finding of violation, namely Arizona's funding-based failure to provide adequate English-learning educational resources*. The moving parties asserted that "Arizona has poured money" into Nogales as a result of various funding changes, *id.*, at 5. They pointed to a 0.6% addition to the state sales tax; the dedication of a portion of the State's share of Indian gaming proceeds to Arizona school districts; to the increase in federal funding since 2001; and to HB 2064's increase in state-provided funding. *Id.*, at 5–8. The parties said that, in light of these "dramatic" additions to the funding available for education in Arizona, the court should "declare the judgment and orders satisfied, and ... relieve defendants from the judgment and orders under Rule 60(b)(5)." *Id.*, at 8.

In April 2006, the District Court held that HB 2064 by itself did not adequately satisfy the court's orders; it denied the request to forgive the fines; but it did not decide the petitioners' Rule 60(b)(5) motion.***2613** In August 2006, the Court of Appeals ordered the District Court to decide that motion, and, in particular, to consider whether changes to "the landscape of educational funding ... required modification of the original court order or otherwise had a bearing on the appropriate remedy." 204 Fed.Appx. 580, 582 (C.A.9 2006) (memorandum).

In January 2007, the District Court held a hearing that lasted eight days and produced an evidentiary transcript of 1,684 pages. The hearing focused on the changes that the petitioners said had occurred and justified setting aside the original judgment. The petitioners pointed to three sets of changed circumstances—all related to "practices, resources, and personnel"—which, in their view, showed that the judgment and the related orders were no longer necessary. They argued that the changes had brought the State into compliance with the Act's requirements. The three sets of changes consisted of (1) increases in the amount of funding available to Arizona school districts; (2) changes in the method of English-learning instruction; and (3) changes in the administration of the Nogales school district. These changes, the petitioners said, had cured the resource-linked deficiencies that were noted in the District Court's 2000 judgment, 172 F.Supp.2d, at 1239, and rendered enforcement of the judgment and related orders unnecessary.

Based on the hearing and the briefs, the District Court again found that HB 2064 by itself did not cure the "resource" problem; it found that all of the changes, resource-related and otherwise, including the new teaching and administrative methods, taken together, were not sufficient to warrant setting aside the judgment or the injunctive orders; and it denied the Rule 60(b)(5) motion for relief. 480 F.Supp.2d 1157, 1164–1167 (D.Ariz.2007). The Court of Appeals affirmed the District Court's conclusions, setting forth its reasons, as I have said, in a lengthy and detailed opinion. The state superintendent, along with the

Speaker of the Arizona House of Representatives and the President of the Arizona Senate, sought certiorari, and we granted the petition.

B

Five conclusions follow from the description of the case I have just set forth. First, the Rule 60(b)(5) "changes" upon which the District Court focused included the "changed teaching methods" and the "changed administrative systems" that the Court criticizes the District Court for ignoring. Compare *ante,* at 2600 – 2601, 2604 – 2605, with Parts III–A, III–C, *infra*. Those changes were, in the petitioners' view, related to the "funding" issue, for those changes reduced the need for increased funding. See Motion to Purge, p. 7. I concede that the majority of the District Court's factual findings focused on funding, see *ante,* at 2599. But where is the *legal error,* given that the opinion clearly shows that the District Court considered, " 'focus[ed]' " upon, and wrote about *all* the matters petitioners raised? *Ibid.;* 480 F.Supp.2d, at 1160–1161.

Second, the District Court and the Court of Appeals focused more heavily upon "incremental funding" costs, see *ante,* at 2596 – 2599, for the *reason* that the State's provision for those costs—*i.e.*, its provision of the resources necessary to run an adequate English-learning program—was the basic contested issue at the 2000 trial and the sole basis for the District Court's finding of a statutory violation. 172 F.Supp.2d, at 1226. That is, the sole subsection (f) dispute in the case originally was whether the State provides the "practices, resources, and personnel necessary" to implement its English-learning ***2614** program. *Castaneda,* 648 F.2d, at 1010. To be sure, as the Court points out, changes other than to the State's funding system could demonstrate that Nogales was receiving the necessary resources. See, *e.g., ante,* at 2600 – 2601. But given the centrality of "resources" to the case, it is hardly surprising that the courts below scrutinized the State's provision of "incremental funding," *but without ignoring* the other related changes to which petitioners pointed, such as changes in teaching methods and administration (all of which the District Court rejected as insufficient). See Part III, *infra*.

Third, the type of issue upon which the District Court and Court of Appeals focused lies at the heart of the statutory demand for equal educational opportunity. A State's failure to provide the "practices, resources, and personnel necessary" to eliminate the educational burden that accompanies a child's inability to speak English is precisely what the statute forbids. See *Castaneda, supra,* at 1010 (emphasizing the importance of providing "resources"); Nixon Address 593 (referring to the importance of providing "financial support"). And no one in this case suggests there is no need for those resources, *e.g.*, that there are no extra costs associated with English-learning education irrespective of the teaching method used. English-learning students, after all, not only require the instruction in "academic content areas" like math and science that "typical" students require, but they also need to increase their proficiency in speaking, reading, and writing English. This language-acquisition instruction requires particular textbooks and other instructional materials, teachers trained in the school's chosen method for teaching English, special assessment tests, and tutoring and other individualized instruction—all of which resources cost money. Brief for Tucson Unified School District et al. as *Amici Curiae* 10–13; Structured English Immersion Models of the Arizona English Language Learners Task Force, http:// www. ade. state. az. us/ ELLTaskForce/ 2008/SEIModels05–14–08.pdf (describing Arizona's requirement that English-learning students receive four hours of language-acquisition instruction per day from specially trained teachers using designated English-learning materials); Imazeki, Assessing the Costs of Adequacy in California Public Schools, 3 Educ. Fin. & Pol'y 90, 100 (2008) (estimating that English-learning students require 74% more resources than typical students). That is why the petitioners, opposed as they are to the District Court's judgment and orders, admitted to the District Court that English learners "need extra help and that costs extra money." See 480 F.Supp.2d, at 1161.

Fourth, *the "resource" issue* that the District Court focused upon when it decided the Rule 60(b)(5) motion, and *the statutory subsection (f) issue* that lies at the heart of the court's original judgment (and the plaintiffs' original complaint) are not *different* issues, as the Court claims. See *ante,* at 2599 – 2600. Rather in all essential respects *they are one and the same issue.* In focusing upon the one, the District Court and Court of Appeals were focusing upon the other. For all practical purposes, changes that would have proved sufficient to show the statutory violation cured would have proved sufficient to warrant setting aside the original judgment and decrees, and vice versa. And in context, judges and parties alike were fully aware of the modification/violation relationship. See, *e.g.*, Intervenor–Defendants' Closing Argument Memorandum, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 631, p. 1 (arguing that factual changes had led to "satisf[action]" of the judgment).

***2615** To say, as the Court does, that "[f]unding is merely one tool that may be employed to achieve the statutory objective," *ante,* at 2600, while true, is beside the point. Of course, a State might violate the Act in other ways. But one way in which a State can violate the Act is to fail to provide necessary "practices, resources, and personnel." And that is the way the District Court found that the State had violated the Act here. Thus, whatever might be true of some other case, in this case the failure to provide adequate resources and the underlying subsection (f) violation were one and the same thing.

Fifth, the Court is wrong when it suggests that the District Court ordered "increased incremental funding," *ante,* at 2598; when it faults the District Court for effectively "dictating state or local budget priorities," *ante,* at 2594; when it claims that state officials welcomed the result "as a means of achieving appropriations objectives," *ante,* at 2593, n. 3; and when it implies that the District Court's orders required the State to provide a "particular level of funding," *ante,* at 2605. The District Court ordered the State to produce a plan that set forth a "reasonable" or "rational" relationship between the needs of English-learning students and the resources provided to them. The orders expressed no view about what *kind* of English-learning program the State should use. Nor did the orders say anything about the *amount* of "appropriations" that the State must provide, *ante,* at 2593, n. 3, or about any "particular funding mechanism," *ante,* at 2597, that the State was obligated to create. Rather, the District Court left it up to the State "to recommend [to the legislature] the level of funding necessary to support the programs that it determined to be the most effective." 160 F.Supp.2d, at 1044. It ordered no more than that the State (*whatever* kind of program it decided to use) must see that the chosen program benefits from a funding system that is not "arbitrary and capricious," but instead "bear[s] a rational relationship" to the resources needed to implement the State's method. No. CV–92–596–TUCACM, 2001 WL 1028369, *2.

II

Part I shows that there is nothing suspicious or unusual or unlawful about the lower courts having focused primarily upon changes related to the resources Arizona would devote to English-learning education (while also taking account of *all* the changes the petitioners raised). Thus the Court's *basic* criticism of the lower court decisions is without foundation. I turn next to the Court's discussion of the standards of review the Court finds applicable to "institutional reform" litigation.

To understand my concern about the Court's discussion of standards, it is important to keep in mind the well-known standards that ordinarily govern the evaluation of Rule 60(b)(5) motions. The Rule by its terms permits modification of a judgment or order (1) when "the judgment has been satisfied," (2) "released," or (3) "discharged;" when the judgment or order (4) "is based on an earlier judgment that has been reversed or vacated;" or (5) "applying [the judgment] prospectively is no longer equitable." No one can claim that the second, third, or fourth grounds are applicable here. The relevant judgment and orders have not been released or discharged; nor is there any relevant earlier judgment that has been reversed or vacated. Thus the only Rule 60(b)(5) questions are whether the judgment and orders have been satisfied, or, if not, whether their continued application is "equitable." And, as I have explained, in context these come down to the same question: Is continued enforcement inequitable because the defendants have satisfied the 2000 declaratory***2616** judgment or at least have come close to doing so, and, given that degree of satisfaction, would it work unnecessary harm to continue the judgment in effect? See *supra,* at 2595.

To show sufficient inequity to warrant Rule 60(b)(5) relief, a party must show that "a significant change either in factual conditions or in law" renders continued enforcement of the judgment or order "detrimental to the public interest." *Rufo,* 502 U.S., at 384, 112 S.Ct. 748. The party can claim that "the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.,* at 388, 112 S.Ct. 748; see also *Railway Employees v. Wright,* 364 U.S. 642, 651, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961). Or the party can claim that relevant facts have changed to the point where continued enforcement of the judgment, order, or decree as written would work, say, disproportionately serious harm. See *Rufo, supra,* at 384, 112 S.Ct. 748 (modification may be appropriate when changed circumstances make enforcement "substantially more onerous" or "unworkable because of unforeseen obstacles").

The Court acknowledges, as do I, as did the lower courts, that *Rufo*' s "flexible standard" for relief applies. The Court also acknowledges, as do I, as did the lower courts, that this "flexible standard" does not itself define the inquiry a court passing on a Rule 60(b)(5) motion must make. To give content to this standard, the Court refers to *Milliken v. Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), in which this Court said that a decree

cannot seek to "eliminat[e] a condition that does not violate" federal law or "flow from such a violation," *ante,* at 2595, and to *Frew v. Hawkins*, 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004), in which this Court said that a "*consent decree*" must be "limited to reasonable and necessary implementations of federal law" (emphasis added; internal quotation marks omitted). *Ante,* at 2595. The Court adds that in an "institutional reform litigation" case, a court must also take account of the need not to maintain decrees in effect for too long a time, *ante,* at 2594 – 2595, the need to take account of "sensitive federalism concerns," *ante,* at 2593, and the need to take care lest "consent decrees" reflect collusion between private plaintiffs and state defendants at the expense of the legislative process, *ante,* at 2594.

Taking these cases and considerations together, the majority says the critical question for the lower courts is "whether ongoing enforcement of the original order was supported by an ongoing violation of federal law (here [subsection (f)])." *Ante,* at 2597. If not—*i.e.,* if a current violation of federal law cannot be detected—then " 'responsibility for discharging the State's obligations [must be] returned promptly to the State.' " *Ante,* at 2596.

One problem with the Court's discussion of its standards is that insofar as the considerations it mentions are widely accepted, the lower courts fully acknowledged and followed them. The decisions below, like most Rule 60(b)(5) decisions, reflect the basic factors the Court mentions. The lower court opinions indicate an awareness of the fact that equitable decrees are subject to a "flexible standard" permitting modification when circumstances, factual or legal, change significantly. 516 F.3d, at 1163; 480 F.Supp.2d, at 1165 (citing *Rufo, supra,* at 383, 112 S.Ct. 748). The District Court's application of *Castaneda*'s interpretation of subsection (f), 648 F.2d, at 1009, along with its efforts to provide state officials wide discretionary authority (about the level of funding and the kind of funding plan), show considerable sensitivity to "federalism concerns." And given ***2617** the many years (at least seven) of state non-compliance, it is difficult to see how the decree can have remained in place too long.

Nor is the decree at issue here a "consent decree" as that term is normally understood in the institutional litigation context. See *ante,* at 2593 – 2595. The State did consent to a few peripheral matters that have nothing to do with the present appeal. App. 19–30. But the State vigorously contested the plaintiffs' basic original claim, namely, that the State failed to take resource-related "appropriate action" within the terms of subsection (f). The State presented proofs and evidence to the District Court designed to show that no violation of federal law had occurred, and it opposed entry of the original judgment and every subsequent injunctive order, save the relief sought by petitioners here. I can find no evidence, beyond the Court's speculation, showing that some state officials have "welcomed" the District Court's decision "as a means of achieving appropriations objectives that could not [otherwise] be achieved." *Ante,* at 2593, n. 3. But even were that so, why would such a fact matter here more than in any other case in which some state employees believe a litigant who sues the State is right? I concede that the State did not appeal the District Court's original order or the ensuing injunctions. But the fact that litigants refrain from appealing does not turn a litigated judgment into a "consent decree." At least, I have never before heard that term so used.

Regardless, the Court's discussion of standards raises a far more serious problem. In addition to the standards I have discussed, *supra,* at 2615 – 2616, our precedents recognize *other,* here outcome-determinative, hornbook principles that apply when a court evaluates a Rule 60(b)(5) motion. The Court omits some of them. It mentions but fails to apply others. As a result, I am uncertain, and perhaps others will be uncertain, whether the Court has set forth a correct and workable method for analyzing a Rule 60(b)(5) motion.

First, a basic principle of law that the Court does not mention—a principle applicable in this case as in others—is that, in the absence of special circumstances (*e.g.,* plain error), a judge need not consider issues or factors that the parties themselves do not raise. That principle of law is longstanding, it is reflected in Blackstone, and it perhaps comes from yet an earlier age. 3 Commentaries on the Laws of England 455 (1768) ("[I]t is a practice unknown to our law" when examining the decree of an inferior court, "to examine the justice of the ... decree by evidence that was never produced below"); *Clements v. Macheboeuf,* 92 U.S. 418, 425, 23 L.Ed. 504 (1876) ("Matters not assigned for error will not be examined"); see also *Savage v. United States,* 92 U.S. 382, 388, 23 L.Ed. 660 (1876) (where a party with the "burden ... to establish" a "charge ... fails to introduce any ... evidence to support it, the presumption is that the charge is without any foundation"); *McCoy v. Massachusetts Inst. of Technology,* 950 F.2d 13, 22 (C.A.1 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal" for "[o]verburdened trial judges cannot be ex-

pected to be mind readers"). As we have recognized, it would be difficult to operate an adversary system of justice without applying such a principle. See *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927). But the majority repeatedly considers precisely such claims. See, *e.g., ante,* at 2602 – 2604 (considering significant matters not raised below); *ante,* at 2606 – 2607 (same).

***2618** Second, a hornbook Rule 60(b)(5) principle, which the Court mentions, *ante,* at 2593, is that the party seeking relief from a judgment or order "*bears the burden* of establishing that a significant change in circumstances warrants" that relief. *Rufo,* 502 U.S., at 383, 112 S.Ct. 748 (emphasis added); cf. *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) (party moving for relief from judgment must make a "sufficient showing" of change in circumstances). But the Court does not apply that principle. See, *e.g., ante,* at 2604 – 2605, and 2606 n. 22 (holding that movants potentially *win* because of *failure* of record to show that English-learning problems do *not* stem from causes other than funding); see also *ante,* at 2601 – 2603 (criticizing lower courts for failing to consider argument not made).

Third, the Court ignores the well-established distinction between a Rule 60(b)(5) request to *modify* an order and a request to set an unsatisfied judgment entirely aside—a distinction that this Court has previously emphasized. Cf. *Rufo, supra,* at 389, n. 12, 112 S.Ct. 748 (emphasizing that "we do not have before us the question whether the entire decree should be vacated"). Courts normally do the latter only if the "party" seeking "to have" the "decree set aside entirely" shows "that the decree has served its purpose, and there is no longer any need for the injunction." 12 J. Moore et al., Moore's Federal Practice § 60.47[2][c] (3d ed.2009) (hereinafter Moore). Instead of applying the distinction, the majority says that the Court of Appeals "strayed" when it referred to situations in which changes justified setting an unsatisfied judgment entirely aside as " 'likely rare.' " *Ante,* at 2595.

Fourth, the Court says nothing about the well-established principle that a party moving under Rule 60(b)(5) for relief that amounts to having a "decree set aside entirely" must show *both* (1) that the decree's objects have been "attained," *Frew,* 540 U.S., at 442, 124 S.Ct. 899, *and* (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will again occur. This Court so held in *Dowell,* a case in which state defendants sought relief from a school desegregation decree on the ground that the district was presently operating in compliance with the Equal Protection Clause. The Court agreed with the defendants that "a finding by the District Court that the Oklahoma City School District was being operated in compliance with ... the Equal Protection Clause" was indeed relevant to the question whether relief was appropriate. 498 U.S., at 247, 111 S.Ct. 630. But the Court added that, to show entitlement to relief, the defendants must *also* show that "it was unlikely that the [school board] would return to its former ways." *Ibid.* Only then would the "purposes of the desegregation litigation ha[ve] been fully achieved." *Ibid.* The principle, as applicable here, simply underscores petitioners' failure to show that the "changes" to which they pointed were sufficient to warrant entirely setting aside the original court judgment.

Fifth, the majority mentions, but fails to apply, the basic Rule 60(b)(5) principle that a party cannot dispute the legal conclusions of the judgment from which relief is sought. A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance. *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); *United States v. Swift & Co.,* 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (party cannot claim that injunction could not lawfully have been applied "to the conditions ***2619** that existed at its making"). Nor can a party require a court to retrace old legal ground, say, by re-making or rejustifying its original "constitutional decision every time an effort [is] made to enforce or modify" an order. *Rufo, supra,* at 389–390, 112 S.Ct. 748 (internal quotation marks omitted); see also *Frew, supra,* at 438, 124 S.Ct. 899 (rejecting argument that federal court lacks power to enforce an order "unless the court first identifies, at the enforcement stage, a violation of federal law").

Here, the original judgment rested upon a finding that the State had failed to provide Nogales with adequate *funding* "resources," *Castaneda,* 648 F.2d, at 1010, in violation of subsection (f)'s "appropriate action" requirement. How then can the Court fault the lower courts for first and foremost seeking to determine whether Arizona had developed a plan that would provide Nogales with adequate *funding* resources? How can it criticize the lower courts for having "insulated the policies embedded in the order ... from challenge and amendment," *ante,* at 2596, for having failed to appreciate that "funding is simply a means,

not the end" of the statutory requirement, *ante,* at 2597, and for having misperceived "the nature of the obligation imposed by the" Act, *ante,* at 2600? When the Court criticizes the Court of Appeals for "misperceiving ... the nature of the obligation imposed" by the Act, *ibid.,* when it second-guesses finding after finding of the District Court, see Part III, *infra,* when it early and often suggests that Arizona may well comply despite lack of a rational funding plan (and without discussing how the changes it mentions could show compliance), see *ante,* at 2596, 2597, what else is it doing but putting "the plaintiff [or] the court ... to the unnecessary burden of re-establishing what has once been decided"? *Railway Employees,* 364 U.S., at 647, 81 S.Ct. 368.

Sixth, the Court mentions, but fails to apply, the well-settled legal principle that appellate courts, including this Court, review district court denials of Rule 60(b) motions (of the kind before us) for abuse of discretion. See *Browder, supra,* at 263, n. 7, 98 S.Ct. 556; *Railway Employees, supra,* at 648–650, 81 S.Ct. 368. A reviewing court must not substitute its judgment for that of the district court. See *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) *(per curiam);* see also *Calderon v. Thompson,* 523 U.S. 538, 567–568, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (SOUTER, J., dissenting) ("[A] high degree of deference to the court exercising discretionary authority is the hallmark of [abuse of discretion] review"). Particularly where, as here, entitlement to relief depends heavily upon fact-related determinations, the power to review the district court's decision "ought seldom to be called into action," namely only in the rare instance where the Rule 60(b) standard "appears to have been misapprehended or grossly misapplied." Cf. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490–491, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Court's bare assertion that a court abuses its discretion when it fails to order warranted relief, *ante,* at 2593, fails to account for the deference due to the District Court's decision.

I have just described Rule 60(b)(5) standards that concern (1) the obligation (or lack of obligation) upon a court to take account of considerations the parties do not raise; (2) burdens of proof; (3) the distinction between setting aside and modifying a judgment; (4) the need to show that a decree's basic objectives have been attained; (5) the importance of not requiring relitigation of previously litigated matters; and (6) abuse of discretion review. Does the Court intend to ignore one or ***2620** more of these standards or to apply them differently in cases involving what it calls "institutional reform litigation"?

If so, the Court will find no support for its approach in the cases to which it refers, namely *Rufo, Milliken,* and *Frew*. *Rufo* involved a motion to modify a complex court-monitor-supervised decree designed to prevent overcrowding in a local jail. The Court stressed the fact that the modification did not involve setting aside the entire decree. 502 U.S., at 389, n. 12, 112 S.Ct. 748. It made clear that the party seeking relief from an institutional injunction "bears the burden of establishing that a significant change in circumstances warrants" that relief. *Id.,* at 383, 112 S.Ct. 748. And it rejected the argument that a reviewing court must determine, in every case, whether an ongoing violation of federal law exists. *Id.,* at 389, 390, and n. 12, 112 S.Ct. 748 (*refusing to require a new* " '*constitutional decision every time an effort [is] made to enforce or modify*' " *a judgment or decree* (emphasis added)).

Frew addressed the question whether the Eleventh Amendment permits a federal district court to enforce a *consent* decree against state officials seeking to bring the State into compliance with federal law. 540 U.S., at 434–435, 124 S.Ct. 899. The Court unanimously held that it does; and in doing so, the Court rejected the State's alternative argument that a federal court may only enforce such an order if it "first identifies ... a violation of federal law" existing at the time that enforcement is sought. *Id.,* at 438, 124 S.Ct. 899. Rather, the Court explained that " 'federal courts are not reduced to' " entering judgments or orders " 'and hoping for compliance,' " *id.,* at 440, 124 S.Ct. 899, but rather retain the power to enforce judgments in order "to ensure that ... the objects" of the court order are met, *id.,* at 442, 124 S.Ct. 899. It also emphasized, like *Dowell,* that relief is warranted only when "the objects of the decree have been attained." 540 U.S., at 442, 124 S.Ct. 899.

What of *Milliken? Milliken* involved direct review (rather than a motion for relief) of a district court's order requiring the Detroit school system to implement a host of remedial programs, including counseling and special reading instruction, aimed at schoolchildren previously required to attend segregated schools. 433 U.S., at 269, 272, 97 S.Ct. 2749. The Court said that a court decree must aim at "eliminating a condition" that violates federal law or which "flow[s] from" such a "violation." *Id.,* at 282, 97 S.Ct. 2749. And it unanimously found that the remedy at issue *was lawful*.

These cases confirm the unfortunate fact that the Court has failed fully to apply the six essential principles that I have mentioned. If the Court does not intend any such modifications of these traditional standards, then, as I shall show, it must affirm the Court of Appeals' decision. But if it does intend to modify them, as stated or in application, it now applies a new set of new rules that are *not* faithful to our cases and which will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof imposed once again upon the plaintiffs.

I recognize that the Court's decision, to a degree, reflects one side of a scholarly debate about how courts should properly handle decrees in "institutional reform litigation." Compare, in general, R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003), with, *e.g.*, Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L.Rev. 1281, 1307–1309 (1976). But ***2621** whatever the merits of that debate, this case does not involve the kind of "institutional litigation" that most commonly lies at its heart. See, *e.g.*, M. Feeley & E. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998); but see *ante*, at 2593, n. 3.

The case does not involve schools, prisons, or mental hospitals that have failed to meet basic constitutional standards. See, *e.g.*, *Dowell*, 498 U.S., at 240–241, 111 S.Ct. 630. It does not involve a comprehensive judicial decree that governs the running of a major institution. See, *e.g.*, *Hutto v. Finney*, 437 U.S. 678, 683–684, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). It does not involve a highly detailed set of orders. See, *e.g.*, *Ramos v. Lamm*, 639 F.2d 559, 585–586 (C.A.10 1980). It does not involve a special master charged with the task of supervising a complex decree that will gradually bring a large institution into compliance with the law. See, *e.g.*, *Ruiz v. Estelle*, 679 F.2d 1115, 1160–1161 (C.A.5 1982). Rather, it involves the more common complaint that a state or local government has failed to meet a federal statutory requirement. See, *e.g.*, *Concilio de Salud Integral de Loiza, Inc. v. Perez–Perdomo*, 551 F.3d 10, 16 (C.A.1 2008); *Association of Community Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 797–798 (C.A.7 1995); *John B. v. Menke*, 176 F.Supp.2d 786, 813–814 (M.D.Tenn.2001). It involves a court imposition of a fine upon the State due to its lengthy failure to take steps to comply. See, *e.g.*, *Hook v. Arizona Dept. of Corrections*, 107 F.3d 1397, 1404 (C.A.9 1997); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1360 (C.A.5 1995). And it involves court orders that leave the State free to pursue the English-learning program of its choice while insisting only that the State come up with a funding plan that is rationally related to the program it chooses. This case is more closely akin to *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (in effect requiring legislation to fund welfare-related "due process" hearings); cf. *id.*, at 277–279, 90 S.Ct. 1011 (Black, J., dissenting), than it is to the school busing cases that followed *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

As I have said, *supra*, at 2596 – 2597, the framework that I have just described, filling in those principles the Court neglects, is precisely the framework that the lower courts applied. 516 F.3d, at 1163, 480 F.Supp.2d, at 1165. In the opinions below, I can find no misapplication of the legal standards relevant to this case. To the contrary, the Court of Appeals' opinion is true to the record and fair to the decision of the District Court. And the majority is wrong to conclude otherwise.

III

If the Court's criticism of the lower courts cannot rest upon what they did do, namely examine directly whether Arizona had produced a rational funding program, it must rest upon what it believes they did not do, namely adequately consider the other changes in English-learning instruction, administration, and the like to which petitioners referred. Indeed, the Court must believe this, for it orders the lower courts, on remand, to conduct a "proper examination" of "four important factual and legal changes that may warrant the granting of relief from the judgment:" (1) the "adoption of a new ... instructional methodology" for teaching English; (2) "Congress' enactment" of the No Child Left Behind Act of 2001, 20 U.S.C. § 6842 *et seq.;* (3) "structural and management reforms in Nogales," and (4) "increased overall education funding." *Ante*, at 2600.

The Court cannot accurately hold, however, that the lower courts failed to conduct***2622** a "proper examination" of these claims, *ibid.*, for the District Court considered three of them, in detail and at length, while petitioners *no where raised* the remaining argument, which has sprung full-grown from the Court's own brow, like Athena from the brow of Zeus.

A

The first "change" that the Court says the lower courts must properly "examin[e]" consists of the "change" of

instructional methodology, from a method of "bilingual education" (teaching at least some classes in Spanish, while providing separate instruction in English) to a method of " 'structured English immersion' " (teaching all or nearly all classes in English but with a specially designed curriculum and materials). *Ante,* at 2600. How can the majority suggest that the lower courts failed properly to "examine" this matter?

First, more than two days of the District Court's eight-day evidentiary hearing were devoted to precisely this matter, namely the claim pressed below by petitioners that "[t]he adoption of English immersion" constitutes a "substantial advancemen[t] in assisting" English learners "to become English proficient." Hearing Memorandum, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 588, pp. 4–5. The State's Director of English Acquisition, Irene Moreno, described the new method as "the most effective" way to teach English. Tr. 19 (Jan. 9, 2007). An educational consultant, Rosalie Porter, agreed. *Id.,* at 95–96. Petitioners' witnesses also described a new assessment test, the Arizona English Language Learner Assessment, *id.,* at 50–51; they described new curricular models that would systematize instructional methods, *id.,* at 78; they explained that all teachers would eventually be required to obtain an "endorsement" demonstrating their expertise in the chosen instructional method, see Proposed Findings of Fact and Conclusions of Law, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 593, p. 7; and they pointed to data showing that the percentage of Nogales' English learners successfully completing the program had recently jumped from 1% of such students in 2004 to 35% in 2006. App. to Pet. for Cert. in No. 08–289, p. 309.

The District Court in its opinion, referring to the several days of hearings, recognized the advances and acknowledged that the State had formulated new systems with new "standards, norms and oversight for Arizona's public schools and students with regard to" English-learning programs. 480 F.Supp.2d, at 1160. It also indicated that it expected the orders would soon prove unnecessary as the State had taken "step[s] towards" developing an "appropriate" funding mechanism, App. to Pet. for Cert. in No. 08–289, p. 125—a view it later reaffirmed, Order, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 703, p. 4. The Court of Appeals, too, in its opinion acknowledged that the dispute "may finally be nearing resolution." 516 F.3d, at 1180.

But, at the same time, the District Court noted that "many of the new standards are still evolving." 480 F.Supp.2d, at 1160. It found that "it would be premature to make an assessment of some of these changes." *Ibid.* And it held that, all in all, the changes were not yet sufficient to warrant relief. *Id.,* at 1167. The Court of Appeals upheld the findings and conclusions as within the discretionary powers of the District Court, adding that the evidence showing that significantly more students were completing the program was "not reliable." 516 F.3d, at 1157. What "further factual findings," *ante,* at 2601, are needed? As I have explained, the District Court was not obligated to relitigate the case. See *supra,* at 2618 – 2619. And it *did* find that ***2623** "the State has changed its primary model" of English-learning instruction "to structured English immersion." 480 F.Supp.2d, at 1161. How can the majority conclude that "further factual findings" are necessary?

Perhaps the majority does not mean to suggest that the lower courts failed properly to examine these changes in teaching methods. Perhaps it means to express its belief that the lower courts reached the wrong conclusion. After all, the Court refers to a "documented, academic support for the view that" structured English immersion "is significantly more effective than bilingual education." *Ante,* at 2601.

It is difficult to see how the majority can substitute its judgment for the District Court's judgment on this question, however, for that judgment includes a host of subsidiary fact-related determinations that warrant deference. *Railway Employees,* 364 U.S., at 647–648, 81 S.Ct. 368 ("Where there is ... a balance of imponderables there must be wide discretion in the District Court"). And, despite considerable evidence showing improvement, there was also considerable evidence the other way, evidence that supported the District Court's view that it would be "premature" to set aside the judgment of violation.

The methodological change was introduced in Arizona in late 2000, and in Nogales it was a work in progress, "[t]o one degree or another," as of June 2005. Tr. 10 (Jan. 12, 2007); *ante,* at 2601. As of 2006, the State's newest structured English immersion models had not yet taken effect. Tr. 138 (Jan. 17, 2007) ("We're getting ready to hopefully put down some models for districts to choose from"). The State had adopted its new assessment test only the previous year. App. 164–165. The testimony about the extent to which Nogales had adopted the new teaching system was unclear and conflicting. Compare Tr. 96 (Jan. 9, 2007) with Tr. 10 (Jan. 12, 2007). And, most importantly, there was evidence that the optimistic improvement

in the number of students completing the English-learning program was considerably overstated. See Tr. 37 (Jan. 18, 2007) (stating that the *assessment test* used in 2005 and 2006, when dramatic improvements had been reported, *was significantly less "rigorous" and consequently had been replaced*). The State's own witnesses were unable firmly to conclude that the new system had so far produced significantly improved results. Tr. 112–113 (Jan. 11, 2007) (stating that "*at some point* " it would be possible to tell how quickly the new system leads to English proficiency (emphasis added)).

Faced with this conflicting evidence, the District Court concluded that it was "premature" to dissolve the decree on the basis of changes in teaching (and related standards and assessment) methodology. Given the underlying factual disputes (about, *e.g.*, the reliability of the testing method), how can this Court now hold that the District Court, and the appellate court that affirmed its conclusions, were legally wrong?

B

The second change that the Court says the lower courts should properly "examine" is the "enactment" of the No Child Left Behind Act. *Ante,* at 2601. The Court concedes, however, that both courts did address the only argument about that "enactment" that the petitioners made, namely, that "compliance" with that new law automatically constitutes compliance with subsection (f)'s " 'appropriate action' " requirement. *Ante,* at 2602; see also, *e.g.*, App. 73 (arguing that the new law "preempts" subsection (f)). And the Court today agrees (as do I) that the lower ***2624** courts properly rejected that argument. *Ante,* at 2602.

Instead, the Court suggests that the lower courts wrongly failed to take account of four other ways in which the new Act is "probative," namely (1) its prompting "significant structural and programming" changes, (2) its increases in "federal funding," (3) "its assessment and reporting requirements," and (4) its "shift in federal education policy." *Ante,* at 2602 – 2603. In fact, the lower courts did take account of the changes in structure, programming, and funding (including federal funding) relevant to the English-learning program in Nogales and elsewhere in the State. See Part III–A, *supra*; Parts III–C and III–D, *infra*. But, I agree with the Court that the District Court did not explicitly relate its discussion to the new Act nor did it take account of what the majority calls a "shift in federal education policy." *Ante,* at 2603.

The District Court failed to do what the Court now demands for one simple reason. No one (with the possible exception of the legislators, who hint at the matter in their reply brief filed in this Court) has ever argued that the District Court should take account of any such "change." But see *ante,* at 2602, and n. 12.

As I have explained, see *supra,* at 2598 – 2599, it is well-established that a district court rarely commits legal error when it fails to take account of a "change" that no one called to its attention or fails to reply to an argument that no one made. See, *e.g., Dowell,* 498 U.S., at 249, 111 S.Ct. 630 (party seeking relief from judgment must make a "sufficient showing"). A district court must construe fairly the arguments made to it; but it is not required to conjure up questions never squarely presented. That the *Court of Appeals* referred to an argument resembling the Court's new assertion does not change the underlying legal fact. The District Court committed no legal error in failing to consider it. The Court of Appeals could properly reach the same conclusion. And the Government, referring to the argument here, does not ask for reversal or remand on that, or on any other, basis.

That is not surprising, since the lower courts have consistently and explicitly held that "flexibility cannot be used to relieve the moving party of its burden to establish that" dissolution is warranted. *Thompson v. United States Dept. of Housing and Urban Development,* 220 F.3d 241, 248 (C.A.4 2000); *Marshall v. Board of Ed., Bergenfield, N.J.,* 575 F.2d 417, 423–424 (C.A.3 1978). There is no basis for treating this case in this respect as somehow exceptional, particularly since publicly available documents indicate that, in any event, Nogales is not " 'reaching its own goals under Title III' " of the Act. *Ante,* at 2602, n. 12; FY 2008 Statewide District/Charter Determinations for the Title III AMAOs (rev.Oct.2008), http:// www. azed. gov/ oelas/ downloads/ T 3 Determinations 2008. pdf (showing that Nogales failed to meet the Act's "Annual Measurable Achievement Objectives," which track the progress of ELL students).

C

The third "change" that the Court suggests the lower courts failed properly to "examine" consists of "[s]tructural and management reforms in Nogales." *Ante,* at 2603 – 2604. Again, the Court cannot mean that the lower courts failed to "examine" these arguments, for the District Court heard extensive evidence on the matter. The Court itself refers to some (but only *some*) of the evidence introduced on this point, namely the testimony of Kelt

Cooper, the former Nogales district superintendent, who said that his administrative ***2625** policies had " 'ameliorated or eliminated many of the most glaring inadequacies' " in Nogales' program. *Ibid.* The Court also refers to the District Court's and Court of Appeals' conclusions about the matter. 480 F.Supp.2d, at 1160 ("The success or failure of the children of" Nogales "should not depend on" "one person"); 516 F.3d, at 1156–1157 (recognizing that Nogales had achieved "reforms with limited resources" but also pointing to evidence showing that "there are still significant resource constraints," and affirming the District Court's similar conclusion).

Rather the Court claims that the lower courts improperly "discounted" this evidence. *Ante,* at 2604. But what does the Court mean by "discount"? It cannot mean that the lower courts failed to take account of the possibility that these changes "might have brought Nogales[']" program into "compliance" with subsection (f). After all, that is precisely what the petitioners below argued. Intervenor–Defendants' Closing Argument Memorandum, No. CV–92–596–TUC–RCC (D.Ariz.), Dkt. No. 631, pp. 7–18. Instead the Court must mean that the lower courts should have given significantly more weight to the changes, *i.e.,* the Court disagrees with the lower courts' conclusion about the likely effect these changes will have on the success of Nogales' English-learning programs (hence, on the need for the judgment and orders to remain in effect).

It is difficult to understand the legal basis for the Court's disagreement about this fact-related matter. The evidence before the District Court was mixed. It consisted of some evidence showing administrative reform and managerial improvement in Nogales. *Ante,* at 2603 – 2604. At the same time other evidence, to which the Court does not refer, shows that these reforms did not come close to curing the problem. The record shows, for example, that the graduation rate in 2005 for English-learning students (59%) was significantly below the average for all students (75%). App. 195. It shows poor performance by English-learning students, compared with English-speaking students, on Arizona's content-based standardized tests. See Appendix A, *infra*. This was particularly true at Nogales' sole high school—which Arizona ranked 575th out of its 629 schools on an educational department survey, 516 F.3d, at 1159—where only 28% of ELL students passed those standardized tests. *Ibid.*

The record also contains testimony from Guillermo Zamudio, who in 2005 succeeded Cooper as Nogales' superintendent, and who described numerous relevant "resource-related" deficiencies: Lack of funding meant that Nogales had to rely upon long-term substitute and "emergency certified" teachers without necessary training and experience. Tr. 45 (Jan. 18, 2007). Nogales needed additional funding to hire trained teachers' aides—a "strong component" of its English-learning program, *id.,* at 47. And Nogales' funding needs forced it to pay a starting base salary to its teachers about 14% below the state average, making it difficult to recruit qualified teachers. *Id.,* at 48. Finally, Zamudio said that Nogales' lack of resources would likely lead in the near future to the cancellation of certain programs, including a remedial reading program, *id.,* at 56, and would prevent the school district from providing appropriate class sizes and tutoring, which he characterized as "essential and necessary for us to be able to have our students learn English," *id.,* at 75–78.

The District Court, faced with all this evidence, found the management and structural "change" insufficient to warrant dissolution of its decree. How can the Court say that this conclusion is unreasonable? What is the legal basis for concluding***2626** that the District Court acted beyond the scope of its lawful authority?

In fact, the Court does not even try to claim that the District Court's conclusion is unreasonable. Rather it enigmatically says that the District Court made "insufficient factual findings" to support the conclusion that an ongoing violation of law exists. *Ante,* at 2604 – 2605. By "insufficient," the Court does not mean nonexistent. See 480 F.Supp.2d, at 1163–1164. Nor can it mean that the District Court's findings were skimpy or unreasonable. That court simply drew conclusions on the basis of evidence it acknowledged was mixed. *Id.,* at 1160–1161. What is wrong with those findings, particularly if viewed with appropriate deference?

At one point the Court says that there "are many possible causes" of Nogales' difficulties and that the lower courts failed to "take into account other variables that may explain" the ongoing deficiencies. *Ante,* at 2605 and n. 20. But to find a flaw here is to claim that the plaintiffs have failed to negate the possibility that these other causes, not the State's resource failures, explain Nogales' poor performance. To say this is to ignore well-established law that accords deference to the District Court's fact-related judgments. See *supra,* at 2618 – 2619. The Court's statements reflect the acknowledgment that the evidence below was mixed. Given that acknowledgment, it is clear that the District Court did not abuse its discretion in finding that

petitioners had not shown sufficient "changed circumstances." And it was petitioners' job, as the moving party, to show that compliance with federal law has been achieved. Where "other variables" make it difficult to conclude that a present violation does or does not exist, what error does the District Court commit if it concludes that the moving party has failed to satisfy that burden?

D

The fourth "change" that the Court suggests the lower courts did not properly "examine" consists of an "overall increase in the education funding available in Nogales." *Ante,* at 2605. Again, the Court is wrong to suggest that the District Court failed fully to examine the matter, for despite the Court's assertions to the contrary, it made a number of "up-to-date factual findings," *ante,* at 2606, on the matter, see 480 F.Supp.2d, at 1161–1164. Those findings reflect that the State had developed an educational plan that raised the "base level amount" for the typical student from $3,139 per pupil in 2000 to $3,570 in 2006 (in constant 2006 dollars), *ante,* at 2605, n. 21; and that plan increased the additional (*i.e.,* "weighted") amount that would be available per English-learning student from $182 to $349 (in 2006 dollars). The State contended that this new plan, with its explanation of how the money needed would be forthcoming from federal, as well as from state, sources, met subsection (f)'s requirement for "appropriate action" (as related to "resources") and the District Court's own insistence upon a mechanism that rationally funded those resources. See Appendix B, *infra*.

Once again the Court's "factual-finding" criticism seems, in context, to indicate its disagreement with the lower courts' resolution of this argument. That is to say, the Court seems to disagree with the District Court's conclusion that, even with the new funding, the State failed to show that adequate resources for English-learning programs would likely be forthcoming; hence the new plan was not "rationally related" to the underlying resource problem.

The record, however, adequately supports the District Court's conclusion. For ***2627** one thing, the funding plan demonstrates that, in 2006, 69% of the available funding was targeted at "base level" education, see Appendix B, *infra, i.e.,* it was funding available to provide students with basic educational services like instruction in mathematics, science, and so forth. See Tr. 110 (Jan. 12, 2007). The District Court found that this funding likely would not become available for English-learning programs.

How is that conclusion unreasonable? If these funds are provided for the provision of only basic services, how can the majority now decide that a school district—particularly a poor school district like Nogales—would be able to cover the additional expenses associated with English-learning education while simultaneously managing to provide for its students' basic educational needs? Indeed, the idea is particularly impractical when applied to a district like Nogales, which has a high percentage of students who need extra resources. See 516 F.3d, at 1145 (approximately 90% of Nogales' students were, or had been, enrolled in the English-learning program in 2006). Where the vast majority of students in a district are those who "need extra help" which "costs extra money," it is difficult to imagine where one could find an untapped stream of funding that could cover those additional costs.

For another thing, the petitioners' witnesses conceded that the State had not yet determined the likely costs to school districts of teaching English learners using the structured English immersion method. See, *e.g.,* Tr. 199–200 (Jan. 17, 2007). The legislators reported that the State had recently asked a task force to "determine" the extra costs associated with implementing the structured English immersion model. Speaker's Opening Appellate Brief in No. 07–15603 etc. (CA9), p. 31. But that task force had not yet concluded its work.

Further, the District Court doubted that the federal portion of the funding identified by the petitioners would be available for English-learning programs. It characterized certain federal grant money, included in the petitioners' calculus of available funds, as providing only "short-term" assistance, 480 F.Supp.2d, at 1161. And testimony at the evidentiary hearing indicated that some of the funds identified by petitioners might not in fact be available to Nogales' schools. See Tr. 59–61 (Jan. 10, 2007). It also noted that certain funds were restricted, meaning that no particular English-learning child could benefit from them for more than two years—despite the fact that English-learning students in Nogales on average spend four to five years in that program. 480 F.Supp.2d, at 1163–1164 (Nogales will have to "dilute" the funds provided to cover students who remain English learners for more than two years).

Finally, the court pointed to federal law, which imposes a restriction forbidding the State to use a large portion of (what the State's plan considered to be) available funds in the manner the State proposed, *i.e.,* to "supplant,"

or substitute for, the funds the State would otherwise have spent on the program. *Id.*, at 1162; see also 20 U.S.C. §§ 6314(a)(2)(B), 6315(b)(3), 6613(f), 6825(g). The District Court concluded that the State's funding plan was in large part unworkable in light of this restriction. In reaching this conclusion, the District Court relied in part upon the testimony of Thomas Fagan, a former United States Department of Education employee and an "expert" on this type of federal funding. Fagan testified that Arizona's plan was a " 'blatant violation' " of the relevant laws, which could result in a loss to the State of over $600 million in federal ***2628** funds—including those federal funds the State's plan would provide for English learners. 480 F.Supp.2d, at 1163.

The Court says that the analysis I have just described, and in which the court engaged, amounts to "clear legal error." *Ante*, at 2605. What error? Where is the error? The Court does say earlier in its opinion that the lower courts "should not" have "disregarded" the relevant federal (*i.e.*, No Child Left Behind Act) funds "just because they are not state funds." *Ante*, at 2602. But the District Court did *not* disregard those funds "just because they are not state funds." Nor did it "foreclos[e] the possibility that petitioners could" show entitlement to relief by pointing to "an overall increase in education funding." *Ante*, at 2605. Rather, the District Court treated those increased funds as potentially unavailable, primarily because their use as planned would violate federal law and would thereby threaten the State with total loss of the stream of federal funding it planned to use. It concluded that the State's plan amounted to " 'a blatant violation' " of federal law, and remarked that "the potential loss of federal funds is substantial." 480 F.Supp.2d, at 1163. Is there a better reason for "disregard[ing]" those funds?

The Court may have other "errors" in mind as well. It does say, earlier in its opinion, that some believe that "increased funding *alone* does not improve student achievement," *ante*, at 2603 (emphasis added), and it refers to nine studies that suggest that increased funding does not always help. See *ante*, at 2603 – 2605, nn. 17–19; see also Brief for Education–Policy Scholars as *Amici Curiae* 7–11 (discussing such scholarship). I do not know what this has to do with the matter. But if it is relevant to today's decision, the Court should also refer to the many studies that cast doubt upon the results of the studies it cites. See, *e.g.*, H. Ladd & J. Hansen, Making Money Matter: Financing America's Schools 140–147 (1999); Hess, Understanding Achievement (and Other) Changes Under Chicago School Reform, 21 Educ. Eval. & Pol'y Analysis 67, 78 (1999); Card & Payne, School Finance Reform, The Distribution of School Spending, and the Distribution of Student Test Scores, 83 J. Pub. Econ. 49, 67 (2002); see also Rebell, Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts, 85 N.C.L.Rev. 1467, 1480 (2007); R. Greenwald, L. Hedges & R. Laine, The Effect of School Resources on Student Achievement, 66 Rev. Educ. Res. 361, 362 (1996).

Regardless, the relation of a funding plan to improved performance is not an issue for this Court to decide through footnote references to the writings of one side of a complex expert debate. The question here is whether the State has shown that its new funding program amounts to a "change" that satisfies subsection (f)'s requirement. The District Court found it did not. Nothing this Court says casts doubt on the legal validity of that conclusion.

IV

The Court's remaining criticisms are not well founded. The Court, for example, criticizes the Court of Appeals for having referred to the "circumstances" that "warrant Rule 60(b)(5) relief as '*likely rare,*' " for having said the petitioners would have to "*sweep away*" the District Court's "funding determination" in order to prevail, for having spoken of the "landscape" as not being "so *radically changed* as to justify relief from judgment without compliance," and for having somewhat diminished the "close [ness]" of its review for "federalism concerns" because the State and its Board of Education "wish the injunction***2629** to remain in place." *Ante*, at 2595 – 2596 (first, second, and fourth emphases added; internal quotation marks omitted).

The Court, however, does not explain the context in which the Court of Appeals' statements appeared. That court used its first phrase ("likely rare") to refer to the *particular kind* of modification that the State sought, namely complete relief from the original judgment, even if the judgment's objective was not yet fully achieved. 516 F.3d, at 1167; cf. Moore § 60.47[2][c]. As far as I know it is indeed "rare" that "a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable" even though compliance with the judgment's legal determination has not occurred. 516 F.3d, at 1167. At least, the Court does not point to other instances that make it common. Uses of the word "sweeping" and "radica[l] change" in context refer to the deference owed to the District Court's 2000 legal determination. See *id.*, at 1168 (describing the 2000 order's "basic determination" that English-learning "programs require substantial state

funding in addition to that spent on basic educational programming"). If there is an error (which I doubt, see *supra*, at 2618 – 2619) the error is one of tone, not of law.

Nor do I see any legal error that could have made a difference when the Court of Appeals said it should downplay the importance of federalism concerns because some elements of Arizona's state government support the judgment. I do not know the legal basis for the majority's reference to this recalibration of judicial distance as "flatly incorrect," but, if it is wrong, I still do not see how recalibrating the recalibration could matter.

In sum, the majority's decision to set aside the lower court decisions rests upon (1) a mistaken effort to drive a wedge between (a) review of funding plan changes and (b) review of changes that would bring the State into compliance with federal law, Part I, *supra;* (2) a misguided attempt to show that the lower courts applied the wrong legal standards, Part II, *supra;* (3) a mistaken belief that the lower courts made four specific fact-based errors, Part III, *supra;* and (4) a handful of minor criticisms, Part IV, *supra* and this page. By tracing each of these criticisms to its source in the record, I have tried to show that each is unjustified. Whether taken separately or together, they cannot warrant setting aside the Court of Appeals' decision.

V

As a totally separate matter, the Court says it is "unclear" whether the District Court improperly ordered statewide injunctive relief instead of confining that relief to Nogales. And it orders the District Court to vacate the injunction "insofar as it extends beyond Nogales" unless the court finds that "Arizona is violating" subsection (f) "on a statewide basis." *Ante,* at 2607.

What is the legal support for this part of the majority's opinion? Prior to the appearance of this case in this Court, no one asked for that modification. Nothing in the law, as far as I know, makes the relief somehow clearly erroneous. Indeed, as the majority recognizes, the reason that the injunction runs statewide is that the State of Arizona, the defendant in the litigation, *asked the Court to enter that relief.* The State pointed in support to a state constitutional provision requiring educational uniformity. See *ante,* at 2607. There is no indication that anyone disputed whether the injunction should have statewide scope. A statewide program harmed Nogales' students, App. 13–14, ¶¶ 40, 42; and the State wanted statewide ***2630** relief. What in the law makes this relief erroneous?

The majority says that the District Court must consider this matter because "[p]etitioners made it clear at oral argument that they wish to argue that the extension of the remedy to districts other than Nogales should be vacated." *Ante,* at 2606, n. 23. I find the matter less clear. I would direct the reader to the oral argument transcript, which reads in part:

> "Mr. Starr: What was entered here in this order, which makes it so extraordinary, is that the entire State funding mechanism has been interfered with by the order. This case started out in Nogales.
>
> .....
>
> "Justice SCALIA: Well, I—I agree with that. I think it was a vast mistake to extend a lawsuit that applied only to Nogales to the whole State, but the State attorney general wanted that done.
>
> "Mr. Starr: But we should be able now to—
>
> "Justice SCALIA: But that's—that's water over the dam. That's not what this suit is about now." Tr. of Oral Arg. 26.

Regardless, what is the legal basis for the Court's order telling the District Court it *must* reconsider the matter? There is no clear error. No one has asked the District Court for modification. And the scope of relief is primarily a question for the District Court. *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies").

VI

As the length of the opinions indicates, this case requires us to read a highly detailed record. Members of this Court have reached different conclusions about what that record says. But there is more to the case than that.

First, even if one sees this case as simply a technical record-reading case, the disagreement among us shows why this Court should ordinarily hesitate to hear cases that require us to do no more than to review a lengthy record simply to determine whether a lower court's fact-based determinations are correct. Cf. *Universal Camera,* 340 U.S., at 488, 71 S.Ct. 456 ("[A] court may [not] displace" a

"choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*"); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949) (noting the well-settled rule that this court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). In such cases, appellate courts are closer to the fray, better able to reach conclusions that are true to the record, and are more likely to treat trial court determinations fairly and with respect—as is clearly so here.

Second, insofar as the Court goes beyond the technical record-based aspects of this case and applies a new review framework, it risks problems in future cases. The framework it applies is incomplete and lacks clear legal support or explanation. And it will be difficult for lower courts to understand and to apply that framework, particularly if it rests on a distinction between "institutional reform litigation" and other forms of litigation. Does the Court mean to say, for example, that courts must, on their own, go beyond a party's ***2631** own demands and relitigate an underlying legal violation whenever that party asks for modification of an injunction? How could such a rule work in practice? See *supra*, at 2618 – 2619. Does the Court mean to suggest that there are other special, strict pro-defendant rules that govern review of district court decisions in "institutional reform cases"? What precisely are those rules? And when is a case an "institutional reform" case? After all, as I have tried to show, see *supra*, at 2616 – 2617, the case before us cannot easily be fitted onto the Court's Procrustean "institutional reform" bed.

Third, the Court may mean its opinion to express an attitude, cautioning judges to take care when the enforcement of federal statutes will impose significant financial burdens upon States. An attitude, however, is not a rule of law. Nor does any such attitude point towards vacating the Court of Appeals' opinion here. The record makes clear that the District Court did take care. See *supra*, at 2615. And the Court of Appeals too proceeded with care, producing a detailed opinion that is both true to the record and fair to the lower court and to the parties' submissions as well. I do not see how this Court can now require lower court judges to take yet greater care, to proceed with even greater caution, while at the same time expecting those courts to enforce the statute as Congress intended.

Finally, we cannot and should not fail to acknowledge the underlying subject matter of this proceeding. The case concerns the rights of Spanish-speaking students, attending public school near the Mexican border, to learn English in order to live their lives in a country where English is the predominant language. In a Nation where nearly 47 million people (18% of the population) speak a language other than English at home, U.S. Dept. of Commerce, Economics and Statistics Admin., Census Bureau, Census 2000 Brief: Language Use and English–Speaking Ability 2 (Oct.2003), it is important to ensure that those children, without losing the cultural heritage embodied in the language of their birth, nonetheless receive the English-language tools they need to participate in a society where that second language "serves as the fundamental medium of social interaction" and democratic participation. Rodríguez, Language and Participation, 94 Cal. L.Rev. 687, 693 (2006). In that way linguistic diversity can complement and support, rather than undermine, our democratic institutions. *Id.*, at 688.

At least, that is what Congress decided when it set federal standards that state officials must meet. In doing so, without denying the importance of the role of state and local officials, it also created a role for federal judges, including judges who must see that the States comply with those federal standards. Unfortunately, for reasons I have set forth, see Part II, *supra*, the Court's opinion will make it more difficult for federal courts to enforce those federal standards. Three decades ago, Congress put this statutory provision in place to ensure that our Nation's school systems will help non-English-speaking schoolchildren overcome the language barriers that might hinder their participation in our country's schools, workplaces, and the institutions of everyday politics and government, *i.e.*, the "arenas through which most citizens live their daily lives." Rodríguez, *supra*, at 694. I fear that the Court's decision will increase the difficulty of overcoming barriers that threaten to divide us.

For the reasons set forth in this opinion, I respectfully dissent.

APPENDIXES

A

PERFORMANCE ON CONTENT–BASED ASSESSMENT

TESTS—SPRING 2006 [1]

MATH

GRADE	ELL STUDENTS PASSING EXAM	NON–ELL AND RECLASSIFIED STUDENTS PASSING EXAM
3	54%	94%
4	44%	91%
5	53%	88%
6	23%	82%
7	40%	82%
8	28%	70%

READING

GRADE	ELL STUDENTS PASSING EXAM	NON–ELL AND PASSING EXAM
3	40%	92%
4	19%	83%
5	22%	81%
6	14%	76%
7	13%	74%
8	31%	73%

WRITING

GRADE	ELL STUDENTS PASSING EXAM	NON–ELL AND PASSING EXAM
3	52%	82%
4	52%	87%
5	34%	80%
6	71%	97%
7	66%	98%
8	49%	94%

FN1. App. to Pet. for Cert. in No. 08–289, p. 311.

B

FUNDING AVAILABLE TO NOGALES UNIFIED SCHOOL DISTRICT, PER STUDENT [2]

TYPE	1999–2000	2000–2001	2001–2002	2002–2003	2003–2004	2004–2005	2005–2006	2006–2007

Base level	$2,593	$2,618	$2,721	$2,788	$2,858	$2,929	$3,039	$3,173
ELL funds	$156	$157	$163	$321	$329	$337	$349	$365
Other state ELL funds	$0	$0	$0	$126	$83	$64	$0	$74
Federal Title I funds	$439	$448	$467	$449	$487	$638	$603	$597
Federal Title II funds	$58	$63	$74	$101	$109	$91	$92	$87
Federal Title III (ELL) funds	$0	$0	$0	$67	$89	$114	$118	$121
State and federal grants	$58	$56	$59	$47	$207	$214	$205	$109
TOTAL [3]	**$3,302**	**$3,342**	**$3,484**	**$3,899**	**$4,162**	**$4,387**	**$4,406**	**$4,605** [4]
Constant dollars (2006) [5]	**$3,866**	**$3,804**	**$3,904**	**$4,272**	**$4,442**	**$4,529**	**$4,406**	**$4,477**
Total ELL funds	**$156**	**$147**	**$163**	**$514**	**$501**	**$515**	**$467**	**$639**

FN2. 516 F.3d 1140, 1159 (C.A.9 2008); App. to Pet. for Cert. in No. 08–289, pp. 42–43.

FN3. Nogales received less per-pupil funding in 2006 than the average provided by every State in the Nation. New Jersey provided the highest, at $14,954; Arizona the third-lowest, at $6,515. 2008 Digest.

FN4. As of 2007, county override funds provided an additional $43.43 per student. See 516 F.3d, at 1158.

FN5. Constant dollars based on the Consumer Price Index (CPI).

U.S.,2009.
Horne v. Flores
557 U.S. 433, 129 S.Ct. 2579, 174 L.Ed.2d 406, 77 BNA USLW 4611, 73 Fed.R.Serv.3d 1562, 245 Ed. Law Rep. 572, 09 Cal. Daily Op. Serv. 8012, 2009 Daily Journal D.A.R. 9410, 21 Fla. L. Weekly Fed. S 1020

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647 F.2d 69
(Cite as: 647 F.2d 69)

United States Court of Appeals,
Ninth Circuit.
IDAHO MIGRANT COUNCIL et al., Plaintiffs-Appellants,
v.
BOARD OF EDUCATION et al., Defendants-Appellees.

No. 79-4660.
Argued and Submitted April 9, 1981.
Decided June 5, 1981.

Nonprofit corporation representing Idaho public school students with limited English language proficiency sued Idaho Department of Education, State Board of Education, and Superintendent of Public Instruction seeking declaratory and injunctive relief concerning equal educational opportunities for subject students. The United States District Court for the District of Idaho, Fred M. Taylor, J., rendered summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, Hug, Circuit Judge, held that defendants were empowered under state law and required under federal law to ensure that needs of students with limited English language proficiencies were addressed.

Reversed and remanded.

West Headnotes

Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. Most Cited Cases

Idaho State Department of Education, State Board of Education and Superintendent of Public Instruction had power under state law and were required under federal law to ensure that needs of students with limited English language proficiency were addressed, especially as state agencies had entered into contractual agreement with United States to comply with Title VI. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Idaho Const. Art. 9, § 2; I.C. §§ 33-116, 33-118, 33-119; Equal Educational Opportunities Act of 1974, §§ 204(f), 221(a), 20 U.S.C.A. §§ 1703(f), 1720(a); U.S.C.A.Const. Amend. 14; Elementary and Secondary Education Act of 1965, § 801(k), 20 U.S.C.A. § 881(k).

***70** Peter Roos, San Francisco, Ca., for plaintiffs-appellants.

Thomas C. Frost, Boise, Idaho, for defendants-appellees; Kenneth L. Mallea, Boise, Idaho, on brief.

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

Before HUG and SKOPIL, Circuit Judges, and ORRICK [FN*], District Judge.

FN* The Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

HUG, Circuit Judge:

Appellant Idaho Migrant Council (Council), a non-profit corporation representing Idaho public school students with limited English language proficiency, filed suit against the Idaho State Department of Education, the State Board of Education, and the Superintendent of Public Instruction (hereinafter referred to collectively as "State Agency"), seeking declaratory and injunctive relief, asserting that the State Agency is in violation of federal law because it has failed to exercise its supervisory powers over local school districts to ensure that appellants receive an equal educational opportunity. The district court granted summary judgment for the State Agency, on the basis that under Idaho State law the State Agency is not empowered to supervise compliance with federal law by the local school districts. Because we conclude that Idaho law does empower the State Agency to supervise the local school districts, and that federal law does impose such an obligation, we reverse.

The Council asserts that it is the responsibility of the State Agency, pursuant to the Equal Educational Opportunities Act of 1974, 20 U.S.C. s 1703(f),[FN1] Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, [FN2] and the fourteenth amendment, to supervise local districts to ensure that students with limited English language proficiency be given instruction which addresses their linguistic needs. The State Agency maintains that it is not empowered, under State law, to supervise the implementation of federal requirements at the local level. The proper parties to the suit, the State Agency ***71** asserts, are the local districts. The district court, agreeing with the State Agency, granted summary judgment in its favor.

> FN1. The Equal Educational Opportunities Act of 1974 provides in part:
>
> > No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by
> >
> > (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.
> >
> > 20 U.S.C. s 1703(f).
>
> FN2. 42 U.S.C. s 2000d provides:
>
> > No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The issue before this court is not whether the State Agency or local districts are in compliance with the mandates of federal law. Rather, the issue here is whether the State Agency has an obligation to supervise the local districts to ensure compliance. It is the latter question which we decide in favor of the Council.

The Idaho State Constitution provides that the "general supervision of the state educational institutions and public school system of the State of Idaho, shall be vested in a state board of education " Art. 9 s 2. The Idaho legislature has vested specific supervisory functions in the State Board of Education. For example, the State Board is required to "supervise all school districts," Idaho Code s 33-116, "prescribe the minimum courses to be taught in all elementary and secondary schools," Idaho Code s 33-118, and "set forth minimum requirements to be met by public, private and parochial secondary schools," Idaho Code s 33-119. Thus we find that the State Agency clearly has the power under state law to supervise local school districts and, where appropriate, to require minimum standards of instruction.

In addition, federal law imposes requirements on the State Agency to ensure that plaintiffs' language deficiencies are addressed. The Equal Educational Opportunities Act of 1974, 20 U.S.C. s 1703(f), provides in part that "(n)o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." The term "educational agency" is defined to include both local school boards and "the state board of education or other agency or officer primarily responsible for the state supervision of public elementary and secondary schools " 20 U.S.C. ss 1720(a), 881(k).

Title VI of the Civil Rights Act of 1964 also creates an obligation on the part of the State Agency. The Act provides that "(n)o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. s 2000d. Further, the State Agency has entered into a contractual agreement with the United States whereby it has agreed to comply with Title VI.[FN3]

> FN3. Because we find a specific statutory obligation on the part of the state, we need not reach the fourteenth amendment issue. See Lau v. Nichols, 414 U.S. 563, 566, 94 S.Ct. 786, 788, 39 L.Ed.2d 1 (1974).

We emphasize that we reach no conclusion on the

question whether the State of Idaho, through its state educational agencies, is currently in compliance with the Equal Educational Opportunities Act of 1974 and Title VI. We merely hold that the State Agency is empowered under state law and required under federal law to ensure that needs of students with limited English language proficiency are addressed. It was thus improper for the district court to have granted summary judgment. On remand, the district court should receive evidence regarding the educational needs of students with limited proficiency in English, and the nature of the programs currently in place that address the needs of those students, in order to determine whether federal requirements are being met.

REVERSED and REMANDED.

C.A.Idaho, 1981.
Idaho Migrant Council v. Board of Educ.
647 F.2d 69

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

H

United States District Court,
D. Colorado.

Wilfred KEYES, et al., Plaintiffs,
Congress of Hispanic Educators, et al., Plaintiff-Intervenors,
v.
SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al., Defendants.

Civ. A. No. C–1499.
Dec. 30, 1983.

Parents of public school students brought suit for relief from alleged segregation in school system, and Hispanic groups and individuals intervened as plaintiffs, alleging that children with limited English language proficiency were discriminated against by school system. After the District Court, 380 F.Supp. 673, William E. Doyle, Circuit Judge, adopted desegregation plan, the Court of Appeals, 521 F.2d 465, Lewis, Chief Judge, affirmed in part and reversed in part. On remand, plaintiff intervenor filed supplemental complaint in intervention, adding claim under Equal Educational Opportunities Act. The District Court, Matsch, J., held that: (1) evidence supported certification of class identified as all children with limited English language proficiency who attended or would in future attend schools operated by defendant district, and (2) evidence of deficiencies in school system's transitional bilingual program warranted determination that school system was in violation of section of EEOA requiring educational agency to take appropriate action "to overcome language barriers that impede equal participation by its students," and thus, school system was properly required to take appropriate action to achieve equal educational opportunity for limited English proficiency student population.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A 187.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak187.5 k. Students, Parents, and Faculty. 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 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In General. 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 Fran-

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

cisco, 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) the limitations in the Rules of Evidence, (4) the tension between minority objectives and majoritarian values in the political process, (5) the time constraints imposed by the volume of other litigation, and (6) the inertia inherent in the bureaucratic structure of public education. While the following discourse is directed toward the problems of children with language barriers, it must be recognized that the analysis is made in the context of a desegregation case which has been in this court for more than a decade.

Stated in the most comprehensive form, the plaintiff-intervenors' contention is that within the pupil population of the Denver Public Schools, those children who have limited-English language proficiency ("LEP") are being denied equal access to educational opportunity because the school system has failed to take appropriate action to address their special needs. Accordingly, it is claimed that such children are denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution; that the school district has violated Title VI of the Civil Rights Act of 1964, as amended; and that the school district has violated the ***1505** mandate of Section 1703(f) of the Equal Educational Opportunities Act.

PROCEDURAL HISTORY

These are ancillary issues in this litigation which began in 1969. In *Keyes v. School District No. 1,* 413 U.S. 189, 213, 93 S.Ct. 2686, 2699, 37 L.Ed.2d 548 (1973), the Supreme Court ordered trial of the factual question of whether the Denver School Board's policy of deliberate segregation in the Park Hill Schools constituted the entire school system a dual system. Judge William E. Doyle's findings that a dual system did exist required further proceedings to ensure that the school board discharged its "affirmative duty to desegregate the entire system 'root and branch'." *Id.* That process is still continuing under this court's supervision.

The Congress of Hispanic Educators ("CHE") and thirteen individually named Mexican-American parents of minor children attending the Denver Public Schools filed a motion to intervene as plaintiffs to participate in the remedy phase hearings. Those plaintiff-intervenors were represented by attorneys from the Mexican American Legal Defense and Educational Fund (MALDEF). Plaintiff-intervenors' motion to intervene was granted by Judge Doyle at a hearing on January 11, 1974. The only record of that order is in the handwritten minutes of the deputy clerk, which note, "Motion of Mexican American Legal Defense Fund to Intervene, Ordered-Motion to Intervene is Granted." The defendants never filed an answer or any other pleading in response to the complaint in intervention.

In that original complaint, the intervenors asserted claims under the Fourteenth Amendment, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000d). Paragraph 9 of the complaint alleged that the action was brought as a Rule 23(b)(1) and (3) class action, with the class defined as follows:

> (a) All Chicano school children, who by virtue of the actions of the Board complained of in the First Cause of Action, Section III of the plaintiff's complaint, are attending segregated schools and who are forced to receive unequal educational opportunity including *inter alia,* the absence of Chicano teachers and bilingual-bicultural programs;
>
> (b) All those Chicano school children, who by virtue of the actions or omissions of the Board complained of in the Second Cause of Action, Section IV of the plaintiff's complaint, are attending segregated schools, and who will be and have been receiving an unequal educational opportunity;

> (c) All those Chicano teachers, staff, and administrators who have been the victims of defendant's discriminatory hiring, promotion, recruitment, assignment, and selection practices and whose victimization has additionally caused educational injury to Chicano students in that Chicano teachers, staff, and administrators are either nonexistent or underemployed. Additionally, the class is composed of present and future teachers, staff, and administrators who may be affected by this court's impending relief in such a manner as to detrimentally affect Chicano children within said district.

There is no record of any order by Judge Doyle certifying such a class. MALDEF lawyers actively participated in the hearings on the desegregation plans submitted by the plaintiff class and the defendant. There was no challenge to the standing of the parties they were representing.

On April 17, 1974, Judge Doyle ordered implementation of a desegregation plan based on the work of Dr. Finger, a court-appointed expert witness. Parts of that plan addressed the special interests and needs of Chicano children as urged by another expert witness, Dr. Jose Cardenas. On appeal, the Tenth Circuit Court of Appeals held that those special requirements went beyond Judge Doyle's findings. *Keyes v. School District No. 1,* 521 F.2d 465 (10th Cir.1975). The Court of Appeals ruled, in relevant part:

> The [district] court made no finding, on remand, that either the School District's curricular offerings or its methods of educating minority students constituted ***1506** illegal segregative conduct or resulted from such conduct. Rather, the court determined that ... a meaningful desegregation plan must provide for the transition of Spanish-speaking children to the English language. But the court's adoption of the Cardenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far.
>
> Other considerations lead us to the same conclusion. Direct local control over decisions vitally affecting the education of children 'has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.' ... We believe that the district court's adoption of the Cardenas Plan would unjustifiably interfere with such state and local attempts to deal with the myriad economic, social and philosophical problems connected with the education of minority students.
>
> We remand for a determination of the relief, if any, *necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language.* (emphasis added)
>
> *Id.* at 482–83 (citations omitted).

After that remand, the parties agreed upon a plan to start the process of desegregation. That stipulated plan, approved by Judge Doyle in an order entered on March 26, 1976, did not contain any provisions dealing with the issues relating to limited-English language proficiency of any students. This civil action was reassigned to me immediately after the entry of that order.

On November 3, 1980, the plaintiff-intervenors filed a supplemental complaint in intervention, adding a claim under a provision of the Equal Educational Opportunities Act of 1974 (the EEOA), 20 U.S.C. §§ 1701 *et seq.* Although the supplemental complaint indicated that the parties were the same as in the original complaint, the statement of the claims expanded the group of intervenors to "those students who are limited-English proficient," without regard to native language. The supplemental complaint did not contain class action allegations. The defendant did not respond to either the original complaint or the supplemental complaint.

The filing of the supplemental complaint in intervention followed several years of unsuccessful efforts to negotiate and compromise the English language proficiency issues. The failure of those efforts is indicative of the intractable character of this controversy. Throughout several years of discovery and up to the time for trial, the defendant school district never raised any question of plaintiff-intervenors' standing and never challenged the contention that these claims should be maintained as a class action. The first challenge was made on April 26, 1982, when the

district suggested that the trial date be vacated. On the last day of trial, the plaintiff-intervenors tendered an amended supplemental complaint and filed motions to add parties, and for class certification. The motion to file the amended complaint to add the additional parties was granted and those additional parties are Hispanic parents whose children now attend the Denver Public Schools. The proposed class certification was simplified to consist of all limited English proficient Hispano children in the Denver Public Schools.

CLASS CERTIFICATION

[1] The question of class certification must be considered before determining the factual and legal questions presented. It arises in an unusual, although not unique, procedural setting since the trial on the merits has already been held. *See Amos v. Board of Directors of City of Milwaukee,* 408 F.Supp. 765, 772 (E.D.Wis.1976). Anyone who has any familiarity with the history of this case knows that there has been a ****1507*** *de facto* recognition of the standing of CHE in representing the Hispanic population group as a class since Judge Doyle first recognized participation by MALDEF attorneys in January, 1974. For example, in the March 26, 1976 order for implementation of the agreed pupil assignment plan, Judge Doyle said:

> The order to modify the bi-lingual program has not been fulfilled and an extension of time (to April 1, 1976) to present a proposal has been granted to the Intervenors.

In determining the awards on applications for attorneys fees, Judge Finesilver commented on the role of the plaintiff-intervenors as follows:

> Without the participation of the Congress of Hispanic Educators, the School District's largest minority group would have gone unrepresented. Their involvement assured a fair and balanced presentation of the various views, was important to the success of desegregation, and contributed to the acceptance of the plan by the Hispano community. The Congress of Hispanic Educators are a prevailing party in this litigation. *Keyes v. School District No. 1,* 439 F.Supp. 393, 400 (D.Colo.1977).

The optimistic expectation that an agreement on bilingual education could be achieved was not fulfilled and the disagreements came on for trial in 1982. At that trial, the complete program for addressing the special needs of all limited-English proficiency students was explored. Indeed, through the testimony of the witnesses and the arguments of counsel, the school district emphasized that because of the many languages spoken by the pupil population and the changes which have occurred in that population since this case was commenced, including the transient nature of attendance patterns, the scope of the problem is considerably wider than that which was defined in the pleadings prior to trial. It is clear from the evidence presented at the trial that the Denver Public Schools now serve a population which is neither bi-racial, nor tri-ethnic. It is pluralistic.

The evidence fully supports the certification of a class identified as all children with limited-English language proficiency who now attend, and who will in the future attend schools operated by the defendant district. That conclusion must, of course, be supported by the separate analysis of the record with respect to each of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

Numerosity.

This prerequisite is not disputed by the defendant even if the class is limited to Spanish-speaking children with limited-English proficiency. Considering all classifications of LEP, there were more than 3,300 such children enrolled in the Denver Public Schools at the time of trial.

Common Questions Of Law Or Fact.

Here, there is a dispute. The defendant asserts that there is a conflict of interest between Hispanic and Indochinese students. While the arguments are focused more on the typicality and adequacy of representation prerequisites, the possibility of such a conflict must also be considered here. I do not find that conflict at this stage of the proceeding. We are now concerned with the question of whether the school district has failed to follow the requirements of two federal statutes and whether there has been a denial of equal protection of the laws. From the evidence presented at trial, I find that the limitations arising from the influence of a language other than English are the same without regard for the particular language affecting the student. Accordingly, there is a common question of what obligation is owing to all LEP children in the district.

Additionally, to limit the class to Spanish speakers would be inconsistent with the remand from the

Tenth Circuit Court of Appeals quoted on page 4 of this opinion. There, the appellate court directed "a determination of the relief necessary to ensure that Hispano *and other minority children* will have the opportunity to acquire proficiency in the English language." *Keyes v. School District No. 1,* 521 F.2d at 483. In the context of the opinion as a ***1508** whole, it is clear that the reference to "other minority children" refers to all children with limited-English language proficiency.

The issues common to all children of limited-English language proficiency now or hereafter enrolled in the Denver Public Schools to be considered in this litigation are whether the school district has denied them equal protection of the laws, whether the defendant has failed to follow the requirements of Title VI of the Civil Rights Act of 1964, as amended, and whether the school district has failed to follow the mandate of Section 1703(f) of the Equal Educational Opportunities Act.

Typicality.

Before trial of the language issues, CHE and the original intervenors were particularly identified with the Hispanic community. The additional intervenors who participated in the trial are also from that community. The typicality prerequisite is met if the claims of students with limited-English proficiency who are affected by the Spanish language are representative of the claims of children who are affected by other languages. I find that they are representative and therefore typical because there are Spanish-speaking children who do not have the opportunity to participate in the special bilingual programs provided for some Spanish speakers and who are, therefore, no different from speakers of other languages for whom there are no comparable programs in Denver. Whatever conflict may exist for those Spanish-speaking children who are receiving bilingual instruction, and who are thus provided better opportunities than those given to Indochinese or other children who are classified as LEP, there are other Spanish speakers who are attending schools under the same programs for those who speak Asian languages and the other identified language groups shown in the trial record in this case.

Adequacy of Representation.

The determination of this prerequisite has been made easy by the delay in class certification. The principal question in deciding whether the representative parties will fairly and adequately protect the interests of the class is the adequacy of the attorneys who are in appearance. One need only read the record of the trial and the briefs filed for the plaintiff-intervenors to conclude that their counsel are highly competent lawyers who have vigorously asserted the interests of all present and future LEP pupils involved with the Denver Public Schools.

Having determined that all of the prerequisites required under Rule 23(a) are met, the court must then consider whether a class action is maintainable under one of the subsections of Rule 23(b). Again, the answer is self-evident from a review of the record in this case. The school district has designed its program in a manner which can be considered as action or refusal to act on grounds generally applicable to all LEP children and, therefore, the class action should be maintained under Rule 23(b)(2).

This court has not disregarded the defendant's concerns about the possibility that non-Hispanic LEP children may be denied their constitutional protection of due process of law by being made a part of the class certified by this court. It is apparent that their rights and interests have been fully considered by the manner in which the evidence and legal arguments have been presented by plaintiff-intervenors' counsel in this case and by the procedural and evidentiary rulings made by this court to this time. It is appropriate, as plaintiff-intervenors' counsel have suggested, to distinguish between the liability and remedy phases of a class action lawsuit and, in the event of any remedy hearings which may involve a conflict, this court has the authority to change both the class certification and to order the separate representation of sub-classes.

SECTION 1703(F) OF THE EEOA

[2] In enacting the Equal Educational Opportunities Act in 1974, the United States Congress was reacting to the many court cases in which the transportation of students from their residential neighborhoods was used as a means for removing ***1509** some of the effects of segregation from the operation of a dual school system. The statement of policy in Section 1701 includes a specific statement of support for neighborhood schools. That section, in its entirety, is as follows:

(a) The Congress declares it to be the policy of the

United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this sub-chapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

20 U.S.C. § 1701.

The legislative findings in Section 1702 of the EEOA include explicit criticism of extensive use of student transportation and, in the following language from Section 1702(a)(6), express a sense of frustration with the guidelines provided by the courts:

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

From the legislative findings, the Congress reached the following conclusion set forth in Section 1702(b):

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

In this litigation, the transportation of students has been used as a part of the effort to remedy the effects of the past segregative policies in the Denver school system. Busing has been the primary means for the removal of racially isolated schools. That aspect of the case is not now directly under consideration, but, as will appear, it is unrealistic to parse out particular components of a school system when considering the fundamental issue of an equal educational opportunity for all students within the school population. The Congress showed the same perception in defining unlawful practices in Section 1703 of the EEOA, which reads as follows:

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

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to ***1510** schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

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> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.
>
> 20 U.S.C. § 1703.

The present focus of attention is on subsection (f) of Section 1703. That subsection was analyzed carefully by the United States Court of Appeals for the Fifth Circuit in *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir.1981), a case which is very instructive in the present controversy. There, the Court made the following pertinent observations:

> We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.
>
> Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking—prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i.e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators.

Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir.1981).

The suggested analysis is to ask three questions. First, is the school system pursuing a program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Second, is the program reasonably calculated to implement that theory? Third, after being used for enough time to be a legitimate trial, has the program produced satisfactory results? *United States v. State of Texas,* 680 F.2d 356, 371 (5th Cir.1982).

THE EVIDENCE

Limited-English proficiency children in the district.

School District No. 1 has a duty to identify, assess and record those students who come within the provisions of the English ***1511** Language Proficiency Act, enacted by the Colorado General Assembly in 1981, codified at C.R.S. §§ 22–24–101 to 106 (1982 Cum.Supp.). The district uses classifications called Lau categories. These Lau categories were defined originally by the Department of Health, Education and Welfare ("HEW"), now the Department of Education, as part of its Lau Guidelines, which HEW drafted as administrative recommendations following the Supreme Court's decision in *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

Section 22–24–103(4) of the Colorado statute does not use the words "Lau A, B and C," but the definitions provided therein track the Lau categories. That section provides for the classification of children as follows:

> "Student whose dominant language is not English" means a public school student whose academic

achievement and English language proficiency are determined by his local school district, using instruments and tests approved by the department, to be impaired because of his inability to comprehend or speak English adequately due to the influence of a language other than English and who is one or more of the following:

(a) A student who speaks a language other than English and does not comprehend or speak English; or

(b) A student who comprehends or speaks some English, but whose predominant comprehension or speech is in a language other than English; or

(c) A student who comprehends and speaks English and one or more other languages and whose dominant language is difficult to determine, if the student's English language development and comprehension is:

(I) At or below the district mean or below the mean or equivalent on a nationally standardized test; or

(II) Below the acceptable proficiency level on an English language proficiency test developed by the department.

C.R.S. § 22–24–103(4).

For the 1981–82 school year, the defendant school district used a survey which identified 3,322 children as limited-English speaking. Of that total count, 2,429 were Lau categories A and B, and 893 were Lau category C, as those terms are defined under the Colorado English Language Proficiency Act. There were 42 separate language groups identified among these students in the Denver Public Schools.

At the elementary level (Grades K–6) 1,639 students were identified as Lau A and B and 637 as Lau C. In the secondary grades (7–12) there were 790 Lau A and B students and 256 Lau C. During the 1981–1982 school year, the school district operated 117 schools—88 elementary, 19 junior high, and 10 senior high schools—with a total enrollment in grades 1–12 of 54,644 students. Lau Category A and B students in the 42 language groups attended 83 of the school district's 88 elementary schools and there were Lau A and B students in all 19 of the junior high schools and all 10 of the senior high schools.

Although 42 languages were represented among the district's limited-English proficiency children in 1981–82, the majority fell into two language groups. There were 1,851 children, or 55.72% of the total number of LEP students at all grade levels, whose other language was Spanish. The second largest group, comprising 36.48% of all LEP children in the district, consisted of 1,212 children who are influenced by one of four Indochinese languages: Cambodian (116); Hmong (417); Lao (174); and Vietnamese (505).

At the elementary level, 919 Spanish language students were identified as Lau A and B, which represents 2.8% of the K–6 population. At the time of the trial, 80% of the Spanish language Lau A and B children were in grades K–3. At the junior high level, 146 Spanish language A and B students were identified, representing 1.07% of the junior high school population. At the senior high school level, the survey identified 86 Spanish language A and B students or two-thirds of one percent (.67%) of the senior high population. District-wide the Spanish language A and B population K–12 totaled 1,151 or 1.9% of the total ***1512** district enrollment. An additional 700 Spanish language students were identified as Lau category C.

The school district's curriculum.

At the elementary level, a transitional bilingual program exists at twelve elementary schools: Boulevard, Bryant-Webster, Crofton, Del Pueblo, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Mitchell, Swansea and Valdez. At all those schools except Valdez, the program is for grades K–3; at Valdez it is provided for grades K–6. Not all classrooms in these schools are designated bilingual classrooms; most have one designated bilingual classroom for each grade level in the program. At Fairmont there are two designated bilingual classrooms for each grade level K–3. While only 13.4% of the total number of limited-English proficiency children enrolled in the district (Lau A, B and C children, including all 42 language groups) were receiving instruction in bilingual classrooms during 1981–82, 31.03% of the total number of Spanish speaking, elementary level limited-English speaking children were in bilingual classrooms.

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No speakers of languages other than Spanish, and no Spanish speaking Lau C children receive instruction in designated bilingual classrooms. The bilingual classrooms are intended to have about 40% limited-English proficiency children, and 60% English proficient children, but the actual figures deviate from this goal. Students who are placed in bilingual classrooms merge with the rest of the student body for classes in art, music and physical education, and for lunch and recess.

There are differences in the teaching staff in the desegregated bilingual schools. Each bilingual classroom is taught by a certified teacher, but many of those teachers are monolingual English. Most teachers, including all of the monolingual English teachers, have a bilingual aide to assist in communicating with those children who do not speak English. It is a fair inference that any instruction in Spanish, in classrooms led by monolingual English teachers, occurs through these bilingual aides. In several designated bilingual classrooms, there are full or part-time ESL (English as a Second Language) tutors to assist in English language instruction. In other classrooms ESL is taught by the teachers and aides.

In addition, each bilingual school, except for Mitchell, has a bilingual resource teacher who serves in an administrative and supportive role. (Del Pueblo and Valdez have two bilingual resource teachers, while Bryant-Webster and Greenlee have half-time bilingual resource teachers.) The resource teacher's duties are extensive, including: coordinate between the classroom teacher and the aide in establishing an instructional program; provide technical and other assistance to bilingual classrooms; coordinate the total bilingual effort within the school; meet weekly with the teachers and aides to discuss student progress and other program concerns; provide at least two hours of in-service training to the aides weekly; develop curriculum and materials; involve parents and the community in the program; assess and evaluate limited-English speaking children; diagnose their needs and prescribe specialized curricula; demonstrate techniques and methodologies involved in bilingual instruction, second language acquisition, ESL, and Spanish oral language development; read to children in Spanish; and work with children on conceptual development using the child's native language. All the bilingual resource teachers are bilingual.

For those Lau A and B elementary level children who are not in designated bilingual classrooms—about 1,200 in all languages and about 500 Spanish-speaking children—the district provides two modes of ESL instruction. Four elementary schools—Brown, Cheltenham, Goldrick and Mitchell—have a full-time ESL teacher. The remaining elementary schools (and the non-Spanish speaking Lau A and B children in the twelve bilingual schools) are served by full or part-time tutors who instruct in ESL. All ESL instruction, whether it is by a teacher or tutor, occurs on a "pull-out" basis: the children are taken from their regular classrooms to receive from 30 to 60 minutes of ESL instruction each day. The ***1513** school district's 55 tutors serve Lau A and B children in 75 elementary schools, generally meeting with groups of two to four children at one time, and tutoring an average of 20 children per six-hour day. For the rest of the day, the child receives content instruction in the regular classroom, entirely in English. Some regular classroom teachers are bilingual and the child may receive some content instruction in his native language through those teachers. The elementary ESL program uses the "IDEA Kit," which employs pictures, actions and other materials to teach Lau A and B children oral skills in English.

At the secondary level, there is no program comparable to that found in the designated bilingual elementary schools.

The principal program for secondary level limited-English proficiency students is ESL taught by teachers and tutors for about 45 minutes each day. The ESL curriculum consists of four sequential levels of reading, writing and conversation instruction: levels I and II are for Lau A students; levels III and IV are for Lau B students. Lau C students do not receive ESL instruction unless they choose to take courses offered as electives, such as "Practical English," "Language Development in English," or language lab courses.

The October, 1981, survey identified 146 Spanish A and B Category students in the junior high schools. Of this number 121 or 82.8% attended schools with ESL programs. 108 of those students (89.2%) were in ESL programs conducted by a bilingual teacher.

In the senior high schools ESL programs are available in schools attended by 78 of the 86 identified

Spanish speaking A and B students. In addition, 316 A and B students in other identified language groups attended schools with structured ESL programs.

At four of the district's thirty secondary schools—Hill Junior High, Hamilton Junior High, Manual High, and Thomas Jefferson High—ESL instruction is not available. At the time of trial there were either no limited-English speaking students, or only Lau C students, at Hill and Hamilton. For Lau A and B students at secondary schools without established ESL programs, and for some limited-English speaking students at other secondary schools in the district, the Fred Thomas Career Center provides ESL instruction. Students travel to the Center, which had an enrollment of 55 students in 1981–82, for ESL instruction by a teacher and two aides.

In addition to the specific ESL programs, course materials in content areas of American History, geography, physical science, natural science, mathematics, sex education, health and hygiene, and general hygiene have been translated into the five major language groups for use in the school curriculum. Materials have also been translated for use in the home economics, physical education, and industrial arts areas. Ms. Bonilla, the director of this program, is also engaged in the development of a program known as Transference of Learning from Native Language to English through Content Area Cassette Tapes and Supplementary Materials. This is a project designed to meet the needs of two populations—those students who are literate in their native language and need to develop cognitive skills while learning English, and, secondly, those who are illiterate in their own language and thus need to hear the content area material in order to have an understanding of it.

A final component of the school district's program is a summer ESL program. According to Mr. Hal Anderson, who directs the program, it was expected to serve from 400 to 500 Lau A and B children in 22 classrooms. Students are selected for the summer program based on teacher referrals.

Testing.

The identification of limited-English speaking children, and the placement of those children in Lau categories A, B and C, does not occur through a formal testing process. Instead, the school district employs the Lau questionnaire. The questionnaire is filled out by each child's parents and is reviewed by a teacher. If the parents and teacher concur that the child is ***1514** not limited-English speaking, the district determines him to be ineligible for the bilingual/ESL program. It is common for parents to overstate the language abilities of their children, and the teacher's involvement in the questionnaire is intended to safeguard against that. Most of the district's teachers are not trained in linguistics, bilingual education, other languages, or in detecting language problems. At the secondary level those students who are identified as LEP are given an ESL test to place them in ESL level I, II, III or IV.

To measure the progress of elementary children receiving ESL instruction, the school district uses the IDEA Test, which is a part of the IDEA Kit. In addition to the IDEA Test, the district relies on the opinions of its teachers and staff to determine whether and how much the child has progressed. If the student achieves “mastery” of the IDEA Test, he leaves the ESL program, unless his tutor or teacher determines that it would not be appropriate to “mainstream” him at that point. The IDEA Test is also used for those students receiving instruction in designated bilingual classrooms, because part of the transitional bilingual program is ESL instruction through the IDEA Kit. If the child achieves mastery in the test, he will be released from the bilingual program. Of course, if a child becomes proficient in English during the school year he can remain in the bilingual classroom and simply do without the ESL instruction, effectively joining the English speaking children already in the classroom.

At the secondary level, the school district measures progress in the ESL program through the Structure Test of English Language, or STEL. That test is administered twice a year, on a pre/post basis.

The school district does not keep records of the progress of children who have left either the bilingual or ESL program. There is no continuing support provided to students who have exited from either program, and the district does not compare their performance against that of non-limited-English speaking children. None of the tests used by the district measures the capabilities of limited-English speaking children in their native languages in either language skills or content areas.

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Staffing.

Teachers in designated bilingual classrooms are placed by the school district's personnel office, rather than by the bilingual program administrator, Mr. Moses Martinez. These placement decisions do not depend upon the teacher's proficiency in a second language or in bilingual instruction skills. For example, the personnel office often will assign tenured teachers or teachers already working within a particular school, to fill vacancies in bilingual classrooms, even though those teachers are not bilingual and have no training for bilingual teaching, and even though a non-tenured bilingual teacher is available. There is no state endorsement for bilingual classroom teachers. Selection is based on an oral interview. The district does not administer a written test to evaluate either language skills or bilingual instruction skills.

No special training is required for ESL teachers and there is no state endorsement for ESL teachers. There is no formal district procedure to assess them for language proficiency or ESL teaching skills. ESL teachers are not required to be bilingual.

During the 1980–81 school year, over 200 of the district's teachers—predominantly teachers who did not lead designated bilingual classrooms or teach ESL—received an 18-hour in-service training course which covered the basics of linguistics, ESL (including the IDEA Kit curriculum), and multicultural awareness. The school district did not follow up on whether those teachers actually used such training in their classrooms; nor did the school district know whether those teachers taught in classrooms or schools with large numbers of limited-English speaking children.

There are regular classroom teachers in the district who are bilingual, generally in English and Spanish. The evidence did not show the number of bilingual teachers who were working in the district during the 1981–82 school year.

***1515** The district's ESL tutors are classified as Paraprofessional III staff, which means they must have two years of college or equivalent experience. According to Mr. Martinez, many of the tutors have college and graduate degrees; a few have less than two years of college. ESL tutors are not required to have state certification for teaching, previous training in language acquisition or ESL instruction, bilingual capabilities, or past experience teaching ESL. The school district provides a two-day training session for new ESL tutors at the start of each school year. If tutors are hired during the school year (due to vacancies, which occur frequently), they receive one day of training at the office of bilingual education, and two days of observation in the field.

Bilingual classroom aides are designated as Paraprofessional II staff, which means they must have completed high school. Aides' bilingualism is measured through an oral interview only, without any written examination or classroom observation. The evidence does not disclose what, if any, training is required for bilingual aides. Bilingual resource teachers must be bilingual. As with other teachers, there is no written instrument for determining their bilingualism; instead, that determination is based on an oral interview.

Program Administration.

The school district's program for limited-English speaking students is directed by the Department of Bilingual and Multi-cultural Education headed by Mr. Martinez. That office is responsible for the coordination of the programs of Bilingual Education, English for Speakers of Other Languages, ESL Tutorial Programs and others. The staff consists of one secretary, three clerks, four teachers on special assignment, six paraprofessionals who serve as translators and interpreters, one paraprofessional for community liaison, one paraprofessional resource librarian, and instrumental consultants. The community liaison paraprofessional works in the elementary bilingual program, does some liaison work at the secondary level, and works actively with Indochinese parents. She also teaches an English class for parents. The six paraprofessionals include native language speakers of Hmong, Laotian, Vietnamese, Cambodian, and Spanish. The paraprofessionals are primarily responsible for translating curriculum, and interpreting and translating messages and information for the parents of limited-English speaking students. The curriculum translations include units in social studies, science, and mathematics in the five major languages.

Program growth and funding.

The program of services for limited-English speaking students in the Denver Public Schools has been developed with the assistance of expert consultants from the Colorado Department of Education and

from Bueno Bilingual Service Center at Boulder, Colorado. The current program began in September, 1980.

There has been an increase in the number of bilingual teachers from three (3) to thirty-six (36), an increase in tutors from twelve (12) to seventy-two (72), an increase of four (4) schools at the elementary level with ESL programs, and the placement of seventeen (17) tutors in addition to the regular classroom teachers and full-time ESL teachers in twenty-seven (27) secondary schools.

During this same period, the school district substantially increased its funding for bilingual and ESL instruction from $139,326 in 1979 to $1,293,625 at the time of the trial. This commitment is in addition to the salaries of the regularly assigned teachers in the program. During the 1981–82 school year, the school district received $81,687 under a Title VII Computer Demonstration Grant, $137,200 under the Transition Act for Refugee Children, and $991,137 in state funds under the English Language Proficiency Act.

The funds from the state are computed pursuant to the formula set out in the Colorado English Language Proficiency Act, C.R.S. § 22–24–104. That section of the Act sets limits on the funding allowed for limited-English speaking children, and allots funds on a per-student basis. The maximum amount is $400 per year for a Lau A or B child, and $200 per year for a ***1516** Lau C child as that term is used in the Act. In addition, the Act prohibits funding of a particular student's educational program for longer than two years. *Id.* § 22–24–104(3).

HAS DENVER DESIGNED A PROGRAM BASED ON A SOUND EDUCATIONAL THEORY?

The defendant district has a freedom of choice among several educational theories which experts have recognized as valid strategies for language remediation in public schools. It is, of course, subject to the requirements of Colorado statutes. While the Colorado English Language Proficiency Act is essentially a funding program, it does establish an affirmative duty on Colorado school districts in § 22–24–105 which reads as follows:

(1) It is the duty of each district to:

(a) Identify, through the observations and recommendations of parents, teachers, or other persons, students whose dominant language may not be English;

(b) Assess such students, using instruments and techniques approved by the department, to determine if their dominant language is not English;

(c) Certify to the department those students in the district whose dominant language is not English;

(d) Administer and provide programs for students whose dominant language is not English.

The state has not, however, directed the use of any particular type of language program.

Denver has elected to use what is called a "transitional bilingual approach" which is well described in the following language from the Denver Public Schools' Bilingual Program Model for the 1981–82 School Year:

> 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.

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HAS DENVER PURSUED ITS PROGRAM WITH ADEQUATE RESOURCES, PERSONNEL AND PRACTICES?

The elementary bilingual classroom program is the best which Denver has to offer LEP children. Accordingly, the analysis should begin with a focus on the deficiencies in that program.

The key to an effective elementary bilingual classroom is the ability of the teacher to communicate with the children. Thus, if it is expected that understandable instruction will take place, there must be assurance that the teacher has the necessary bilingual skills. That is not the fact in Denver.

Teachers are designated as bilingual in Spanish and English based on an oral interview. There are no standardized testing procedures to determine the competence of the bilingual teacher in speaking and writing both languages. Accordingly, it is inappropriate to assume that effective communication is taking place even with the fortunate few Lau A Spanish speaking students who are assigned to bilingual classrooms***1517** with bilingual teachers in the twelve elementary schools having that program.

Given the district's declaration of a transitional bilingual policy and the obvious need for the services of competent bilingual teachers, it would be reasonable to expect that the placement of teachers with those skills would be matched with the programs in the designated schools. That is not the case in Denver.

The assignment of teachers to bilingual schools in the defendant district is accomplished by the same procedure used for the assignment of teachers to all other schools. Teachers with tenure have preferential rights for assignment to vacancies according to their seniority. Accordingly, a monolingual English teacher may fill a vacancy in a bilingual classroom at a bilingual school even though a qualified bilingual teacher with less seniority is available for placement there. Likewise, tenured monolingual teachers cannot be removed from a bilingual classroom to create a vacancy for a competent bilingual teacher. The justification for this contradiction of common sense is that the movement and placement of teachers is restricted by personnel regulations and contractual commitments.

The ESL component of the program is being delivered by ESL designated instructors who have not been subjected to any standardized testing for their language skills and they receive very little training in ESL theory and methodology. The record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that the policy objectives of the program are being met in such schools. The tutorial program relies on paraprofessionals who may have second language skills but who are not required to show any competence or experience with content area knowledge, or teaching techniques, and who receive scant in-service training.

It should be noted that the inadequacy of the delivery system for the bilingual education program in Raymondville, Texas was one of the specific defects which the court required to be remedied in the *Castaneda v. Pickard, supra,* case from which opinion the following comment is taken:

> The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed “qualified” despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers .... Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking “appropriate action” to overcome the language disabilities of its students.
>
> 648 F.2d at 1013.

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The Spanish speakers in the elementary bilingual classrooms are the most fortunate of the limited-English proficient children. Most LEP students are not in those classrooms. Accordingly, it follows that for those students there is less commitment and effort to achieve implementation of the transitional bilingual policy. Significant numbers of limited-English proficient children attend schools which are not bilingual. Some of the secondary students from certain schools are brought together for extended ESL services at the Fred Thomas Center. That type of "clustering" has not ***1518** been used elsewhere. What appears from the record is that outside of the bilingual classrooms, the Lau A children and perhaps the Lau B children, are not receiving content area instruction in a language which they understand and that, at best, some remedial oral English training is being given to them.

The emphasis on the acquisition of oral English skills for LEP students is another cause for concern. The record indicates that on the average, ESL instruction by a teacher or tutor is limited to 40 minutes per day of remedial English instruction using an audiolingual approach. While there is no doubt that acquisition of oral English skills is vital for the students' participation in classroom work, it is equally obvious that reading and writing skills are also necessary if it is expected that "parity in participation" in the total academic experience will be achieved.

Another matter of concern is the apparent disregard of any special curriculum needs of Lau C children. The defendant considers Lau C children to be bilingual, presumably with equal proficiency in English and another language. The apparent assumption is that such students need not be participants in a remedial English language program. That view disregards the other element of the applicable definition in the Colorado Language Proficiency Act that the English language development and comprehension of such bilingual students is at or below the district mean or below an acceptable proficiency level on a national standardized test or a test developed by the Colorado Department of Education. Lau C students are within the class of persons for whom there is a statutory duty under both the Colorado Act and § 1703(f). Denver is not meeting that obligation.

The defendant's program is also flawed by the failure to adopt adequate tests to measure the results of what the district is doing. The operative philosophy exhibited in the evidence is that there is a "good faith" effort to provide "some service" to as many LEP students as possible. The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional bilingual policy.

In summary, what is shown by this record is that the defendant district has failed, in varying degrees, to satisfy the requirements of § 1703(f) of the Equal Educational Opportunities Act.

The defendant seeks to justify its program by talking in numbers, and quoting from the concurring opinion of Justice Blackmun in *Lau v. Nichols,* 414 U.S. 563, 572, 94 S.Ct. 786, 791, 39 L.Ed.2d 1 (1974) and from the opinion in *Serna v. Portales Municipal Schools,* 499 F.2d 1147 (10th Cir.1974). There are two pertinent observations. First, the numbers of Lau A, B and C children for whom appropriate action has not been taken are substantial and significant. Second, the importance of numbers in an equal protection analysis under the Constitution is materially different from their use in considering the adequacy of compliance with the statutory mandate of § 1703(f). As the plaintiff-intervenors have observed, under § 1706, any individual denied an equal educational opportunity as defined in the Act may institute a civil action for private relief.

HAS THE DENVER TRANSITIONAL BILINGUAL PROGRAM ACHIEVED SATISFACTORY RESULTS?

This is the most difficult question in the *Castaneda* case analysis because it implies the establishment of a substantive standard of quality in educational benefits. It is beyond the competence of the courts to determine appropriate measurements of academic achievement and there is damage to the fabric of federalism when national courts dictate the use of any component of the educational process in schools governed by elected officers of local government.

Fortunately, it is not now necessary to discuss this question because of the findings of the district's failure to take reasonable action to implement the bilingual education policy which it adopted. The inadequacies of the programs and practices shown in this record

make it premature to consider any analysis of the results. Moreover,***1519** the program is still under development.

What is subject to comment are two very significant indications of failure in achieving the objective of equal educational opportunity for LEP children. One is the number of Hispanic "drop-outs" peaking in the tenth grade. There is an interesting relationship between that surge of drop-outs and the sharp decline in the overall number of Lau C category students between grades 7–9 and grades 10–12. A second indicator of failure is the use of "levelled English" handouts for the district's LEP student population in the secondary schools. The evidence includes illustrations of such handouts and it is apparent from examining those exhibits that they are not comparable to the English language textbooks. The use of such materials is an acknowledgement by the school district that the LEP students have failed to attain a reasonable parity of participation with the other students in the educational process at the secondary school level.

CLAIMS FOR DENIAL OF EQUAL PROTECTION AND VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) the Supreme Court held that the failure of the San Francisco school system to provide meaningful education to non-English-speaking Chinese students had the effect of denying them equal educational opportunity in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI). The Court did not find it necessary to consider whether that was also a violation of the Equal Protection Clause of the Fourteenth amendment to the United States Constitution. Here, it is not necessary to consider either the constitutional question or Title VI. Section 1703(f) is a much more specific direction and to take appropriate action under it would necessarily redress any violation of the equal educational opportunities requirements of Title VI of the Civil Rights Act of 1964 and of the Constitution. It may be observed parenthetically, that the vitality of *Lau v. Nichols, supra,* has been questioned since *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). *See* discussion in *Otero v. Mesa County Valley School District No. 51*, 470 F.Supp. 326, 330 (D.Colo.1979), *aff'd on other grounds* 628 F.2d 1271 (10th Cir.1982). If *Bakke* has altered *Lau,* to require a discriminatory intent, the evidence in the record in this case does not support a finding of such an intent with respect to Hispanic or any other language group.

The inquiry is not necessary here because it is clear from the plain language of the statute and from the opinion in *Castaneda, supra,* that the affirmative obligation to take appropriate action to remove language barriers imposed by 20 U.S.C. § 1703(f) does not depend upon any finding of discriminatory intent, and a failure to act is not excused by any amount of good faith.

REMEDY

The defendant district has amply demonstrated the many practical difficulties involved in attempting to take appropriate action to achieve equal educational opportunity for the limited-English proficiency student population. Denver does have public education burdens which are different from other districts in the state of Colorado. It serves a core city community. Students with many different language backgrounds and varying degrees of literacy in any language enter and leave the public schools of Denver, at all grade levels, and without any predictable patterns. This creates uncertainties making both the planning and delivery of remedial language services very difficult. The problem is further complicated by the great diversity of cultural and socio-economic conditions among the pupil population.

It is unreasonable to expect that the school district could provide a full bilingual education to every single LEP student who attends or will ever attend a Denver Public School. The law does not require such perfection. But the defendant does have ***1520** the duty to take appropriate action to eliminate language barriers which currently prevent a great number of students from participating equally in the educational programs offered by the district.

The findings made in this memorandum opinion compel the conclusion that the defendant has failed to perform this duty. Accordingly, under § 1706 of the EEOA, the members of the plaintiff-intervenors' class are entitled to "such relief as may be appropriate." That will include changes in the design of the program and in the system for delivery of services. Such changes must remedy the failure to give adequate consideration to Lau classifications in the pupil assignment plan; the failure to consider the need to serve

Lau C children; the lack of adequate standards and testing of the qualifications for bilingual teachers, ESL teachers, tutors and aides; the lack of adequate tests for classifying Lau A, B and C students; the failure to provide remedial training in the reading and writing of English; the lack of adequate testing for effects and results of the remedial program provided to the students; and the absence of any standards or testing for educational deficits resulting from their lack of participation in the regular classrooms.

These changes will increase the capacity of the system. That alone will not be effective. There must be a change in the institutional commitment to the objective and a recognition that to assist disadvantaged children to participate in public education is to help them enter the mainstream of our social, economic and political systems. The resulting benefits to the community are self-evident and the production of such benefits is the purpose of tax supported education in the United States. "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982). The character of the disadvantage, whether it results from racial identities or the language influences of different ethnicity, is relevant only to the methodology to be employed. Throughout the trial and in the post trial brief, the defendant district has consistently claimed that there has been a good faith effort to provide some service to every student in the district who needs assistance in gaining proficiency in English. To the extent that "good faith" is equated with a lack of discriminatory intent or an absence of a complete disregard for students who are disadvantaged by a lack of English language proficiency, the record supports that contention. That, however, is not an adequate defense to claims under 42 U.S.C. § 1706. What is required is an effort which will be reasonably effective in producing the intended result of removing language barriers to participation in the instructional programs offered by the district.

Whether that effort will be made internally through the normal processes of local government or externally, through the procedures of litigation in this court, will depend upon the degree of acceptance of responsibility by those who direct the defendant district. Those who are most critical of this nation's civil rights laws and court decisions must surely realize that the need for the use of the coercive forces of the legal system is in inverse proportion to the degree of recognition that the viability of a pluralistic democracy depends upon the willingness to accept all of the "thems" as "us." Whether the motives of the framers be considered moralistic or pragmatic, the structure of the Constitution rests on the foundational principle that successful self-governance can be achieved only through public institutions following egalitarian policies.

The approach to developing a remedy for the defendant's failure to obey the congressional mandate in 42 U.S.C. § 1703(f) must be considered in the complete context of this civil action. The record which was before the Tenth Circuit Court of Appeals at the time of its rejection of the "Cardenas plan" aspects of the desegregation order in ***1521** 1975 did not include any consideration of the claims under that statute. Indeed, the enactment of the EEOA in 1974 is one of the legal developments which occurred during the pendency of this case. Consideration of the claims concerning language remediation is a new facet in this old problem.

During the course of this litigation, this court has repeatedly stressed the importance of recognizing that disestablishing a dual school system and creating a unitary system with equal educational opportunity requires attention to all aspects of public education. Unfortunately, the record of this case shows that those who have governed the district during the past decade have consistently centered their attention on the shibboleth of "forced busing." The requirement that some students must be transported from their residential areas to achieve a mix of racial and ethnic groups in individual schools has never been intended to be more than a lever to try to energize other efforts to ameliorate the historical disadvantages of race and national origin in a society which has long been dominated by a single group. Limited-English proficiency is one of those disadvantages.

The Congress had justification when, in § 1702 of the EEOA, they criticized the failure of the courts to articulate adequate guidance for local public officials in desegregation cases. The Denver Board of Educa-

tion has expressed the same frustration. Yet, it is noted that the legislative mandate to take "appropriate action to overcome language barriers" appearing in § 1703(f) is not a particularly helpful contribution. As observed in the quotations from the *Castaneda* opinion, the lack of precision in that phraseology has resulted in a return to the courts to litigate these issues.

Perhaps what Congress did achieve is to give added emphasis to the importance of the *educational opportunities* which should be provided and to remind those who govern school districts that removing the vestiges of a dual school system requires more than maintaining ratios in pupil assignments.

Consideration of the deficiencies in Denver's efforts to remove the barriers to participation by limited-English proficiency students demonstrates, again, the inter-relationship of each integral aspect of a truly unitary school system. To remedy the lack of bilingual teachers involves aspects of the affirmative action plan which has never been completed in this case, and may require alterations in the use of the seniority system. The placement of pupils into appropriate bilingual language programs may require changes in pupil assignments and transfers, which impact on the mix of students in individual schools. The use of "clustering" and magnet schools are approaches which may be productive, but which also impact on other aspects of the system. Perhaps the computer can be a very significant teaching tool for language remediation as suggested by the demonstration grant program which was discussed in the testimony at trial.

In sum, the issues which have been brought before the court by the plaintiff-intervenors are part and parcel of the mandate to establish a unitary school system. Accordingly, no discrete remedy for these issues will now be ordered, but the school district has the responsibility for implementing appropriate action as a part of compliance with the mandate to remove the effects of past segregative policies and to establish a unitary school system in Denver, Colorado.

In a memorandum opinion and order entered on May 12, 1982, accepting a "consensus" pupil assignment plan, I gave the following definition of a unitary school system:

> A unitary school system is one in which all of the students have equal access to the opportunity for education, with the publicly provided educational resources distributed equitably, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an ***1522** identification with any racial or ethnic groups.

Keyes v. School District No. 1, Denver, Colorado, 540 F.Supp. 399, 403–04 (D.Colo.1982).

A failure to take appropriate action to remove language barriers to equal participation in educational programs is a failure to establish a unitary school system.

On December 16, 1982, an order was entered appointing three persons as the Compliance Assistance Panel and at a hearing held on January 4, 1983, it was established that the panel would attempt to work with the district on the ten matters identified in an earlier order to show cause as necessary steps toward developing a final order in this case. While this court has some awareness that there have been contacts by the panel members with the Board of Education and administrative staff of the district, there has been no formal submission to this court on any of those items.

It being apparent that the remedying of the failure to take appropriate action to remove language barriers is implicitly involved in many of these matters, it is this court's conclusion that a hearing should be set for the purpose of establishing procedures and timing for the defendant to make the required submissions for consideration through the formal procedures of the litigation process and that the development of remedies for the discrete issues discussed in this memorandum opinion will be considered as a part of the total process directed toward the entry of a final judgment establishing the parameters of federal law within which the district will be governed according to the educational policies established by those who are selected for that purpose. Accordingly, it is

ORDERED, that a hearing will be held on January 20, 1984 at 10:00 a.m. in Courtroom A, Second Floor, Post Office Building, 18th and Stout Streets (use 19th Street entrance), Denver, Colorado.

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

D.C.Colo.,1983.
Keyes v. School Dist. No. 1, Denver, Colo.
576 F.Supp. 1503, 15 Ed. Law Rep. 796

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Supreme Court of the United States
Kinney Kinmon LAU, a minor by and through Mrs. Kam Wai Lau, his guardian ad litem, et al., Petitioners,
v.
Alan H. NICHOLS et al.

No. 72-6520.
Argued Dec. 10, 1973.
Decided Jan. 21, 1974.

Action by students of Chinese ancestry who do not speak English for relief against alleged unequal educational opportunities in that they do not receive courses in the English language. The United States District Court for the Northern District of California denied relief and plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, 483 F.2d 791, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that school system's failure to provide English language instruction denied meaningful opportunity to participate in public educational program in violation of Civil Rights Act of 1964.

Reversed.

Mr. Justice White concurred in the result; Mr. Justice Stewart filed an opinion concurring in the result, in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined; Mr. Justice Blackmun filed an opinion concurring in the result, in which Mr. Chief Justice Burger joined.

West Headnotes

[1] Federal Courts 170B 452

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk452 k. Certiorari in General. Most Cited Cases

Certiorari was granted to review determination that school district's failure to provide English language instruction to students of Chinese ancestry who do not speak English did not deny equal protection or violate Civil Rights Act of 1964, because of public importance of question presented. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; U.S.C.A.Const. Amend. 14.

[2] Civil Rights 78 1070

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1070 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k127.1, 78k127, 78k9)

School system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied them meaningful opportunity to participate in public educational program in violation of Civil Rights Act of 1964; equality is not provided by providing the same facilities, textbooks, teachers, and curriculum. Civil Rights Act of 1964, §§ 201 et seq., 601 et seq., 602, 42 U.S.C.A. §§ 2000a et seq., 2000d et seq., 2000d-1.

***563 **786** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program and thus violates s 601 of the Civil Rights Act of 1964, which bans discrimination****787** based

'on the ground of race, color, or national origin,' in 'any program or activity receiving Federal financial assistance,' and the implementing regulations of the Department of Health, Education, and Welfare. Pp. 787-789.

483 F.2d 791, reversed and remanded.

Edward H. Steinman, Santa Clara, Cal., for petitioners; Kenneth Hecht and David C. Moon, San Francisco, Cal., on the briefs.

Thomas M. O'Connor, San Francisco, Cal., for respondents; George E. Frueger and Burk E. Delventhal, San Francisco, Cal., on the brief.

J. Stanley Pottinger, Asst. Atty. Gen., San Francisco, Cal., for the United States, as amicus curiae, by special leave of Court; Solicitor Gen., Robert Bork, Deputy Solicitor Gen., Lawrence G. Wallace, Mark L. Evans and Brian K. Landsberg, Washington, D.C., on the brief.

Stephen J. Pollak, Ralph J. Moore, Jr., David Rubin, Washington, D.C., and Peter T. Galiano, Burlingame, Cal., for Nat. Ed. Assn. and others; W. Reece Bader and James R. Madison, San Francisco, Cal., for San Francisco Lawyers' Committee for Urban Affairs; J. Harold Flannery, Washington, D.C., for Center for Law and Ed., Harvard University; Herbert Teitelbaum, New York City, for Puerto Rican Legal Defense and Ed. Fund, Inc; Mario G. Obledo, San Francisco, Cal., Sanford J. Rosen, Berkeley, Cal., Michael Mendelson, and Alan Exelrod, San Francisco, Cal., for Mexican American Legal Defense and Educational Fund and others; Samuel Rabinove, Joseph B. Robison, Arnold Forster, and Elliot C. Rothenberg, New York City, for American Jewish Committee and others; F. Raymond Marks, Berkeley, Cal., for the Childhood and Government Project; Martin Glick, San Francisco, Cal., for Efrain Tostado and others; and the Chinese Consolidated Benevolent Assn. and others, as amicus curiae.

***564** Mr. Justice DOUGLAS delivered the opinion of the Court.

The San Francisco, California, school system was integrated in 1971 as a result of a federal court decree, 339 F.Supp. 1315. See Lee v. Johnson, 404 U.S. 1215, 92 S.Ct. 14, 30 L.Ed.2d 19. The District Court found that there are 2,856 students of Chinese ancestry in the school system who do not speak English. Of those who have that language deficiency, about 1,000 are given supplemental courses in the English language.[FN1] About 1,800, however, do not receive that instruction.

FN1. A report adopted by the Human Rights Commission of San Francisco and submitted to the Court by respondents after oral argument shows that, as of April 1973, there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.

This class suit brought by non-English-speaking Chinese students against officials responsible for the operation of the San Francisco Unified School District seeks relief against the unequal educational opportunities, which are alleged to violate, inter alia, the Fourteenth Amendment. No specific remedy is urged upon us. ***565** Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

[1] The District Court denied relief. The Court of Appeals affirmed, holding that there was no violation of the Equal Protection Clause of the Fourteenth Amendment or of s 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 ****788** U.S.C. s 2000d, which excludes from participation in federal financial assistance, recipients of aid which discriminate against racial groups, 483 F.2d 791. One judge dissented. A hearing en banc was denied, two judges dissenting. Id., at 805.

We granted the petition for certiorari because of the public importance of the question presented, 412 U.S. 938, 93 S.Ct. 2786, 37 L.Ed.2d 397.

The Court of Appeals reasoned that '(e)very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background,

created and continued completely apart from any contribution by the school system,' 483 F.2d, at 797. Yet in our view the case may not be so easily decided. This is a public school system of California and s 71 of the California Education Code states that 'English shall be the basic language of instruction in all schools.' That section permits a school district to determine 'when and under what circumstances instruction may be given bilingually.' That section also states as 'the policy of the state' to insure 'the mastery of English by all pupils in the schools.' And bilingual instruction is authorized 'to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.'

***566** Moreover, s 8573 of the Education Code provides that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in 'English,' as well as other prescribed subjects. Moreover, by s 12101 of the Education Code (Supp. 1973) children between the ages of six and 16 years are (with exceptions not material here) 'subject to compulsory full-time education.'

Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

[2] We do not reach the Equal Protection Clause argument which has been advanced but rely solely on s 601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, to reverse the Court of Appeals.

That section bans discrimination based 'on the ground of race, color, or national origin,' in 'any program or activity receiving Federal financial assistance.' The school district involved in this litigation receives large amounts of federal financial assistance. The Department of Health, Education, and Welfare (HEW), which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 U.S.C. s 2000d-1, in 1968 issued one guideline that '(s)chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the ***567** opportunity to obtain the education generally obtained by other students in the system.' 33 Fed.Reg. 4955. In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded 'to rectify the language deficiency in order to open' the instruction to students who had 'linguistic deficiencies,' 35 Fed.Reg. 11595.

By s 602 of the Act HEW is authorized to issue rules, regulations, and orders [FN2] to make sure that recipients of ****789** federal aid under its jurisdiction conduct any federally financed projects consistently with s 601. HEW's regulations, 45 CFR 80.3(b)(1), specify that the recipients may not

FN2. Section 602 provides:

> 'Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . .' 42 U.S.C. s 2000d-1.

'(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

'(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.'

Discrimination among students on account of race or national origin that is prohibited includes

'discrimination . . . in the availability or use of any academic . . . or ***568** other facilities of the grantee or other recipient.' Id., s 80.5(b).

Discrimination is barred which has that effect even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or have 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.' Id., s 80.3(b)(2).

It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program-all earmarks of the discrimination banned by the regulations.[FN3] In 1970 HEW issued clarifying guidelines, 35 Fed.Reg. 11595, which include the following:

> FN3. And see Report of the Human Rights Commission of San Francisco, Bilingual Education in the San Francisco Public Schools, Aug. 9, 1973.

'Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.'

'Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.'

Respondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the ***569** Regulation' of HEW (45 CFR pt. 80) which are 'issued pursuant to that title . . .' and also immediately to 'take any measures necessary to effectuate this agreement.' The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 142-143, 67 S.Ct. 544, 552-554, 91 L.Ed. 794. Whatever may be the limits of that power, Steward Machine Co. v. Davis, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279 et seq., they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said:[FN4]

> FN4. 110 Cong.Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'

We accordingly reverse the judgment of the Court of Appeals and remand the ****790** case for the fashioning of appropriate relief.

Reversed and remanded.

Mr. Justice WHITE concurs in the result.

Mr. Justice STEWART, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, concurring in the result.

It is uncontested that more than 2,800 schoolchildren of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency. The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only ***570** that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that s 601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. For that section provides that '(n)o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'

On the other hand, the interpretive guidelines published by the Office for Civil Rights of the Department of Health, Education, and Welfare in 1970, 35 Fed.Reg. 11595, clearly indicate that affirmative efforts to give special training for non-English-speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools:

'Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.'[FN1]

FN1. These guidelines were issued in further clarification of the Department's position as stated in its regulations issued to implement Tit. VI, 45 CFR pt. 80. The regulations provide in part that no recipient of federal financial assistance administered by HEW may

'Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (or)

'Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.' 45 CFR s 80.3(b)(1)(ii), (iv).

***571** The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of s 601.[FN2] Last Term, in Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, 93 S.Ct. 1652, 1661, 36 L.Ed.2d 318, we held that the validity of a regulation promulgated under a general authorization provision such as s 602 of Tit. VI [FN3] 'will be sustained so long as it is 'reasonably related to the ****791** purposes of the enabling legislation.' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1969).' I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and 'consistent administrative construction' are 'entitled to great weight.' Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415; Griggs v. duke Power Co., 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158; Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616. The Department has reasonably and consistently interpreted s 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

FN2. The respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.

FN3. Section 602, 42 U.S.C. s 2000d-1, provides in pertinent part:

'Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . .'

The United States as amicus curiae asserts in its brief, and the respondents appear to concede, that the guidelines were issued pursuant to s 602.

For these reasons I concur in the result reached by the Court.

Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

I join Mr. Justice STEWART'S opinion and thus I, too, concur in the result. Against the possibility that the Court's judgment may be interpreted too broadly, I ***572** stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. We may only guess as to why they have had no exposure to English

in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

U.S.Cal. 1974.
Lau v. Nichols
414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1

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75 Cal.App.4th 196, 89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

H

JACK McLAUGHLIN et al., Plaintiffs and Respondents,
v.
STATE BOARD OF EDUCATION et al., Defendants and Appellants.

No. A084730.

Court of Appeal, First District, Division 2, California.
Sept. 27, 1999.

SUMMARY

Several local school districts sought a petition for a writ of mandate commanding the State Board of Education (state board) to accept, consider, and approve requests for general waivers of Prop. 227, the English Language in Public Schools initiative statute (Ed. Code, § 300 et seq.), pursuant to the general waiver provision of Ed. Code, § 33050, which generally allows local school districts to apply to the state board for waivers from program requirements of the Education Code not enumerated in that section. Prop. 227 requires public school children who are of limited English proficiency (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. The trial court granted a writ of mandamus, ordering the state board to consider the general waivers previously submitted. The trial court found that there was nothing in Ed. Code, § 300 et seq. that addressed the general waiver provision of Ed. Code, § 33050, that Ed. Code, § 33050, authorized a waiver procedure as to all or any part of any section of the Education Code, and that the parental waiver exception of Prop. 227 was coexistent with the general waiver procedure outlined in Ed. Code, § 33050. (Superior Court of Alameda County, No. 8008105, Henry E. Needham, Jr., Judge.)

The Court of Appeal reversed the writ of mandamus, and remanded to the trial court with directions. The court held that the general waiver embodied in Ed. Code, § 33050, may not be used as a means to avoid Prop. 227's mandate that, in the absence of parental waivers, LEP students shall be taught English by being taught in English. First, the two statutes could not be harmonized, and the failure to specifically amend Ed. Code, § 33050, to add the core provisions of Prop. 227 was due to an oversight by the initiative's drafters. Second, the subject of public school instruction of LEP students is narrowly addressed by Prop. 227. Combined with the initiative's parental waiver provisions, Prop. 227 is immeasurably more specific than the broad, general references to all or any part of the Education Code contained in Ed. Code, § 33050. As such, and given the clear conflict created by the two statutes, the language of Prop. 227 controlled. (Opinion by Ruvolo, J., with Kline, P. J., and Haerle, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Legislature § 5--Powers--Scope--Public School System:Initiative and Referendum § 6--State Elections--Initiative MeasuresAuthority of Voters-- Education.

The Legislature's power over the public school system is exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints. The voters, acting through the initiative process in enacting statutory law, fulfill the same function and wield the same ultimate legal authority in matters of education as does the Legislature.

(2) Appellate Review § 145--Scope of Review--Questions of Law and Fact-- Function of Appellate Court--Statutory Construction.

Issues of statutory construction are questions of law to which the appellate court accords a de novo standard of review.

(3) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, the court begins by examining the language of the statute. However, language of a statute should not be given a literal meaning if doing so would result in absurd consequences unintended by the Legislature. Thus, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Finally, the courts do not construe statutes in isolation, but rather read every statute with refer-

75 Cal.App.4th 196, 89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
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ence to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. Moreover, in looking at the relationship between two statutes, literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. An interpretation that renders related provisions nugatory must be avoided. Each sentence must be read not in isolation but in the light of the statutory scheme, and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.

(4a, 4b, 4c, 4d) Schools § 66--Activities--Initiative Statute Limited English Proficiency Students to Be Taught in English--Applicability of Preexisting General Waiver Provision:Initiative and Referendum § 6--State Elections--Initiative Measures--English Language in Public Schools.

The trial court erred in granting local school districts' petition for a writ of mandamus commanding the State Board of Education (state board) to accept, consider, and approve requests for general waivers of Prop. 227, the English Language in Public Schools initiative statute (Ed. Code, § 300 et seq.), pursuant to the general waiver provision of Ed. Code, § 33050, which generally allows local school districts to apply to the state board for waivers from program requirements of the Education Code not enumerated in that section. Prop. 227 requires public school children who are of limited English proficiency (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. The general waiver embodied in Ed. Code, § 33050, may not be used as a means to avoid Prop. 227's mandate that, in the absence of parental waivers, LEP students shall be taught English by being taught in English. First, the two statutes could not be harmonized, and the failure to specifically amend Ed. Code, § 33050, to add the core provisions of Prop. 227 was due to an oversight by the initiative's drafters. Second, the subject of public school instruction of LEP students is narrowly addressed by Prop. 227. Combined with the initiative's parental waiver provisions, Prop. 227 is immeasurably more specific than the broad, general references to all or any part of the Education Code contained in Ed. Code, § 33050. As such, and given the clear conflict created by the two statutes, the language of Prop. 227 controlled.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 120, 121.]

(5) Statutes § 45--Construction--Presumptions--Existing Laws:Initiative and Referendum § 1--Construction.

Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them.

(6) Statutes § 46--Construction--Presumptions--Legislative Intent--Silence.

Legislative silence after a court has construed a statute at most gives rise to an arguable inference of acquiescence or passive approval.

(7) Statutes § 19--Construction--Initiative Measures--Ambiguity:Initiative and Referendum § 1--Construction.

Where statutory language is clear and unambiguous, there is no need to construct the statute, and resort to legislative materials or other external sources is unnecessary. Absent ambiguity, the voters are presumed to have intended the meaning apparent on the face of an initiative measure, and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. In construing the statute, the words must be read in context, considering the nature and purpose of the statutory enactment. However, where the language may appear to be unambiguous and yet a latent ambiguity exists, the courts must go behind the literal language and analyze the intent of the law utilizing customary rules of statutory construction or legislative history for guidance. This may include reference to ballot materials in the case of initiatives in order to discern what the average voter would understand to be the intent of the law upon which he or she was voting.

(8) Statutes § 51--Construction--Codes--Conflicting Provisions--Implied Amendment or Exception.

An act adding new provisions to and affecting the application of an existing statute in a sense amends that statute. An implied amendment is an act that creates an addition, omission, modification, or substitution and changes the scope or effect of an existing statute. Like the related principles of repeal by implication and drafters' oversight, amendments by implication are disfavored but are allowed to preserve statutory harmony and effectuate the intent of the Legislature. The principle of amendment or exception by implication is to be employed frugally, and only

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where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(9) Statutes § 19--Construction--Background, Purpose, and Intent of Enactment--General Principles.

One discovers the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. An interpretation that is repugnant to the purpose of the statute would permit the very mischief the statute was designed to prevent. Such a view conflicts with the basic principle of statutory interpretation-that provisions of statutes are to be interpreted to effectuate the purpose of the law.

(10) Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions.

Where a general statute standing alone would include the same matter as a special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one. Furthermore, where a general statute conflicts with a specific statute, the specific statute controls the general one. The referent of general and specific is subject matter. Unless repealed expressly or by necessary implication, a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. This is the case regardless of whether the special provision is enacted before or after the general one, and notwithstanding that the general provision, standing alone, would be broad enough to include the subject to which the more particular one relates.

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RUVOLO, J.

I.

Introduction

In the Primary Election held in June 1998, the voters of California passed Proposition 227, the "English Language in Public Schools" initiative statute, creating a new chapter in California's Education Code [FN1] (the Chapter). The enacted statutory scheme requires children in California's public schools who are of "Limited English Proficiency" (LEP) to be taught only in English, subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction. We are asked to decide solely [FN2] whether the Chapter is subject to the waiver provision of Education Code [FN3] section 33050, which generally allows local school districts to apply to the State Board of Education (State Board) for waivers from program requirements of the Education Code not enumerated in that section. [FN4] The parties and amici curiae [FN5] agree that Propo-

sition 227 is silent as to section 33050.

FN1 Title 1, division 1, chapter 3, articles 1-9, codified at Education Code sections 300-340.

FN2 We are neither asked nor required to pass on the constitutionality of Proposition 227. Facial constitutional challenges to Proposition 227 on the grounds that it violates the supremacy clause (art. VI, cl. 2) and the equal protection clause (14th Amend., § 1) of the United States Constitution, as well as the federal Equal Educational Opportunities Act (20 U.S.C. § 1701 et seq.), and title VI of the federal Civil Rights Act (42 U.S.C. § 2000d) have already been made and rejected in federal court. (*Valeria G. v. Wilson* (N.D.Cal. 1998) 12 F.Supp.2d 1007.)

FN3 All further undesignated statutory references are to the Education Code.

FN4 None of the statutory provisions comprising Proposition 227 are included within the list of exceptions to the general waiver in section 33050.

FN5 Amicus curiae briefs have been filed by the Mexican American Legal Defense and Educational Fund (MALDEF); the Education Legal Alliance of the California School Boards Association (Education Legal Alliance); the Pacific Research Institute for Public Policy and Center for Equal Opportunity (PRI); One Nation/One California, Las Familias del Pueblo, Gloria Matta Tuchman, and Travell Louie; and the Sweetwater Union High School District (Sweetwater).

We conclude that the plain meaning of Proposition 227 was to guarantee that LEP students would receive educational instruction in the English language, and that English immersion programs would be provided to facilitate their transition into English-only classes. Proposition 227 also vests parents of LEP students with the *sole* right to seek a waiver from the Chapter's provision requiring English-only instruction for their own children. The Chapter's language permits no other means by which the program ***202** requirements may be waived, and in fact, allows for civil action against school districts, educators, and administrators who fail or refuse to provide English-only instruction (§ 320). To the extent there is any ambiguity as to the intent of Proposition 227, the legislative history clarifies that the Chapter was designed to wrest from school boards and administrators decisionmaking authority for selecting between LEP educational options, and repose this power exclusively in parents of LEP students. Thus, the Chapter is in direct and irreconcilable conflict with section 33050. In the face of such a " ' "positive repugnancy" ' " (*Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102, 134 [95 S.Ct. 335, 354, 42 L.Ed.2d 320]), under well-recognized principles of statutory construction, the enactment of the Chapter amends by implication section 33050 to except these core provisions of the Chapter from the general waiver process.

Therefore, respondent school boards cannot apply for waivers from the requirements of the entire Chapter under the general waiver authority of section 33050, and the writ of mandamus granted by the trial court is hereby reversed. [FN6] The case is remanded to the trial court with directions to vacate its writ, and instead to issue an order denying the petition.

FN6 As we explain, because the waivers submitted by respondents apparently were general and sought exemption from *all* of the Chapter's sections, in reversing, we take no position as to whether there may be individual sections or subsections of the Chapter which may be waivable. For this reason, and because it is not before this court as a party, we need not decide the merits of amicus curiae Sweetwater's request for a partial waiver of the Chapter's requirements as discussed in its brief.

II.
Factual History
A. *Pre-Proposition 227 History of LEP Education in California*

(1) It has been repeated innumerable times that "the Legislature's power over the public school system [i]s 'exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints.' [Citations.]" (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 754 [16 Cal.Rptr.2d 727].) Of course, the voters, acting through the initiative process in enacting statutory law, fulfill the same function and

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wield the same ultimate legal authority in matters of education, as does the Legislature. (Cal. Const., art. II, §§ 1 and 8; *Rossi v. Brown* (1995) 9 Cal.4th 688 [38 Cal.Rptr.2d 363, 889 P.2d 557].)

The administration of California's public school system by the executive branch has been, and is, vested in four primary public entities; three at the ***203** state level, and one at the local level. At the local level, the functioning of districtwide (unified school districts) or countywide schools is administered by school boards elected by their respective voter constituencies (school districts). (See generally, Cal. Const., art. IX, § 3.2; § 35100 et seq.; Elec. Code, § 1302.2.) At the state level, administrative authority is primarily vested in the State Board, which is comprised of 10 persons appointed by the Governor with the advice and consent of two-thirds of the California State Senate. (§§ 33000, 33030-33031.) The chief executive of the public school system is the elected state Superintendent of Public Instruction (Superintendent) (except where a vacancy exists allowing the Governor to make an interim appointment under (§ 33100). (Cal. Const., art. IX, § 2.) The executive branch of state government also includes within its departmental ranks the State Department of Education (Department) (§ 33300).

The State Board exercises direct administrative control over local school districts by adopting rules and regulations consistent with state law for the governance of local schools and school districts. (§ 33031.) How the state entities and offices are allocated or share responsibilities for public instruction in our state would entail a complex discourse that is mercifully unnecessary to our analysis. (But see generally, *State Bd. of Education v. Honig*, *supra*, 13 Cal.App.4th 720.) It is enough to quote the holding of the Third District in *State Bd. of Education v. Honig*, which summarized the hierarchical relationship of the three state entities as follows: "We conclude the Legislature intended the Board to establish goals affecting public education in California, principles to guide the operations of the Department, and approaches for achieving the stated goals. Its role as 'the governing ... body of the department' (§ 33301, subd. (a)) refers to governance in the broad sense by virtue of its policymaking authority. The Legislature did not intend the Board to involve itself in 'micro-management.' Thus, its responsibility to 'direct and control' the Department (Black's Law Dict., [(5th ed. 1979)] p. 625[, col. 2]) necessarily involves general program and budget oversight as a means of monitoring the effectiveness of its policies. [¶] By contrast, the Legislature intended the Superintendent to be involved in 'the practical management and direction of the executive department.' (Black's Law Dict., *supra*, p. 41.) In this role, the Superintendent is responsible for day-to-day execution of Board policies, supervision of staff, and more detailed aspects of program and budget oversight." (*Id.* at p. 766, italics omitted.)

Relevant recent legal history of public instruction of LEP students in California begins with enactment of the Bilingual-Bicultural Education Act of 1976 (§ 52160 et seq.) (the Act). The Act set forth a comprehensive legislative structure designed to provide funding and to train bilingual ***204** teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs was to increase fluency in the English language for LEP students. Secondarily, the "programs shall also provide positive reinforcement of the self-image of participating students, promote cross-cultural understanding, and provide equal opportunity for academic achievement, ..." (§ 52161.)

The Act remained in effect until its sunset by subsequent law on June 30, 1987. (§ 62000.2, subd. (e).) While still in effect, certain central provisions of the Act were enumerated as exceptions to the waiver provision of section 33050. (§ 33050, subd. (a)(8).) Even after the Act's provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002: "If the Legislature does not enact legislation to continue a program listed in Sections 62000.1 to 62000.5, inclusive, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program.... The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5."

Bilingual education continued through extended funding under section 62002 until Proposition 227 was passed. Inexplicably, although the operative sections of the Act lapsed with the sunset of the law in

1987, school districts continued to request waivers from the State Board under section 33050 seeking to opt out of their bilingual programs. Equally inexplicably, the State Board continued to grant waivers from the defunct law until March 1998, when the State Board rescinded this practice.

B. *The Chapter's Salient Provisions*

Chief among those provisions of the Chapter important to our review is section 300, "Findings and declarations," [FN7] which states: "The People of California find and declare as follows:

> FN7 Section 340 states: "Under circumstances in which portions of this statute are subject to conflicting interpretations, Section 300 shall be assumed to contain the governing intent of the statute."

"(a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for ***205** science, technology, and international business, thereby being the language of economic opportunity; and

"(b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and

"(c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and

"(d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and

"(e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.

"(f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible."

Section 305 requires that "*all* children in California public schools *shall* be taught English by being taught in English...." (Italics added.) This requirement is "[s]ubject to the exceptions provided in Article 3 [Parental Exceptions]." The requirements for this parental waiver are spelled out in section 310, [FN8] and are themselves limited to the circumstances described in ***206** section 311. [FN9] No other mechanism for exception from the Chapter's requirements is specified.

> FN8 Section 310 states: "The requirements of Section 305 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian under the circumstances specified below and in Section 311. Such informed consent shall require that said parents or legal guardian personally visit the school to apply for the waiver and that they there be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. Under such parental waiver conditions, children may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer such a class; otherwise, they must allow the pupils to transfer to a public school in which such a class is offered."

> FN9 Section 311 provides: "The circumstances in which a parental exception waiver may be granted under Section 310 are as follows: [¶] (a) Children who already know English: the child already possesses good English language skills, as measured by standardized tests of English vocabulary

> comprehension, reading, and writing, in which the child scores at or above the state average for his or her grade level or at or above the 5th grade average, whichever is lower; or
>
> "(b) Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or
>
> "(c) Children with special needs: the child already has been placed for a period of not less than thirty days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development. A written description of these special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local Board of Education and ultimately the State Board of Education. The existence of such special needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver."

Section 320 affords parents a right to sue if their child or children are not provided English-only instruction: "As detailed in Article 2 (commencing with Section 305) and Article 3 (commencing with Section 310), all California school children have the right to be provided with an English language public education. If a California school child has been denied the option of an English language instructional curriculum in public school, the child's parent or legal guardian shall have legal standing to sue for enforcement of the provisions of this statute, and if successful shall be awarded normal and customary attorney's fees and actual damages, but not punitive or consequential damages. Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parents or legal guardian."

Finally, amendment of the Chapter is limited to enactment of further voter initiative, or a bill passed by two-thirds of each house of the state Legislature and signed by the Governor. (§ 335.)

C. *History of Section 33050*

The current version of section 33050 contains the following waiver language: "(a) The governing board of a school district or a county board of ***207** education may, on a districtwide or countywide basis or on behalf of one or more of its schools or programs, after a public hearing on the matter, request the State Board of Education to waive all or part of any section of this code or any regulation adopted by the State Board of Education that implements a provision of this code that may be waived, except: ..." [FN10]

> FN10 While the language "that may be waived" appears by grammar and punctuation to modify both "all or part of any section of this code" as well as "any regulation ... that implements a provision of this code," that language was added in 1988, when the waiver statute was expanded to include regulations. Therefore, it appears clear from the history of this change that the Legislature intended the phrase "that may be waived" to modify only regulations.

Once a section 33050 waiver application is presented, the State Board is required to approve it unless the State Board specifically finds, among other things: "(1) The educational needs of the pupils are not adequately addressed. [¶] (2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request. [¶] ... [¶] (5) Guarantees of parental involvement are jeopardized...." (§ 33051, subd. (a).) Failure by the State Board to take action within two regular meetings on a fully documented waiver request received by the Department shall be deemed to be approval of the waiver for a period of one year. (§ 33052, subd. (a).)

The progenitor of section 33050 is former section

52820, enacted in 1981 (Stats. 1981, ch. 100, § 25, p. 680). Like section 33050 today, this former statute provided that the "governing board may, on a districtwide basis or on behalf of one or more of its schools, request the State Board of Education to waive all or part of any section of this code, ..." Despite its broad language, there is little doubt that the initial reach of this statute was intended to extend only to relieve local schools of the spending limitations imposed by categorical aid programs.

For example, the California State Assembly Education Committee reported that the intent behind section 52820 was to "provide districts with increased flexibility in *categorical aid programs* by ... (c) empowering the Department of Education [*sic*] to waive virtually any Education Code requirements in order to improve the operation of a local program." (Former § 52820, subd. (a), italics added; see Assem. Ed. Com., Rep. on Assem. Bill No. 777 (1981-1982 Reg. Sess.) p. 2.) Indeed, once passed, the statute became part of chapter 12 of the Education Code, entitled the School-Based Program Coordination Act, which was enacted "to provide greater flexibility for schools and school districts to better coordinate the categorical funds they receive while ensuring that schools continue to receive categorical funds to meet their needs." (§ 52800.) ***208**

This ancestral version of the general waiver statute also limited, but did not eliminate, the ability of school districts to seek waivers of the requirements for bilingual education (former § 52820, subd. (a)(1)). A more limited waiver for bilingual education came the following year in 1982, when former section 52820 was replaced by section 33050 (Sen. Bill No. 968 (1981-1982 Reg. Sess.), enacted as Stats. 1982, ch. 1298, § 1, p. 4787).

Among the matters addressed in Senate Bill No. 968, which purported to be a "clean-up bill," to Assembly Bill No. 777 (former § 52820), was the inclusion of certain provisions of the Act as exceptions to the general waiver provision of the statute. (See Enrolled Bill Mem. to Governor, Sen. Bill No. 968 (1981-1982 Reg. Sess.) Sept. 9, 1982.) Additionally, the waiver statute was moved from chapter 12 of the Education Code (School-Based Program Coordination Act of 1976), and placed in that chapter which deals with the enumeration of powers of state educational agencies (tit. 2, div. 2, pt. 20, ch. 1, art. 3, codified at § 33050).

The significance of this transfer appears in section 17 of the new law: "The Legislature hereby finds and declares that the waiver authority granted to the State Board of Education pursuant to Chapter 100 of the Statutes of 1981 [Assembly Bill No. 777, enacted as former section 52820] is not limited to those programs specified in Chapter 12 (commencing with Section 52800) [School-Based Program Coordination Act] of Part 28 of the Education Code. [¶] Therefore, the changes made by Sections 1 and 2 of this act, which renumber the waiver provisions to clarify the authority of the State Board of Education, do not constitute a change in, but are declaratory of, existing law." (Stats. 1982, ch. 1298, § 17, p. 4794.)

Therefore, while originating as a means by which school districts could overcome restrictions placed on funds earmarked for categorical aid programs, the present version of the waiver statute is broader in scope. Moreover, the history makes clear that while extending application of section 33050 to programs beyond those forming part of the School-Based Program Coordination Act of 1976, the core elements of LEP education were specifically excepted from the waiver procedure, thereby alienating LEP educational choices from local control.

With this history, we turn to the present litigation and the issue it raises.

III.
Procedural History

Anticipating the passage of Proposition 227, respondents Oakland, Berkeley, and Hayward school districts submitted the contested waiver requests ***209** one week before the June 1998 Primary Election. However, after Proposition 227 passed, the State Board concluded that it did not have authority to grant waivers from the Chapter. Therefore, it refused to consider waiver requests from any school districts, and returned them to respondents.

On July 16, 1998, respondents filed a petition for writ of mandamus and complaint for declaratory and injunctive relief in the Alameda County Superior Court. Although not physically attached to the petition, respondents characterized their waiver requests as "requests for general waivers of California Education Code sections 300, *et seq.*" (Original italics.)

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Throughout the petition's allegations the requests were described as "general waiver request[s]." The cause of action for declaratory relief sought a determination that the State Board had a mandatory duty to "accept, consider and approve requests for general waivers of the newly adopted Education Code sections 300, *et seq*.," while the prayer for mandamus asked for a writ "commanding the State Board to accept, consider and approve requests for general waivers of Education Code sections 300, *et seq*." (Original italics.)

At the hearing on the petition held on August 27, 1998, respondents suggested for the first time that their waiver requests did not seek to prevent parents from opting to have their LEP children educated in an English-only program, or from maintaining an action for damages for failing to provide such a program. [FN11] Appellants countered that the trial court should limit respondents to their pleadings because respondents had consistently characterized their waiver requests as "seeking to waive all of [sections] 300 *et seq*., ..." and failed to provide appellants with their actual waiver requests. [FN12]

FN11 Counsel for respondents stated: "As to parents' options, parents have the option. There is a parental enforcement provision in 227. Any parent who wants a child in a[n] English program has a right that is enforceable by an action in damages. We don't seek to waiver that. [¶] If a parent doesn't want their child in a program, we're seeking to continue, and they have the right if we don't do what they want to sue us and sue us for an action of damages." Yet despite this remark, respondents did not seek leave to amend or to supplement their petition. Instead, they attempted to justify their failure to append the waiver requests to their petition by arguing: "[Appellants] had an opportunity to see them. If they don't know what's in them, it's because they chose to send them back to sender."

FN12 The conclusion that the waiver requests at issue sought relief from the "entire scheme of Proposition 227" was shared by counsel for the Superintendent at the hearing.

The trial court apparently rejected these untimely, unsupported comments of counsel, and instead based its decision on the record, including respondents' pleadings. Because the petition unambiguously states that respondents were seeking general waivers from "sections 300, *et seq*.," and the actual waiver requests were never made part of the record, like the trial judge, we base our decision on the record evidence indicating that the waiver requests ***210** submitted by respondents to the State Board sought refuge from all of the provisions of the Chapter, sections 300 through and including 340, for purposes of this appeal.

After oral argument, the trial court granted mandamus, ordering the State Board to consider the waivers previously submitted. [FN13] The court explained the basis for its grant of mandamus relief in an 11-page statement of decision. The trial court concluded there was nothing in the Chapter that addressed the general waiver provision, and that section 33050 authorized a waiver procedure as to "all or any part of any section" of the Education Code. The court noted case law requiring seemingly conflicting statutes to be read in a manner which harmonized them, giving each as much effect as permissible. By relying on this rule of statutory construction, as well as that which presumes the electorate was aware of the existence of the general waiver statute when the Chapter was enacted, the court determined that the parental waiver exception contained in the Chapter was co-existent with the waiver procedure outlined in section 33050; that is, the voters did not intend the Chapter to vitiate the ability of school districts as well as parents to obtain waivers. [FN14]

FN13 The court also refused petitioners' request for a ruling that the waiver requests were deemed denied by the State Board and for a preliminary injunction. However, we need not address these rulings because they were not challenged in this appeal.

FN14 At the hearing, both the Superintendent and the Department confirmed that they were not opposed to the relief requested by petitioners. Thus, only the State Board and its amici curiae opposed the request for mandamus below and by way of this appeal.

This timely appeal by the State Board followed.

IV.
Discussion

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A. *Standard of Review*

(2) Issues of statutory construction are questions of law to which we accord a de novo standard of review. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856].)

(3) While it is not the prerogative of the judiciary to rewrite legislation to conform to a *presumed* intent (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [59 Cal.Rptr.2d 671, 927 P.2d 1175]), the Supreme Court reminds us that the primary purpose of statutory construction is for the courts to determine and effectuate ***211** the purpose of the law as enacted: "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] ... Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [276 Cal.Rptr. 918, 802 P.2d 420].)

Moreover, in looking at the relationship between two statutes, "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided. [Citation.] ... [E]ach sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

Therefore, in order to accomplish our task we must consider the following questions: What was the intent of each statute under consideration? Can the two be harmonized so that the legal effect intended by each can be carried out? If not, what is the legal significance of such a statutory conflict, and how should it be resolved?

B. *The Intent of the Chapter and Section 33050*

The Chapter's mandate that all public instruction in California be administered in the English language appears absolute, and with one exception, unconditional: "... all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms...." (§ 305.) For those in need, "sheltered English immersion" programs normally of a year in length shall be provided to assist in their transition to English-only classrooms. (*Ibid.*) As noted, the only exception to this fiat is through the approval of a parental waiver request.

Should the school district fail or refuse to provide the option of English language instruction, the Chapter empowers the parents of any LEP student ***212** to bring a civil suit to enforce the Chapter's provisions, and to seek actual damages and attorney fees. In instances where the failure or refusal is "willful[] and repeated[]," the action may proceed personally against elected officials, school board members, school administrators, and teachers responsible for noncompliance. (§ 320.) This right to sue is premised on the statutory finding that "all California school children have the right to be provided with an English language public education." (*Ibid.*) Amendment of the Chapter is limited to enactment of further voter initiative, or a bill passed by two-thirds vote of each house of the state Legislature and signed by the Governor. (§ 335.)

Thus, the Chapter on its face ensures in the strongest terms that English instruction of LEP students will be made available, even under pain of a potential lawsuit, except in those instances where the parents or guardian of the affected student request and qualify for a statutory waiver. No other form of waiver or exception from the dictates of the Chapter is available under this law.

Not dissimilarly, section 33050 appears unequivocal in the breadth of the right it extends to school districts to seek waivers from code requirements: "(a) The governing board of a school district ... may ... request the State Board of Education to waive all or part of any section of this code ...."

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(4a) Despite the seemingly contradictory intentions implicit in the plain language of both the Chapter and section 33050, respondents and their amici curiae contend that because there is no *explicit* reference to section 33050 in the Chapter, the voters intended to allow for the continued use by school districts of the general waiver process because they were presumed to be aware of section 33050's existence when the Chapter was passed into law.

(5) Respondents' contention relies on the general presumption in law that: "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them. (*Viking Pools, Inc*. v. *Maloney* (1989) 48 Cal.3d 602, 609 ...; *People v. Weidert* (1985) 39 Cal.3d 836, 844 ...; *People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1628 ....)" (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332 [275 Cal.Rptr. 302].)

But none of the cases they cite apply to instances where the courts have been faced with interpreting a new statute which patently conflicts with ***213** existing law. For example, in *Williams v. County of San Joaquin*, *supra*, 225 Cal.App.3d 1326, the issue was whether criminal prosecutors were required to receive advance notice of a defendant's request for OR (own recognizance) release where the governing statute was silent on the point. An existing statute (Pen. Code, § 1274) required notice in cases where bail was sought. Noting the difference between a request for OR release and monetary bail, the Third District concluded that the Legislature's failure to incorporate the bail notice requirement into the OR release statute evidenced an intent not to do so, because the Legislature was presumed to know of the existence and content of the bail statute when the OR statute was passed. (225 Cal.App.3d at p. 1333.)

Other cited decisions relied on the presumption in similar contexts (*People v. Weidert* (1985) 39 Cal.3d 836 [218 Cal.Rptr. 57, 705 P.2d 380] [relying on existing law excepting juvenile proceedings from the definition of criminal proceedings to interpret new law that killing a witness to prevent testimony in a juvenile case was not the equivalent to a criminal proceeding that would subject defendant to death penalty]; *Viking Pools, Inc*. v. *Maloney* (1989) 48 Cal.3d 602 [257 Cal.Rptr. 320, 770 P.2d 732] [amendment to law extending statute of limitations for purposes of discipline under Contractors' State License Law for breach of warranty adopted in light of existing judicial decision defining "warranty"]).

Still other high court opinions question the conclusiveness of this presumption, particularly where legislative intent is presumed from inaction in the face of judicial decisions. (*People v. Morante* (1999) 20 Cal.4th 403, 429-430 [84 Cal.Rptr.2d 665, 975 P.2d 1071]; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614, 805 P.2d 873].) (6) Legislative silence after a court has construed a statute at most gives rise to "an arguable inference of acquiescence or passive approval [citations]." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 563 [71 Cal.Rptr.2d 731, 950 P.2d 1086].)

Thus, unlike cases where lawmakers can be presumed to borrow from existing law to supply omitted meaning to later enactments, the presumption that one legislates with full knowledge of existing law is not conclusive, and not even helpful, in cases where a later enactment directly conflicts with an earlier law. No facile legal maxim exists to resolve such conflicts.

To the contrary, while exalted as being a core right of a democratic society (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 683 [284 Cal.Rptr. 655] ***214** disapproved on another point in *People v. Tillis* (1998) 18 Cal.4th 284, 295 [75 Cal.Rptr.2d 447, 956 P.2d 409]), the voter initiative process is not without flaws. Although not deciding the validity of the legislative presumption as it applies to voter initiatives, the Supreme Court has acknowledged there exists qualitative and quantitative differences between the state of knowledge of informed voters and that of elected members of the Legislature. (*People v. Davenport* (1985) 41 Cal.3d 247, 263, fn. 6 [221 Cal.Rptr. 794, 710 P.2d 861].)

More to the point is the frank comment in the concurring and dissenting opinion by Justice Broussard in *People v. Pieters*, *supra*, 52 Cal.3d 894, concerning the limitations on legislative review inherent

in the initiative process: "We hold initiatives to a different standard than enactments by the Legislature because of the nature of the initiative process. Initiatives are the direct expression of the people, typically drafted without extended discussion or debate. Of Proposition 8, a far-reaching criminal initiative passed in 1982, we have recognized that 'it would have been wholly unrealistic to require the proponents of Proposition 8 to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that measure.' (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 257 ....) In contrast to the proponents of initiatives, legislators and their staffs are entirely devoted to the analysis and evaluation of proposed laws. Indeed, we presume that the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws. (See, e.g., *Estate of McDill* (1975) 14 Cal.3d 831, 839 ....)" (*People v. Pieters*, *supra*, 52 Cal.3d at p. 907 (conc. and dis. opn. of Broussard, J.).) [FN15]

FN15 Interestingly, Justice Broussard made these observations while analyzing whether the drafters' oversight principle should be reserved for initiative-based lawmaking only.

Lawmakers themselves recognize the practical limits of legislating while avoiding the creation of conflicts in the law, whether by elected officials or the initiative process. For example, Assemblywoman Sheila James Kuehl, the current Chair of the Assembly Judiciary Committee, has written commentary recently, which emphasizes the need to recognize there are important limitations on the initiative process (Kuehl, *Either Way You Get Sausages*: *One Legislator's View of the Initiative Process* (1998) 31 Loyola L.A. L.Rev. 1327). One of these limitations is the absence of rigorous legislative review to ensure that the initiative's provisions are consistent with existing laws. Without such review, it is unlikely that other laws will be amended to avoid conflicts with the new rule of law announced in the initiative. Her hypothetical is prescient and apropos of the predicament created by Proposition 227: "For example, imagine an initiative that would require California to give full faith and credit to any domestic violence restraining order issued ***215** by another state, territory, or tribal court. The proposed draft may be deficient in that there may be several sections of either the Family Code or the Code of Civil Procedure that would need to be amended while the draft addresses only two. Or, the proposed draft may require more deference to the other state than the Constitution allows or may fail to comport with a federal statute. A pre-initiative review by the Legislative Counsel's office would bring to light such deficiencies early in the process, give proponents the opportunity to correct such deficiencies early in the process, and give proponents the opportunity to structure the initiative's language to achieve their goals without violating the state or federal constitutions." (*Id.* at pp. 1331-1332.)

The point is, of course, that the initiative process itself, particularly when viewed in light of the number of existing laws that may be affected by any new law and that may require amendment or repeal to avoid creating conflicts, makes conflicts between the new law and existing laws virtually inevitable. [FN16] Therefore, we cannot simply rely on the legislative presumption of knowledge of existing law in deciding this case, for to do so here would exceed the tensility of this presumption, and ignore other principles of statutory construction developed in recognition of the fallibility of lawmaking.

FN16 While many sections have been repealed or reserved, it is noteworthy that the prodigious Education Code alone runs from section 1 to section 100560.

C. *Resort to the History of Proposition 227 Is Appropriate*

(7) Where statutory language is clear and unambiguous, there is no need to construct the statute, and resort to legislative materials or other external sources is unnecessary. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371 [64 Cal.Rptr.2d 741]). " 'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' [Citations.] Of course, in construing the statute, '[t]he words ... must be read in context, considering the nature and purpose of the statutory enactment.' [Citation.]" (*People* ex rel. *Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 [58 Cal.Rptr.2d 855, 926 P.2d 1042].)

But where the language may appear to be unambiguous yet a latent ambiguity exists, the courts must go behind the literal language and analyze the intent of the law utilizing "customary rules of statutory con-

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struction or legislative history for guidance. [Citation.]" (*Quarterman v. Kefauver*, *supra*, 55 Cal.App.4th at p. 1371.) This may include reference to ballot materials in ***216** the case of initiatives in order to discern what the average voter would understand to be the intent of the law upon which he or she was voting. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505 [286 Cal.Rptr. 283, 816 P.2d 1309].)

One such case involving a latent ambiguity in statutory language created by the initiative process was *Legislature v. Eu*, *supra*, 54 Cal.3d 492, in which the Supreme Court was asked to determine the electorate's intent in passing the legislators' terms limits initiative ("The Political Reform Act of 1990," designated on the ballot as Proposition 140). An argument advanced by opponents of the initiative was that the term limits ban applied only to consecutive terms, and did not prevent a legislator from seeking elected office if that legislator was not holding office at the time of election. (*Id.* at p. 503.) In concluding the term "lifetime ban" was ambiguous in light of the issue raised, the court reviewed the ballot materials presented to the voters. After noting that such materials must be viewed with some degree of caution because the " 'fears and doubts' " expressed in ballot arguments may be "overstate[d]," the court was impressed by the "forceful[]" and "repeated []" statement to the voters that the initiative would result in a "lifetime ban" on officeholders whose terms expired under the proposed law. (*Id.* at p. 505.) Therefore, the court concluded "[w]e think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served." (*Ibid.*; see also *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11 [120 Cal.Rptr. 94, 533 P.2d 222]; *In re Quinn* (1973) 35 Cal.App.3d 473, 483 [110 Cal.Rptr. 881] disapproved on another point in *State v. San Luis Obispo Sportsman's Assn*. (1978) 22 Cal.3d 440, 447 [149 Cal.Rptr. 482, 584 P.2d 1088].)

Similarly, the seemingly absolute language of both the Chapter and section 33050 creates a latent ambiguity, certainly at least as to whether the Chapter's failure to refer specifically to section 33050 evinces an intent to have its mandate nevertheless subject to school district waivers. In light of this ambiguity, resort to the voter history of the Chapter is necessary and appropriate.

D. *The Campaign for Passage of Proposition 227*

Perhaps it rings of understatement to suggest that Proposition 227 was a controversial initiative. Advancing a debate that continues through today, and is reflected in the briefs of the parties and amici curiae, the campaigns ***217** both supporting and opposing the proposition's passage disagreed vehemently as to the success or failure of bilingual education in California. [FN17] The ballot materials furnished all voters reflects a deep division of viewpoints as to whether LEP students should be predominantly taught in English, or in the students' native languages.

> FN17 Directed primarily to the issue of irreparable harm as an element of petitioners' request for a preliminary injunction, the parties submitted learned treatises and declarations from social scientists and educators taking both sides of the issue. As explained, *post*, the prayer for a preliminary injunction is not before us today. Thus, amici curiae's reference to the merits of the underlying educational programs is neither appropriate nor useful in deciding the narrow question of statutory construction before this court.

The proposition summary contained in the ballot pamphlet materials noted the proposed new law: "Requires all public school instruction be conducted in English. [¶] Requirement may be waived if parents or guardian show that child already knows English, or has special needs, or would learn English faster through alternate instructional technique." (Ballot Pamp., Prop. 227, Primary Elec. (June 2, 1998) p. 32.) The analysis by the Legislative Analyst included the note: "Schools must allow parents to choose whether or not their children are in bilingual programs." (Legis. Analyst, Analysis of Prop. 227, Ballot Pamp., Primary Elec., *supra*, at p. 32.)

The "Proposal" is described, in part, as "[r]equir[ing] California public schools to teach LEP students in special classes that are taught nearly all in English. This would eliminate 'bilingual' classes in most cases." Under "*Exceptions*," the analyst notes "Schools would be permitted to provide classes in a language other than English if the child's parent or guardian asks the school to put him or her in such a class *and* one of the following happens: ..." (Legis.

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Analyst, Analysis of Prop. 227, Ballot Pamp., Primary Elec., *supra*, at p. 33 , original italics.) The ballot argument in favor of Proposition 227 was signed by "Alice Callaghan, Director, Las Familias del Pueblo[,] Ron Unz, Chairman, English for the Children[, and] Fernando Vega, Past Redwood City School Board Member." The argument begins by arguing bilingual education has failed in California, "but the politicians and administrators have refused to admit this failure." Under "What 'English For The Children' Will Do," the argument states in part: "Allow parents to request a special waiver for children with individual educational needs who would benefit from another method." (Ballot Pamp., argument in favor of Prop. 227, Primary Elec., *supra*, at p. 34.)

The rebuttal argument was authored by John D'Amelio, president of the California School Boards Association, Mary Bergan, president of the California Federation of Teachers, AFL-CIO, and Jennifer J. Looney, president of the Association of California School Administrators. It begins by recounting the variety of programs used throughout California to teach LEP students. It then proclaims that "Proposition 227 outlaws all of these programs," and warns that if Proposition 227 passes, "[a]nd if it doesn't work, ***218** we're stuck with it anyway." After describing funding sources for the campaign in favor of Proposition 227, the argument concludes: "These are not people who should dictate a single teaching method for California's schools. [¶] If the law allows different methods, we can use what works. Vote No on Proposition 227." (Ballot Pamp., rebuttal to argument in favor of Prop. 227 as presented to voters, Primary Elec., *supra*, at p. 34.)

Similarly, the ballot pamphlet's "Argument Against Proposition 227" [FN18] again cautioned that passage of the proposition would "*outlaw*[] *the best local programs* for teaching English." (Ballot Pamp., argument against Prop. 227 as presented to voters, Primary Elec., *supra*, at p. 35, original italics.) "A growing number of school districts are working with new English teaching methods. Proposition 227 stops them. [¶] ... 'School districts should decide for themselves.' " (*Ibid*.)

FN18 Its authors are the same as the rebuttal except Lois Tinson, president of the California Teachers Association, replaced Jennifer Looney.

Finally, Los Angeles teacher Jaime A. Escalante penned the proponents' "Rebuttal," which included the following: "Today, California schools are forced to use bilingual education despite parental opposition. We give choice to parents, not administrators." (Ballot Pamp., rebuttal to argument against Prop. 227 as presented to voters, Primary Elec., *supra*, at p. 35.)

Proposition 227 passed by a margin of 61 percent "yes" votes, to 31 percent "no" votes. (*Valeria G. v. Wilson*, *supra*, 12 F.Supp.2d 1007, 1012.)

If anything, this history only magnifies the conflict between the Chapter and section 33050. Among other things, the ballot materials reveal that voters were promised passage of Proposition 227 would establish an LEP method of instruction which would heavily favor use of English only, and would bestow the bilingual education "choice" to parents only. Even opponents of the initiative conceded that the proposed Chapter would "outlaw[]" decisionmaking by school districts to provide non-English instruction and, once passed, the electorate would be "stuck with it." They argued that passage of the proposition should be defeated so that "School districts [c]ould decide for themselves" what form of LEP instruction to provide. In a revealing rebuttal, the proponents concluded that the proposed new law "[would] give choice to parents, not administrators."

While undoubtedly florid in tone, the substance of the ballot arguments leads unwaveringly to the conclusion that voters believed Proposition 227 would ensure school districts could not escape the obligation to provide English language public education for LEP students in the absence of ***219** parental waivers. Any other form of LEP education would be "outlaw[ed]." Voters would only be reinforced in this belief by reading the text of the proposition itself, which included such features as a right of action against school officials for failing or refusing to provide English instruction, and a requirement that amendment of the new law be limited to further voter initiative or a two-thirds vote of both state legislative houses.

(4b) In light of these facts and the unavoidable conclusions we must draw from them, there is simply no rational way to reconcile or harmonize the Chapter as an integrated whole with section 33050. One cannot uphold the clear and positive expression of intent in

the Chapter, which mandates a strong English-based system of education subject *only* to parental waiver, while supporting the right of school districts to avoid the Chapter's decree through waivers. The statutes are in such irremediable conflict that to allow one would render the other "nugatory." (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735.)

How do courts respond to these conflicts? Are there rules of statutory interpretation that can be brought to bear to resolve the conflict? Since actual conflicts are inevitable given the breadth of California's extensive statutory law, courts have developed several applicable interpretative paradigms by which a later-enacted law in conflict with an existing statute may be given effect.

E. *The Chapter Amends Section 33050 by Implication*

(8) California courts have long recognized that "an act adding new provisions to and affecting the application of an existing statute 'in a sense' amends that statute...." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 773 [282 Cal.Rptr. 664] (*Huening*), quoting *Hellman v. Shoulters* (1896) 114 Cal. 136, 152 [45 P. 1057].) An implied amendment is an act that creates an addition, omission, modification or substitution and changes the scope or effect of an existing statute. (*Huening*, *supra*, at p. 774; *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776 [145 Cal.Rptr. 819] [court found an implied amendment but invalidated it on constitutional grounds]; see generally, 1A Sutherland, Statutory Construction (5th ed. 1993) Amendatory Acts, § 22.13, p. 215.) Like the related principles of "[r]epeal[] by implication" (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328]), and "draft[ers'] oversight" (*People v. Jackson* (1985) 37 Cal.3d 826, 838, fn. 15 [210 Cal.Rptr. 623, 694 P.2d 736], disapproved on another point in *People v. Guerrero* (1988) 44 Cal.3d 343, 348 [243 Cal.Rptr. 688, 748 P.2d 1150]), "amendments by implication" are disfavored but are allowed to preserve statutory harmony and effectuate the ***220** intent of the Legislature (*Myers v. King* (1969) 272 Cal.App.2d 571, 579 [77 Cal.Rptr. 625]).

In *People v. Jackson*, *supra*, 37 Cal.3d at page 838, the Supreme Court concluded that the general sentencing limitation of double-the-base-term limit (Pen. Code, § 1170.1, subd. (g)) did not apply to restrict imposition of five-year enhancements for serious felonies (added as Pen. Code, § 667 under the voter initiative Proposition 8), and that the failure to specifically address Penal Code section 667 in Penal Code section 1170.1, subdivision (g) was the result of "draft[ers'] oversight." [FN19] (37 Cal.3d at p. 838, fn. 15.) Although the two statutes were not strictly in conflict, in order to give full effect to the apparent intention of the voters, the Supreme Court declared: "We conclude that enhancements for serious felonies under section 667 were not intended to be subject to the double base term limitation of [Penal Code] section 1170.1, subdivision (g). To carry out the intention of the enactment, we read section 1170.1, subdivision (g), as if it contained an exception for enhancements for serious felonies pursuant to section 667, comparable to the explicit exception for enhancements for violent felonies under section 667.5." (37 Cal.3d at p. 838.)

> FN19 The phrases "drafter's oversight" and "drafters' oversight" are used in the cases analyzed and discussed herein. For purposes of uniformity in this opinion, we adopt usage of the plural form throughout our discussion *post*.

Similarly, in *People v. Pieters*, *supra*, 52 Cal.3d 894, the Supreme Court found a three-year enhancement for cocaine offenses involving more than 10 pounds of the drug was impliedly excepted from the same general double-the-base-term limit for sentencing (Pen. Code, § 1170.1, subd. (g)), thereby allowing a criminal defendant to be sentenced to a full three-year consecutive prison term enhancement under Health and Safety Code section 11370.4, subdivision (a)(2). In doing so, the high court explained that by determining section 11370.4 was limited by the general sentencing limit for subordinate terms, the "manifest intention" of the Legislature that dealers in large quantities of drugs would be more severely punished would be undermined. (52 Cal.3d at p. 901.) Therefore, it relied on the same "draft[ers'] oversight" it had articulated in *Jackson* in finding an implied exception to the general sentencing law for this new enhancement. (*Ibid.*) [FN20]

> FN20 In so concluding, the court distinguished *People v. Siko* (1988) 45 Cal.3d 820 [248 Cal.Rptr. 110, 755 P.2d 294], which is also relied on by respondents and their amici here. It noted, and we accept as equally ap-

> plicable, that *Siko* did not involve the interpretation of a statute whose purpose would be "undermined" by the failure to find an implied exception. (*Id.* at p. 902.)

A somewhat different analysis had been employed by the Supreme Court a year earlier in *People v. Prather* (1990) 50 Cal.3d 428 [267 Cal.Rptr. 605, ***221** 787 P.2d 1012]. In *Prather*, the Supreme Court was confronted with the question of whether one provision of then newly enacted Proposition 8 (Cal. Const., art. I, § 28, subd. (f)), which allowed prior felony convictions to be used for sentence enhancement purposes " 'without limitation' " was subject to the general sentencing limitation to double-the-base-term (Pen. Code, § 1170.1, subd. (g)). In that case, the enhancement under scrutiny was Penal Code section 667.5, subdivision (b), which allowed for a one-year enhancement to any felony sentence if the current offense occurred within five years from the defendant's prior confinement in state prison.

The Supreme Court determined that it could not rely on the "draft[ers'] oversight" rule set forth in *People v. Jackson*, *supra*, 37 Cal.3d 826, because there was insufficient evidence that the Legislature intended to except this enhancement from the general sentencing limitation, but failed to provide for it because of a "draft[ers'] oversight." Nevertheless, the court concluded that in order to effectuate the intent of the Legislature in enacting the enhancement, it was necessary to impliedly except section 667.5, subdivision (b) from the new limitation. (*People v. Prather*, *supra*, 50 Cal.3d at pp. 433-434, 439.)

Likewise, in *Huening*, *supra*, 231 Cal.App.3d 766, the court was faced with harmonizing the then newly enacted Elections Code former section 3564.1 with chapter 8 of the Political Reform Act of 1974, codified at Government Code section 81000 et seq., which generally regulates the content of ballot pamphlets. (231 Cal.App.3d at p. 778.) Elections Code former section 3564.1 prohibited the nonconsensual identification of a person in the ballot arguments as for or against the ballot measure. (231 Cal.App.3d at p. 769.) Chapter 8, in contrast, does not contain any limitation on the content of ballot arguments. (231 Cal.App.3d at p. 778.) To avoid the inherent conflict created when the two statutes were simultaneously applied, the court found that Elections Code former section 3564.1 impliedly amended chapter 8. (231 Cal.App.3d at p. 779.) [FN21]

> FN21 However, Elections Code former section 3564.1 was invalidated on other grounds. (*Huening*, *supra*, 231 Cal.App.3d at p. 779.)

Respondents urge us to avoid invoking the principle of "drafters' oversight" or amendment by implication because the two statutes at issue here can be harmonized. (*Nickelsberg v. Workers' Comp. Appeals Bd.*, *supra*, 54 Cal.3d at p. 298.) In part, respondents contend that section 33050 is limited by section 33051, which places restrictions on the granting of waiver ***222** requests. [FN22] Therefore, respondents and their amici curiae argue that appellants' concern that waivers will be granted without considering the views of LEP student parents are unfounded. Amicus curiae Education Legal Alliance of the California School Board Association similarly contends parental preferences will be considered as part of the public hearing requirement antecedent to any application for a general waiver (§ 33050, subds. (a) and (f)), while MALDEF asserts parental oversight is achieved through participation in schoolsite advisory boards or parent associations.

> FN22 In relevant part section 33051 states:
>
> "(a) The State Board of Education shall approve any and all requests for waivers except in those cases where the board specifically finds any of the following:
>
> "(1) The educational needs of the pupils are not adequately addressed.
>
> "(2) The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request.
>
> "(3) The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees.

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> "(4) Pupil or school personnel protections are jeopardized.
>
> "(5) Guarantees of parental involvement are jeopardized.
>
> "(6) The request would substantially increase state costs.
>
> "(7) The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, was not a participant in the development of the waiver...."

However, these observations miss the mark. The intent of the Chapter is not simply to ensure parental input into instructional decisions by local school boards. The Chapter's intent is that English instruction will be provided *in all cases* except those where parental waivers are made. Parents favoring English instruction for their children are assured by law that it will be provided without the need to lobby school boards or form parent groups. The Chapter inflexibly declares that, absent a parental waiver, the interests of LEP children are always best served by English-only instruction. It is only when a parent decides that English-only instruction is not appropriate for his or her child that an individual waiver need be sought. While public participation in local school affairs is to be encouraged and is arguably indispensable to achieving educational goals, it is not directly germane to the Chapter's legal operation. This new law vests decisionmaking over the method of LEP instruction exclusively with *individual* parents of LEP students-not committees, associations, parent groups, school board members, principals or teachers.

We are mindful that the principle of amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are " 'irreconcilable, ***223** clearly repugnant, and so inconsistent that the two cannot have concurrent operation....' " (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].)

(9) "One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. [Citations.]" (*Santa Barbara County Taxpayers Assn.* v. *County of Santa Barbara* (1987) 194 Cal.App.3d 674, 680 [239 Cal.Rptr. 769] (*Santa Barbara County Taxpayers Assn.*); *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371].) "An interpretation which is repugnant to the purpose of the initiative would permit the very 'mischief' the initiative was designed to prevent. [Citation.] Such a view conflicts with the basic principle of statutory interpretation, *supra*, that provisions of statutes are to be interpreted to effectuate the purpose of the law." (*Santa Barbara County Taxpayers Assn.*, *supra*, 194 Cal.App.3d at p. 681.)

(4c) In our view, the intention of the voters in passing Proposition 227 could hardly be clearer (except if they had directly addressed its relation to section 33050). We see no way that the guarantee of English-only instruction subject solely to parental waiver can be accomplished if school boards are allowed to avoid compliance with the entire Chapter by seeking waivers, no matter how well intentioned administrators may be in doing so. Under these circumstances, we conclude that the failure to specifically amend section 33050 to add the core provisions of the Chapter [FN23] was due to an oversight by the initiative's drafters.

> FN23 We emphasize that our analysis accepts the premise that the waiver requests at issue went to *all* of the Chapter's sections. There may be waiver requests as to discrete sections or subsections of the Chapter that could be submitted without conflicting with the intent of the electorate, and indeed, may facilitate its implementation, which are not before us today.

Relevant to our invocation of "drafters' oversight" is the fact that the history of section 33050 and its precursor statute have historically protected LEP education from the waiver process. Respondents argue this history favors their position that, by enacting Proposition 227, the electorate intentionally chose to

release English-only LEP education from waiver protection. But in light of the abolitionist tone of the proposition, including the ballot pamphlet materials, we believe the only reasonable conclusion is that the initiative's failure to conform section 33050 to the Chapter was simply the product of neglect.

We reach this same result by employing yet another, but related, rule of statutory construction. (10) " 'It is the general rule that where the general ***224** statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; ...' " (*In re Williamson* (1954) 43 Cal.2d 651, 654 [276 P.2d 593], quoting *People v. Breyer* (1934) 139 Cal.App. 547, 550 [34 P.2d 1065].) In *Williamson*, the court compared Business and Professions Code section 7030, which specifically punishes violations of the Business and Professions Code as misdemeanors, with Penal Code section 182, which punishes any conspiracy as a felony. There, the court found Business and Professions Code section 7030 to be the more specific and controlling statute. (*In re Williamson*, *supra*, 43 Cal.2d at p. 654.)

Also illustrative of this interpretative axiom is *Tapia v. Pohlmann* (1998) 68 Cal.App.4th 1126 [81 Cal.Rptr.2d 1] (*Tapia*). In *Tapia*, Division One of the Fourth District was faced with apparently conflicting statutes that appeared to relate to the satisfaction of California Children's Services Program medical treatment liens. [FN24] The public entity that held the lien relied on two statutes, which specifically provided for the payment of the lien amount out of any recovery by the minor patient from a third party source. (Gov. Code, § 23004.1; Health & Saf. Code, § 123982.) The minor contended that because the value of his claim had to be compromised due to inadequate insurance, the amount of the lien was subject to a reduction under the general statute applicable to minors' compromises. (Prob. Code, § 3601.)

FN24 Health and Safety Code section 123872.

In reversing the trial court's order reducing the lien, the court noted that to the extent the statutes were in conflict, the more specific statute applicable to the subject matter would control. "Where 'a general statute conflicts with a specific statute the specific statute controls the general one. [Citations.] The referent of 'general' and 'specific' is subject matter.' (*People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1577-1578 ...; see also *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178-179 ...; *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 748 ...; *Conservatorship of Ivey* (1986) 186 Cal.App.3d 1559, 1565 ...." (*Tapia*, *supra*, 68 Cal.App.4th at p. 1133, fn. omitted.) The court explained, " 'Unless repealed expressly or by necessary implication, a special statute dealing with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. [Citations.] This is the case regardless of whether the special provision is enacted before or after the general one [citation], and notwithstanding that the general provision, standing alone, would be broad enough to include the ***225** subject to which the more particular one relates.' ([*Conservatorship of Ivey*, *supra*, 186 Cal.App.3d] at p. 1565.)" (*Tapia*, *supra*, 68 Cal.App.4th at p. 1133, fn. 11.)

We find these decisions and their rationale equally compelling here. (4d)In the instant case, the subject of public school instruction of LEP students is directly and narrowly addressed by the Chapter. Combined with the waiver provisions enumerated in sections 310 and 311, the Chapter is immeasurably more specific than the broad, general references to "all or any part of" the Education Code contained in section 33050. As such, and given the clear conflict created by the two statutes, the language of the Chapter controls. For this additional reason, we conclude the general waiver embodied in section 33050 may not be used as a means to avoid the Chapter's mandate that, in the absence of parental waivers, LEP students "shall be taught English by being taught in English." (§ 305.)

V.

Conclusion

The writ of mandamus granted by the trial court is hereby reversed. The case is remanded to the trial court with directions to vacate its writ, and instead to issue an order denying the petition.

Kline, P. J., and Haerle, J., concurred.

Respondents' petition for review by the Supreme

75 Cal.App.4th 196, 89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133
(Cite as: 75 Cal.App.4th 196)

Court was denied December 21, 1999. ***226**

Cal.App.1.Dist.
McLaughlin v. State Bd. of Educ.
75 Cal.App.4th 196, 89 Cal.Rptr.2d 295, 137 Ed. Law Rep. 1070, 99 Cal. Daily Op. Serv. 7991, 1999 Daily Journal D.A.R. 10,133

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12 F.Supp.2d 1007, 129 Ed. Law Rep. 220, 98 Daily Journal D.A.R. 10,951
(Cite as: 12 F.Supp.2d 1007)

United States District Court,
N.D. California.

VALERIA G., et al., Plaintiffs,
v.
Pete WILSON, et al., Defendants.

No. C–98–2252–CAL.
July 15, 1998.

Public school students having limited English proficiency (LEP) sued state governor, board of education, and Superintendent of Public Instruction, challenging statute amending state Education Code to replace bilingual education of LEP students with sheltered or structured English immersion education. On students' motion for preliminary injunction against implementation of statute pending trial, the District Court, Legge, J., held that: (1) students failed to establish that implementation of challenged statute could not, in any circumstance, constitute "appropriate action" to overcome language barriers, as required by Equal Educational Opportunity Act (EEOA); (2) EEOA "appropriate action"requirement could not serve as basis for Supremacy Clause challenge; (3) Bilingual Education Act (BEA) could not serve as basis for Supremacy Clause challenge; (4) statute would not, on its face, inevitably violate Title VI or regulations thereunder; (5) any higher burden placed upon advocates of bilingual education by provision of statute increasing difficulty of changing English immersion policy did not violate equal protection; (6) any arguable equal protection burden was insufficient to entitle students to injunction against implementation of entire statute; (7) harms resulting from accelerated transition from bilingual system to English immersion system could not be said to be irreparable; (8) statutory challenges were not ripe for adjudication on merits; (9) evidence that some LEP students would not receive bilingual education was insufficient to demonstrate actual or irreparable harm; and (10) grant of injunction would result in irreparable harm to state voters.

Motion denied.

West Headnotes

[1] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases
(Formerly 212k138.1)

Preliminary injunction may issue if movant has shown either likelihood of success on merits and possibility of irreparable injury, or that serious questions are raised and balance of hardships tips sharply in movant's favor; also, in cases involving matters of significant public interest, court must also consider whether public interest weighs in favor of preliminary injunction.

[2] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

For purpose of preliminary injunction analysis, court would not treat state statute replacing system of bilingual education with English immersion education as facially discriminatory on basis of race or national origin; although statute concerned education of children who were primarily members of national origin minorities, challenge thereto was dispute as to relative value of two systems of education. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Educ.Code § 30.

[3] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

For purpose of motion by public school students having limited English proficiency (LEP) for preliminary injunction against implementation of state statute replacing

system of bilingual education with English immersion education, fact that statute might in future operate in violation of federal law or Constitution under some scenario was insufficient to render it facially invalid. West's Ann.Cal.Educ.Code § 30.

[4] Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

Judicial power vested in federal courts by United States Constitution extends only to actual cases and controversies. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

"Standing" and "ripeness" are among the "justiciability doctrines" developed by courts to give meaning to Constitution's "case-or-controversy" requirement. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases

To have "standing" to bring action in federal court, plaintiff must have suffered injury in fact, consisting of invasion of legally protected interest which is both concrete and particularized and actual or imminent, injury in fact fairly traceable to challenged act, and injury likely to be redressed by favorable decision; requirement focuses primarily on whether parties bringing lawsuit have significant stake in the controversy.

[7] Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

"Ripeness" requirement focuses on timing of the lawsuit, stating that lawsuit must be sufficiently well developed and specific to be appropriate for judicial resolution; courts may not decide cases that involve uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

[8] Federal Courts 170B 12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

Issue is not ripe for federal court adjudication if plaintiff has not applied for benefits sought through available administrative channels.

[9] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils

345k148 Nature of Right to Instruction in General
345k148(1) k. In general. Most Cited Cases

Equal Educational Opportunities Act (EEOA) requires states and educational agencies to take appropriate action to overcome language barriers that impede equal participation by all students in instructional programs. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[10] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In general. Most Cited Cases

To prove violation of Equal Educational Opportunities Act (EEOA) for purpose of motion for preliminary injunction against implementation of state statute replacing system of bilingual education with English immersion education, plaintiffs were required to establish that its implementation could not, in any circumstance, constitute "appropriate action" to overcome language barriers. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); West's Ann.Cal.Educ.Code § 30.

[11] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

For particular language program to constitute "appropriate action" to overcome language barriers under Equal Educational Opportunity Act (EEOA), court must ascertain: that school is pursuing program informed by educational theory recognized as sound by some experts in field or, at least, deemed legitimate experimental strategy; that programs and practices actually used by school are reasonably calculated to implement effectively educational theory adopted by school; and that program produces results indicating that language barriers confronting students are actually being overcome. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[12] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In general. Most Cited Cases

Public school students failed to establish, for purpose of motion for preliminary injunction, that implementation of state statute replacing system of bilingual education with English immersion education could not, in any circumstance, constitute "appropriate action" to overcome language barriers, as required by Equal Educational Opportunity Act (EEOA); statute did not require provision of bilingual education, credible evidence indicated that immersion education was valid educational theory, and no programs susceptible of analysis, or of success or failure, as yet implemented immersion program. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); West's Ann.Cal.Educ.Code § 30.

[13] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In general. Most Cited Cases

Statutory requirement that schools provide instruction which emphasizes language acquisition before full education in other areas of curriculum would not per se violate requirement of Equal Educational Opportunities Act (EEOA) that states and educational agencies take "appropriate action" to overcome language barriers. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f).

[14] States 360 18.1

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.1 k. In general. Most Cited Cases

Under Supremacy Clause of United States Constitu-

tion, any state law which interferes with or is contrary to federal law must yield. U.S.C.A. Const. Art. 6, cl. 2.

[15] States 360 18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

In areas of coincident federal and state regulation, court hearing Supremacy Clause challenge to state statute or regulation may not seek out conflicts between state and federal statutes or regulations where no conflict clearly exists. U.S.C.A. Const. Art. 6, cl. 2.

[16] Schools 345 148(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k148 Nature of Right to Instruction in General
345k148(1) k. In general. Most Cited Cases

Provision of Equal Educational Opportunity Act (EEOA) requiring states and state educational agencies to take "appropriate action" to overcome language barriers in public schools could not serve as basis for Supremacy Clause challenge to state statute replacing system of bilingual education with English immersion education; EEOA did not require bilingual education, and therefore did not prohibit state from denying it. Equal Educational Opportunities Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f); West's Ann.Cal.Educ.Code § 30.

[17] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

States 360 18.25

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.25 k. Education. Most Cited Cases

Bilingual Education Act (BEA) could not serve as basis for Supremacy Clause challenge to state statute replacing system of bilingual education with English immersion education; although BEA encouraged bilingual education by offering financial assistance, it did not mandate it. Bilingual Education Act, § 7101 et seq., as amended, 20 U.S.C.A. § 7401 et seq.; West's Ann.Cal.Educ.Code § 30.

[18] Civil Rights 78 1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In general. Most Cited Cases
(Formerly 78k268)

Plaintiff seeking preliminary injunction against alleged violation of Title VI by state policy alleged to impose unjustifiable disparate impact on national origin minorities must make showing of discriminatory purpose; however, showing of adverse disparate impact may suffice where violation of regulations under Title VI, rather than of statute itself, is alleged. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; 34 C.F.R. § 100.3(b)(2).

[19] Civil Rights 78 1457(3)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(3) k. Education. Most Cited Cases
(Formerly 78k268)

State statute replacing system of bilingual education with English immersion education would not, on its face, inevitably result in adverse effect, exclusion, denial of benefits, or discrimination, in violation of Title VI or regulations thereunder, as required to entitle public school students having limited English proficiency to preliminary injunction against its implementation. Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; 34 C.F.R. § 100.3(b)(2); West's Ann.Cal.Educ.Code § 30.

[20] Constitutional Law 92 3617(1)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)8 Education
92k3611 Elementary and Secondary Education
92k3617 Students
92k3617(1) k. In general. Most Cited Cases
(Formerly 92k242.2(5.1))

Schools 345 ⚿164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

Any higher burden placed upon advocates of bilingual education by provision of state statute adopted by initiative, eliminating system of bilingual education, which required approval of electorate or two-thirds vote of each house of legislature and governor's signature for any amendment thereto, did not violate equal protection, in absence of any constitutional right to bilingual education; state voters were entitled to impose generally applicable requirements upon themselves, in absence of intentional discrimination, and any additional burden was not unreasonable in light of availability of alternatives. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Educ.Code § 30.

[21] Constitutional Law 92 ⚿3617(1)

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)8 Education
92k3611 Elementary and Secondary Education
92k3617 Students
92k3617(1) k. In general. Most Cited Cases
(Formerly 92k242.2(5.1))

Schools 345 ⚿164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

Civil rights plaintiffs were not released from requirement of showing intentional discrimination in enactment of legislation alleged by them to violate equal protection by stating that their claim was not "conventional"; plaintiffs alleged that provision of state statute replacing system of bilingual education with English immersion education, which limited amendments thereto to those approved by electorate or two-thirds vote of each house of legislature and signed by governor, placed additional barriers in way of their attempts to change educational system. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Educ.Code § 30.

[22] Civil Rights 78 ⚿1452

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1452 k. Education. Most Cited Cases
(Formerly 78k267)

Any violation of equal protection occasioned by provision of state statute eliminating system of bilingual education, which required approval of electorate or two-thirds vote of each house of legislature and governor's signature for any amendment thereto, was insufficient to entitle plaintiff students to injunction against implementation of statute in its entirety, where statute specifically provided for severance of any portions found unenforceable. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Educ.Code § 30.

[23] Injunction 212 ⚿1319

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1312 Public Elementary and Secondary Education
212k1319 k. Students. Most Cited Cases
(Formerly 212k138.54)

Harms resulting from bureaucratic hardship, loss of continuity, and temporary hardships occasioned by accelerated transition from system of bilingual education for students having limited English proficiency (LEP) to English immersion system of education could not be said

to be irreparable rather than interim, as required to entitle students to injunction postponing implementation of statute mandating English immersion system beyond commencement of imminent school year. West's Ann.Cal.Educ.Code § 30.

[24] Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases
(Formerly 92k48(1))

Showing that statute is capable of operating in manner which might violate federal statutes or Constitution is insufficient for successful facial challenge to unimplemented statute; statute is not facially invalid simply because it is possible to contemplate circumstances in which application thereof could result in violation of federal law, in absence of any evidence to support claim that terms of statute in themselves produce that result.

[25] Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and courses of study. Most Cited Cases

Public school students' challenges to state statute replacing system of bilingual education in public schools with English immersion education were not ripe for adjudication on merits, where relevant programs had not yet been adopted or applied. West's Ann.Cal.Educ.Code § 30.

[26] Injunction 212 1319

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1312 Public Elementary and Secondary Education
212k1319 k. Students. Most Cited Cases
(Formerly 212k147)

Evidence that some public school students having limited English proficiency (LEP) would not receive bilingual education under state statute replacing system of bilingual education with English immersion education was insufficient to demonstrate actual harm to students, or irreparable nature of any harm suffered, as required to entitle students to preliminary injunction against implementation of statute, especially given conflicting evidence that students might be benefitted by English immersion. West's Ann.Cal.Educ.Code § 30.

[27] Injunction 212 1319

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1312 Public Elementary and Secondary Education
212k1319 k. Students. Most Cited Cases
(Formerly 212k138.54)

Grant of preliminary injunction against enforcement of state statute replacing system of bilingual education with English immersion education would irreparably injure public interest in implementation of statutes enacted directly by state voters. West's Ann.Cal.Educ.Code § 30.

***1011** John Affeldt, Mark Savage, Martha I. Jiménez, Public Advocates, Inc., San Francisco, CA, Edward M. Chen, ACLU Foundation of Northern California, San Francisco, CA, Christopher Ho, Joannie C. Chang, Marielena Hincapié, Employment Law Center, San Francisco, CA, Mark D. Rosenbaum, Rocio L. Cordoba, of counsel, ACLU Foundation of Southern California, Los Angeles, CA, Stewart Kwoh, Julie Su, Bonnie Tang, Asian Pacific American Legal Center, Los Angeles, CA, Lora Jo Foo, Frank Tse, Asian Law Caucus, Inc., San Francisco, CA, Antonia Hernández, Theresa Fay–Bustillos, Thomas Saenz, Silvia Argueta, Maribel S. Medina, Mexican American Legal Defense and Educational Fund, Los Angeles, CA, Joseph Jaramillo, Mexican American Legal Defense and Educational Fund, San Francisco, CA, Peter D. Roos, Deborah Escobedo, Multicultural Education, Training and Advocacy, Inc., San Francisco, CA, for Plaintiffs.

John H. Sugiyama, CA State Atty General's Office, San Francisco, CA, Sharon L. Browne, Pacific Legal Foundation, Sacramento, CA, Michael E. Hersher, California Department of Education, Sacramento, CA, for Defendants.

J. Scott Detamore, Todd Welch, William Pendley, Moun-

tain States Legal Foundation, Denver, CO, G. Michael German, San Francisco, CA, Peter Simshauser, Carl Alan Roth, Ayaz Shaikh, Los Angeles, CA, Manuel S. Klausner, Los Angeles, CA (Robert P. Pongetti, Paul M. Eckles, Los Angeles, CA, of counsel), for Intervenors.

Cynthia L. Rice, California Rural Legal Assistance Foundation Labor and Civil Rights Litigation Project, San Francisco, CA, for Amicus Curiae Marivel Almanza, et al.

George Waters, N. Eugene Hill, Abhas Hajela, Olson, Hagel, Leidigh, Waters & Fishburn, LLP, Sacramento, CA, for Amicus Curiae Education Legal Alliance Of The California School Boards Association.

Colleen Rohan, Oakland, CA, for Amicus Curiae Meiklejohn Civil Liberties Institute.

Vilma S. Martinez, Bradley S. Phillips, Munger, Tolles & Olson LLP, Los Angeles, CA, Hojoon Hwang, Munger, Tolles & Olson LLP, San Francisco, CA, Richard K. Mason, Los Angeles Unified School District, Los Angeles, CA, for Amicus Curiae Los Angeles Unified School District.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

LEGGE, District Judge.

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12 F.Supp.2d 1007, 129 Ed. Law Rep. 220, 98 Daily Journal D.A.R. 10,951
(Cite as: 12 F.Supp.2d 1007)

***1012** I. INTRODUCTION

On June 2, 1998 the voters of California approved Proposition 227, an initiative statute entitled "English Language in Public Schools." The statute amends the California Education Code to change the system under which students who are limited in English proficiency are educated in California's public schools. On June 3, 1998 plaintiffs filed this action challenging Proposition 227 under federal statutes and the United States Constitution.

Plaintiffs now move for a preliminary injunction "enjoining defendants from implementing Proposition 227" pending the trial of this case.[FN1] Plaintiffs are several limited English proficient (called by the parties "LEP") students enrolled in California public schools. Five organizations have filed *amicus curie* briefs in support of the motion for a preliminary injunction. [FN2]

FN1. Plaintiffs have also moved for class certification, but that motion is not addressed in this order.

FN2. These organizations include: (i) Los Angeles Unified School District; (ii) Education Legal Alliance of California School Boards Association; (iii) parents of migratory LEP students, represented by the California Rural Legal Assistance Foundation; (iv) Meiklejohn Civil Liberties Institute; and (v) the San Francisco Bay Area chapter of the National Lawyers Guild.

The motion is opposed by defendants: Governor Pete Wilson, the State Board of Education and its members, and the State Superintendent of Public Instruction Delaine Eastin. The motion is also opposed by several parties who have intervened in this lawsuit.[FN3]

FN3. Intervenors include: (i) One Nation/One California, a corporation formed by Mr. Ron Unz, a co-author of Proposition 227; (ii) Ms. Gloria Matta Tuchman, the other co-author; (iii) Las Familias del Pueblo; (iv) several LEP students enrolled in California public schools; and (v) the Center for Equal Opportunity.

This court has studied the moving brief, the briefs in opposition to the motion, the reply briefs, and the *amicus curie* briefs. It has also considered the declarations and exhibits submitted in support of the parties' positions.

For the reasons discussed below, the court will not enjoin the implementation of Proposition 227.

II. THE INITIATIVE

The California electorate approved Proposition 227 by a margin of 61% to 39%. The general thrust of the initiative is to reject the bilingual education programs presently in effect in California public schools. Bilingual education programs are those in which LEP students, while they are learning English, receive instruction in academic subjects such as math, science and social studies in their "primary" or "home" language. The initiative replaces the bilingual education programs with an educational system designed to teach LEP students English, and other subjects in English, early in their education.

Proposition 227 is premised upon certain findings and declarations that include:

> The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children.

***1013** Initiative, § 300(d). The findings also declare that English is "the language of economic opportunity" and that "[i]mmigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement." *Id.* at §§ 300(a) & (b). The findings further state that "[t]he government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children,

regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important." *Id.* at § 300(c).

In response to those defined problems and goals, Proposition 227 requires that LEP children receive instruction pursuant to an educational system known as "sheltered English immersion" or "structured English immersion." *Id.* at § 305. Under this system, children "shall be taught English by being taught in English." *Id.* The initiative requires that "Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year." *Id.* "Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms." *Id.*

The initiative defines the immersion system as "an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language." *Id.* at § 306(d). It provides that "[l]ocal schools shall be permitted to place in the same classroom English learners of different ages but whose degree of English proficiency is similar." *Id.* at § 305.

Beyond this, the language of the initiative does not set forth a specific program or curriculum. It is not the function of this court to interpret all of the language of the initiative in this motion, but some things are apparent from the face of the statute.[FN4] Although the immersion program is "not normally intended to exceed one year," the initiative does not require a student to transition to mainstream classes until he or she has achieved a "good working knowledge of English." Also, the initiative on its face does not preclude the occasional use of an LEP student's primary language in the classroom, or outside of the classroom, such as by tutors, teacher's aids or other academic support programs. Nor does the initiative prohibit additional primary language assistance after an LEP child transitions into a mainstream classroom.

> FN4. The United States Supreme Court has stated that federal courts must extend a high degree of deference to the states in matters dealing with statutory interpretation of state laws. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1072–75, 137 L.Ed.2d 170 (1997). The briefing on this motion has suggested potential interpretations and ambiguities for perhaps later resolution. But neither side has suggested abstention, stay, or any other procedure to have the California state courts rule first on the interpretation of this initiative.

The initiative also sets forth several circumstances under which LEP children may receive waivers from English immersion, and "may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law." *Id.* at § 310. Waivers may be granted (i) where a student already knows English; (ii) where the student is ten years or older and the school agrees that an alternative course of study would be a better way for the student to learn English; and (iii) where the student has tried the immersion program for at least thirty days and the school agrees that in light of his or her particular needs an alternative course of educational study would be better suited to the student's overall educational development. *Id.* at § 311. In all of these circumstances, a waiver may be granted only with parental consent. *Id.* at § 310.

Moreover, "[i]ndividual schools in which 20 pupils of a given grade level receive a waiver shall be *required* to offer" a class in which children are taught English and other subjects through bilingual or other alternative educational techniques. *Id.* (emphasis added).

***1014** The initiative also appropriates from the state's General Fund fifty million dollars per year for each of the next ten years "for the purpose of providing additional funding for free or subsidized programs of adult English language instruction to parents or other members of the community who pledge to provide personal English language tutoring to California school children with limited English proficiency." *Id.* at § 315.

Anticipating a legal challenge, the initiative provides that

> [i]f any part or parts of this statute are found to be in conflict with federal law or the United States or the California State Constitution, the statute shall be implemented to the maximum extent that federal law, and the United States and the California State Constitution permit. Any provision held invalid shall be severed from the remaining portions of this statute.
>
> *Id.* at § 325.

The initiative becomes operative for school terms which begin sixty days after the date of its passage, June 2, 1998. *Id.* at § 330. Thus, if it survives plaintiffs' request for an injunction, the initiative will take effect in California public schools in the fall term of this year.

Finally, as will be discussed in more detail below, the initiative restricts the circumstances under which it may be amended:

> The provisions of this act may be amended by a statute that becomes effective upon approval by the electorate or by a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor.

Id. at § 335.

III. PRELIMINARY INJUNCTION STANDARD

[1] A preliminary injunction may issue "if the movant has shown either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor." *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 700 (1997) (quoting *Armstrong v. Mazurek,* 94 F.3d 566, 567 (9th Cir.1996)). *See also U.S. v. Odessa Union Warehouse Co–op,* 833 F.2d 172, 174 (9th Cir.1987) ("These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases"). In cases involving matters of significant public interest, such as the one now before this court, the court must also consider whether the public interest weighs in favor of the preliminary injunction.

> Thus, under the "traditional test" typically used in cases involving the public interest, the district court should consider (1) the likelihood that the moving party will prevail on the merits, (2) whether the balance of irreparable harm favors the plaintiff, and (3) whether the public interest favors the moving party.

Caribbean Marine Services Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir.1988). *See also Regents of University of California v. ABC, Inc.,* 747 F.2d 511, 514 & 521–22 (9th Cir.1984). The public interest in this case is reflected by the voters' overwhelming approval of Proposition 227.

IV. PRELIMINARY OBSERVATIONS

Before proceeding to the legal issues raised by plaintiffs, the court makes three preliminary observations which concern principles important to the legal analysis:

First, the proponents and the opponents of Proposition 227 all share the *same objective:* to educate children who have limited English proficiency. Substantial state and local resources will be expended toward that common objective, regardless of which educational system will be used. The parties differ only on *how* to accomplish that common objective.

[2] The second observation is related to the first. This court cannot discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group. Because the educational debate and the initiative concern children whose primary language is not English, it necessarily focuses on children who are national origin minorities. [FN5] But the debate is a neutral one, about which system will provide LEP children with the best education to ***1015** enable them to function as American citizens and enjoy the opportunities and privileges of life in the United States.

> FN5. The court notes that not all LEP students were born outside of the United States.

Third, each side has submitted extensive evidence and arguments, including research studies and sometimes vehement expert opinions, that their education system is the better one. There is a legitimate policy debate among respected educators and scholars on this issue. But, most important, that is not a debate for this court to resolve. This court is not a Supreme Board of Education. It is not the province of this court to impose on the people of California its view of which is the better education policy. The voters of California expressed their policy preference by enacting Proposition 227. The only decision this court can properly make is whether Proposition 227 violates any federal statute or the United States Constitution.

V. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs contend that they are likely to succeed on the merits of this suit because Proposition 227 violates (1) the Equal Educational Opportunities Act, (2) the Supremacy Clause of the United States Constitution, (3) Title VI of the Civil Rights Act, and (4) the Equal Protection Clause of the United States Constitution.

Plaintiffs' challenge to Proposition 227 is necessarily a

facial challenge. Proposition 227 does not set forth a detailed educational plan or curriculum to be used by all school districts. The State Board of Education has not yet construed all of the initiative's various provisions or passed final regulations, guidelines, standards or curricula under it.[FN6] No local school district has yet implemented any specific curriculum or program. No child has yet entered a classroom under it. Thus, all this court can decide at this time is whether Proposition 227—on its face and in its present and as yet unapplied form—violates a federal statute or the United States Constitution.

> FN6. The Board has begun that process. On July 9, 1998 the Board adopted Emergency Regulations and a suggested amendment to the policy for the use of funds from the Instructional Materials Fund.

[3] "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The fact that Proposition 227 *might* in the future operate in violation of a federal law or the constitution under some scenario is insufficient to render it facially invalid.

VI. RIPENESS AND STANDING

Defendants contend that plaintiffs' claims are not yet "ripe" for judicial decision. The injuries of which plaintiffs complain, defendants contend, are speculative in that they have not yet occurred and may never occur. Before addressing each of plaintiffs' legal claims individually, it is appropriate to note the general requirements for ripeness and its related principle of standing.

[4][5] The judicial power vested in the federal courts by Article III of the United States Constitution extends only to actual "cases" and "controversies." U.S. Const., Art. III, § 2. Among the "justiciability doctrines" developed by the courts to give meaning to Article III's case-or-controversy requirement are standing and ripeness. *National Treasury Employees Union v. U.S.,* 101 F.3d 1423 (D.C.Cir.1996).

[6] The standing requirement focuses primarily on whether the parties bringing the lawsuit have a significant stake in the controversy. To have standing under Article III, a plaintiff must first have suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Second, the "injury in fact" must be "fairly traceable" to the challenged act. And third, it must be "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[7] The ripeness requirement focuses on the timing of the lawsuit. To be "ripe," a lawsuit must be sufficiently well developed and specific to "be appropriate for judicial resolution." *Toilet Goods Ass'n, Inc. v. Gardner,* 387 U.S. 158, 162, 87 S.Ct. 1520, 18 ***1016** L.Ed.2d 697 (1967). "Ripeness ... shares the constitutional requirement of standing that an injury in fact be certainly impending." *National Treasury Employees Union,* 101 F.3d at 1427. Courts may not decide cases that "involve[ ] uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." *Metzenbaum v. Federal Energy Regulatory Commission,* 675 F.2d 1282, 1289 (D.C.Cir.1982). The basic rationale of the ripeness doctrine

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

[8] Moreover, an issue is not ripe for federal court adjudication if a plaintiff has not applied for the benefits sought through available administrative channels. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 297, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (facial challenge not ripe where plaintiffs have not "availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver from the ... restrictions"); *Christensen v. Yolo County Bd. of Sup'rs,* 995 F.2d 161, 164 (9th Cir.1993) (claim not ripe where plaintiff has made no attempt to obtain benefit sought "through the procedures the State has provided for doing so before turning to the federal courts").

Plaintiffs here have not yet suffered and are not currently suffering any injury. No regulations [FN7] or programs have been adopted. And plaintiffs have not yet applied for the available waivers from the requirements of Proposition

227, which could eliminate their alleged harm. The ripeness and standing issues thus turn on whether plaintiffs' alleged educational injuries under Proposition 227 are so inevitable and imminent that judicial intervention is appropriate now. With these principles in mind, the court addresses individually the legal violations alleged by plaintiffs.

FN7. Except the State Board's Emergency Regulations.

VII. EQUAL EDUCATIONAL OPPORTUNITIES ACT

[9] Plaintiffs contend that Proposition 227 violates Section 1703(f) of Title 20 of the United States Code. Section 1703 was added by the Equal Educational Opportunities Act of 1974 ("EEOA"), codified at 20 U.S.C. § 1701, *et seq.* It provides:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by—
>
> . . . . .
>
> (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs. (emphasis added.)

20 U.S.C. § 1703(f). This section imposes on states and educational agencies an obligation "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *Gomez v. Illinois State Board of Education,* 811 F.2d 1030, 1037 (7th Cir.1987). *See also Idaho Migrant Council v. Board of Education,* 647 F.2d 69, 71 (9th Cir.1981).

[10] The EEOA does not define what is "appropriate action," or provide criteria to evaluate whether a particular educational system constitutes "appropriate action." Nor does the "declaration of policy" underlying the EEOA, set forth in Section 1701, provide guidance as to whether any particular educational program constitutes "appropriate action." [FN8] The act does not even mention,***1017** much less mandate, bilingual education programs. Moreover, "Congress has provided us with almost no guidance, in the form of ... legislative history, to assist us in determining whether a school district's language remediation efforts are 'appropriate.' " *Castaneda v. Pickard,* 648 F.2d 989, 1009 (5th Cir.1981). Thus, to prove a violation of Section 1703(f) at this time, plaintiffs must establish that the implementation of Proposition 227 could not, in any circumstance, constitute "appropriate action" as required by the EEOA.

FN8. The "Congressional declaration of policy" provides:

> (a) *Entitlement to equal educational opportunity; neighborhood as appropriate basis*
>
> 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) *Purpose*
>
> In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.
>
> 20 U.S.C. § 1701.

Judicial precedent is the only guidance available to this court. And the Ninth Circuit Court of Appeal has never addressed whether a particular educational system constitutes "appropriate action" under Section 1703(f). The leading circuit court decision on Section 1703(f) is *Castaneda v. Pickard, supra.* In *Castaneda,* plaintiffs claimed that bilingual education and language remediation programs that had previously been implemented in the defendant school district were in violation of the EEOA. *Id.* at 1006. Faced with little guidance from the statute, the policies stated in the statute, and the legislative history, the *Castaneda* court was, as this court is now,

> 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.

Id., at 1009.

The *Castaneda* court began its analysis by explaining that while Section 1703(f) requires educational agencies to take "appropriate action," it does not require a program of bilingual education.

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. § 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....

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.*

Id., at 1008–09 (emphasis added). *See also Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3,* 587 F.2d 1022, 1030 (9th Cir.1978). Because the EEOA does not *require* school districts to provide bilingual programs, the near elimination of bilingual education programs by Proposition 227 does not in and of itself violate Section 1703(f).

[11] The *Castaneda* court recognized, however, that by obligating schools to address the problem of language barriers, Congress intended to insure that schools make a genuine and good faith effort to remedy language deficiencies. *Castaneda,* 648 F.2d at 1009. The court devised a three-part test designed "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 ***1018** or the expert knowledge of educators." *Id.* For a particular language program to constitute "appropriate action" under section 1703(f), a court must ascertain (1) that a school "is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"; (2) that the programs and practices actually used by a school are "reasonably calculated to implement effectively the educational theory adopted by the school"; and (3) that the program "produce[s] results indicating that the language barriers confronting students are actually being overcome." *Id.* at 1009–10. Using this framework to guide the analysis, the court now turns to plaintiffs' argument that the language program prescribed by Proposition 227 cannot be "appropriate action" under Section 1703(f).

1. *Sound Educational Theory*

[12] In the first step of the court's analysis

... 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 § 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.*

Id. at 1009 (emphasis added).

Plaintiffs contend that Proposition 227 is based upon an unsound educational theory which is unprecedented, untested, and certain to irreparably harm LEP children. They provide expert opinions that a program of sheltered English immersion followed by mainstream classes in English is not a sound approach to educating LEP students. Plaintiffs' two major concerns are (1) that LEP students

will be denied access to the substantive academic curriculum (*i.e.* math, science, social studies) while in language immersion class, which will lead to irremediable learning deficits; and (2) that most students with no prior knowledge of the English language cannot learn enough English in one year to compete on an equal footing with students in mainstream classes in English. Those are legitimate concerns, apparently supported by many experts in the field.

However, defendants present evidence that the sheltered English immersion program of Proposition 227 is also based upon a sound educational theory, which is not only tested but is the predominant method of teaching immigrant children in many countries in Western Europe, Canada and Israel. Defendants present expert opinions that "[t]he common European model is to put all newcomers into a special reception class for one year or, in rare cases two, and then to integrate them into regular classes, with ongoing extra support as needed." They also present evidence that "the advocates and political parties which are most concerned to do justice to immigrant minorities ... vigorously oppose assigning immigrant children to separate classes and teaching them in their home languages; seeing this as a well-meaning but ill-advised strategy leading inevitably to marginalization from the social and economic mainstream." Defendants further present evidence that numerous school districts in this country use structured English immersion methods.

Faced with this conflicting body of evidence, it is apparent that "the state of the art in the area of language remediation [is] such that respected authorities legitimately differ ***1019** as to the best type of educational program for limited English speaking students." *Castaneda,* 648 F.2d at 1009. This court's responsibility, however, is only to ascertain whether the theory underlying Proposition 227 is informed by an educational theory recognized as sound by some experts in the field or, at least is deemed a "legitimate experimental strategy." *Id.* In light of the evidence submitted, this court must conclude that the English immersion system is a valid educational theory. This court may not go beyond that conclusion and determine whether it is the better theory. It thus appears that Proposition 227 will satisfy the first prong of the *Castaneda* test.

Plaintiffs' central concern is that any programs implemented under Proposition 227 will sacrifice students' learning in academic subjects in favor of language instruction. Plaintiffs correctly point out that Section 1703(f) imposes the obligation to teach LEP students substantive curriculum as well as the English language. *Castaneda,* 648 F.2d at 1011 ("We understand § 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacles to learning that 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.").

The court does not yet know how much substantive education will be taught in the immersion classes during the transition period. Although the initiative on its face does not *require* any particular curriculum, it also does not *prohibit* schools from implementing a curriculum designed to teach academic subjects to LEP students. This court may not assume, as plaintiffs do, "the outright absence of any program focused on academic achievement." The initiative leaves room for different educational choices, and this court can not conclude that no possible choice could constitute "appropriate action" under Section 1703(f).

[13] Additionally, the court notes that requiring instruction which emphasizes language acquisition before full education in other areas of the curriculum does not *per se* violate Section 1703(f). This was specifically addressed by the *Castaneda* court:

> [W]e 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 § 1703(f), even if the result of such a program is an interim sacrifice of learning in other areas during this period.... 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."
>
> * * * * * *
>
> We also believe, however, that § 1703(f) leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum by providing instruction in their native language at the same time that an English language development effort is pursued, or to address these problems in sequence, by focusing first on the development of English language skills and then

> later providing students with compensatory and supplemental education to remedy deficiencies in other areas which they may develop during this period. *In short, § 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 to help them catch up in other areas of the curriculum has failed to fulfill its statutory obligation under § 1703(f).

***1020** *Castaneda,* 648 F.2d at 1011–12 (emphasis added).

2. *Programs Calculated to Implement the Theory*

Under *Castaneda,*

> [t]he court's second inquiry [is] 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.

Id. at 1010. In *Castaneda,* unlike the present case, the plaintiffs challenged a program which had been in effect for a significant period of time. That court therefore analyzed whether certain specific programs and practices were reasonably calculated to implement effectively the educational theory adopted by the school district. Specifically, the court analyzed whether the school district's curriculum, staff qualifications, and testing methods were reasonably calculated to implement effectively the school's bilingual education program. *Id.* at 1010–15.

Because Proposition 227 has not yet been implemented, there are no programs or practices "actually used" in California schools for this court to analyze. Moreover, the thrust of plaintiffs' argument is not that no program could reasonably be calculated to implement the immersion system of Proposition 227. Rather, plaintiffs argue that no implementation *of that system* could ever overcome barriers that impede equal participation by LEP students.

First, plaintiffs argue that programs under Proposition 227 are inevitably doomed to failure because the initiative does not specify any mechanism by which to assess students' individual needs or evaluate students' individual progress. The court agrees that the effective implementation of the Proposition 227 system will require adequate methods to assess students' needs and progress. *See, e.g., Castaneda,* 648 F.2d at 1013–14. But nothing in Proposition 227 precludes the State Board of Education from requiring, or local school districts from implementing, adequate methods of individual assessment and evaluation. And the waiver provisions specifically contemplate a system in which the needs of individual students are considered.

Plaintiffs next argue that even if adequate systems for need assessment are implemented, Proposition 227 imposes a "straight jacket" on schools which leaves them no flexibility to respond to deficiencies in their general LEP programs or provide programs specifically tailored to meet individual needs. This characterization of Proposition 227 as a "sink or swim" "one size fits all" "straight jacket" is overstated. The initiative leaves state and local education agencies with significant flexibility in how to design and implement programs which comply with its requirements. For example, Proposition 277 leaves the schools flexibility relating to when and how to grant waivers, how much and what type of academic support to provide LEP children outside of the classroom, how to balance the dual goals of language acquisition and substantive education, how to train teachers, how to define "good working knowledge of English," how to evaluate when LEP students have attained that level of knowledge, how long the English immersion will last, and what additional assistance may be added to the required programs. This court cannot conclude now that no programs could be implemented under Proposition 227 which will allow schools to respond to perceived shortcomings in their programs generally, or meet the needs of a particular student.

Plaintiffs also argue that Proposition 227 can not be adequately implemented under any circumstances, because it does not establish teaching standards or training requirements. Competent and adequately trained teachers are necessary for effective implementation of any educational theory. *See, e.g., Castaneda,* 648 F.2d at 1012. But again, it is premature for this court to make that analysis now. The State Board of Education and local school districts can establish appropriate teaching standards and training re-

quirements. Nothing in the text of Proposition 227 precludes that.

The court finds that it is unlikely that there is no set of circumstances under which ***1021** California's schools can adopt programs reasonably calculated to implement the educational theory of Proposition 227.

3. *Results*

> Finally, ... [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 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.
> *Castaneda,* 648 F.2d at 1010.

Again, because Proposition 227 has not yet been implemented, there are not yet any "results" to evaluate. And there is nothing on the face of the initiative which compels the conclusion that California cannot later evaluate its results. Plaintiffs' arguments to the contrary are based upon their own assumptions about the end results, and they ignore the contrary body of educational opinion supporting the system adopted by Proposition 227.

4. *Conclusion Regarding EEOA*

The court must therefore conclude that plaintiffs have not shown a likelihood that Proposition 227 on its face violates the EEOA. The proposition is based on *an* educational theory that is supported by some experts and some actual experience. Until the State adopts a regulatory scheme and school districts actually implement programs pursuant to the initiative, it is unlikely that this court will have the facts necessary to resolve plaintiffs' claims under the EEOA—namely, whether those programs implement effectively the theory and whether those programs will actually work.

VIII. SUPREMACY CLAUSE

Plaintiffs next contend that Proposition 227 violates the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, in two ways:

First, they argue that the initiative impedes the ability of school districts to comply with their obligations under the EEOA. The initiative, they argue, "bars school districts from utilizing the most obvious and generally accepted options available to meet the needs of LEP students—bilingual education...." As a result, plaintiffs argue, school districts cannot meet their dual obligations under the EEOA of both insuring English language development and preventing academic deficiencies.

[14][15] Under the Supremacy Clause of the Constitution, "any state law ... which interferes with or is contrary to federal law, must yield." *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (citing *Gibbons v. Ogden,* 22 U.S. 1, 9 Wheat. 1, 210–211, 6 L.Ed. 23).

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [ ] This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

Jones v. Rath Packing Co., 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (internal citations omitted). In areas of coincident federal and state regulation, such as education, courts may not "seek[ ] out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 130, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (quoting *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960)).

[16] As discussed above, the EEOA does not require bilingual education. *Castaneda,* 648 It therefore does not prohibit states ***1022** from denying bilingual education. And as also discussed above, this court cannot now determine that Proposition 227 violates the EEOA.

[17] Plaintiffs next argue that the initiative violates the Supremacy Clause because it bars the "congressionally-favored option" of primary language instruction. They argue that Congress has expressed a preference for primary language instruction in the Bilingual Education Act of 1974, 20 U.S.C. § 7401, *et seq.,* which provides federal grant money to local school districts to develop bilingual

programs. Plaintiffs are correct that the statements of "Findings," "Policy," and "Purpose" of the Bilingual Education Act suggest that Congress encouraged bilingual education programs. *See* 20 U.S.C. § 7402(a)–(c). Congress did so by offering financial assistance. But it did not *require* bilingual education. And the fact that Congress was aware of bilingual education suggests that Congress made a deliberate choice *not* to *mandate* such programs when it simultaneously enacted the EEOA, which requires only "appropriate action." Congress did not prohibit or otherwise discourage *other* educational programs for LEP students.

The court sees no conflict between Proposition 227 and the ability of school districts to comply with either the EEOA or the policies expressed in the Bilingual Education Act. Plaintiffs have not established a probability that Proposition 227 violates the Supremacy Clause of the United States Constitution.

IX. TITLE VI OF THE CIVIL RIGHTS ACT

Plaintiffs next contend that Proposition 227 violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations, 34 C.F.R. § 100.3(b)(2). Section 2000d provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The regulations state that recipients of federal funding may not

> utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. 100.3(b)(2).

Plaintiffs argue that Proposition 227 violates Title VI because "it imposes an unjustifiable disparate impact on national origin minorities," "by denying LEP students meaningful access to academic curriculum during its 'sheltered English immersion' program, and then shunting them prematurely into mainstream academic classrooms," without providing "any remedial instruction to recoup the academic deficits incurred by them during that program."

[18] A threshold issue is whether a showing of an adverse disparate *impact* is sufficient to establish a Title VI violation, or whether a showing of discriminatory *intent* is required. There appears to be some disagreement among the authorities on this issue.

In *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Supreme Court stated that "[d]iscrimination is barred which has that effect even though no purposeful design is present." *Id.* at 568, 94 S.Ct. 786. In that case, the Court held that a school district's failure to provide *any* language assistance to substantial numbers of non-English speaking students violated Title VI, because such failure denied LEP students "a meaningful opportunity to participate in the educational program." *Lau,* 414 U.S. at 568, 94 S.Ct. 786. In declaring such an omission unlawful, the Court did not mandate any particular program of assistance. Indeed, it noted that a 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. 786.

Two years later, in *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Supreme Court held that a discriminatory***1023** *purpose,* and not simply a disparate impact or effect, must be shown to establish a violation of the Equal Protection Clause. The Court then decided *Regents of University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), in which the Court interpreted Title VI, to be coextensive, at least for some purposes, with the Equal Protection Clause. A majority of Justices have interpreted these two cases to suggest that Title VI, like the Equal Protection Clause, is violated only by conduct motivated by an intent to discriminate and not by conduct which merely has a discriminatory effect. *See Guardians Ass'n v. Civil Service Com'n of New York,* 463 U.S. 582, 608 n. 1, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983); *Castaneda,* 648 F.2d at 1007.

The Ninth Circuit and a different majority of the Supreme Court, however, appear to have taken the position in recent opinions that where a lawsuit is brought to enforce the *regulations* under Title VI, rather than the statute itself, and where the plaintiffs seek injunctive or declaratory relief as opposed to compensatory relief, plaintiffs can

prove a Title VI violation by establishing only a discriminatory effect. *See Guardians Ass'n,* 463 U.S. at 584, 602–03 & 608 n. 1, 103 S.Ct. 3221 (1983); *Larry P. v. Riles,* 793 F.2d 969, 981–82 (1984). Because plaintiffs here contend that Proposition 227 also violates Title VI's implementing regulations, and because they seek only injunctive and declaratory relief, it may be appropriate to use a discriminatory effect analysis.

[19] However, regardless of which standard applies, plaintiffs are not presently likely to succeed on the merits of their Title VI claim. Plaintiffs do not argue that Proposition 227 intentionally discriminates against LEP students, and as stated above, this court sees no evidence of discriminatory intent from the face of the initiative. Nor are plaintiffs likely to succeed on the merits even if a showing of adverse effect is sufficient. The initiative has not yet had any impact on anyone, and plaintiffs have not established that an adverse impact is inevitable. Plaintiffs advance their same arguments as in their EEOA claim, namely: most children will not learn enough English in one year to allow them to fully participate in mainstream classes; they will not have meaningful access to the academic curriculum during the immersion program; they will receive no remedial instruction to help recoup any academic deficits incurred during the immersion program; and they will receive no individualized assessment of needs or services. As discussed above, some of these contentions are debated by the experts in the field, and others are based on plaintiffs' assumptions about how Proposition 227 will operate. Proposition 227 on its face requires that *all* LEP students receive some kind of instruction designed to teach English and eliminate barriers to equal participation in the schools' instructional programs. Some experts in the field, as well as the California electorate, believe the initiative will have a beneficial rather than a detrimental effect on LEP students. And neither Title VI nor its regulations compel any particular method of education. This court cannot conclude from the face of Proposition 227 that it will inevitably result in an adverse effect, exclusion, denial of benefits, or discrimination.

X. EQUAL PROTECTION CLAUSE

Plaintiffs finally argue that Proposition 227 violates the Equal Protection Clause of the federal constitution. That clause provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S.Constitution, Amend. XIV, § 1.

It is first important to note what plaintiffs do *not* argue in making their equal protection claim. They do *not* assert that the education system enacted by Proposition 227 is itself a violation of the equal protection clause. Indeed, there is at least one circuit case holding that there is no constitutional right to bilingual education. *Guadalupe Organization Inc. v. Tempe Elementary School Dist. No. 3,* 587 F.2d 1022, 1027 (9th Cir.1978).

Instead, plaintiffs argue that Section 335 of Proposition 227 has created a political structure which plaintiffs will be disadvantaged in attempting to modify. Their argument is based upon *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). More specifically, plaintiffs argue ***1024** that Proposition 227 denies them the equal opportunity to secure future legislation for programs that will be beneficial to them. They argue that Proposition 227 elevates the decision making process to a higher level of government than would otherwise be required; that is, that Proposition 227 places higher burdens upon them in seeking future changes by the state legislature, the state Board of Education, and local school boards. The reason is that Section 335 provides that Proposition 227 can be amended only upon approval by the electorate, or by a statute passed by a two-thirds vote by each house of the legislature and signed by the governor. And plaintiffs argue that because the subject is the education of LEP children, which is of particular concern to minorities, it requires strict scrutiny. Plaintiffs emphasize that they do not raise a "conventional" equal protection claim, but one based upon the political structure which results from Section 335.

It is true that Proposition 227 goes further than most legislation which has reached the courts, in that it requires for its change either approval by the state's electorate or a two-thirds majority of the legislature. However, this court concludes that plaintiffs nevertheless do not show probable success on the merits that this is a violation of equal protection.

It is particularly significant that this same argument has recently been rejected by the Ninth circuit in *Coalition For Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir.1997). That court considered the application of the *Hunter—Seattle* principle to the state initiative at issue in that case, and the plaintiffs there made essentially the same argument as plaintiffs here. The Ninth Circuit rejected that argument, despite the dissent of judges who believed that an *en banc* hearing should be granted. Among other things, the Ninth Circuit said as follows:

> The Hunter doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." Rather, for the doctrine to apply at all, the state somehow must reallocate political authority in a discriminatory manner.
>
> States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them." That a law resolves an issue at a higher level of state government says nothing in and of itself. Every statewide policy has the "procedural" effect of denying someone an inconsistent outcome at the local level. [A] law making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

Coalition For Economic Equity, 122 F.3d at 706 (citations omitted). The Ninth Circuit pointed out that the initiative before it in that case, as in this one, was not "an impediment to protection against unequal treatment but ... an impediment to receiving preferential treatment." *Id.* at 708. And "[i]mpediments to preferential treatment do not deny equal protection." *Id.*

In this case the impediment is to plaintiffs obtaining a bilingual education system. As stated, there is no constitutional right to bilingual education. And the Ninth Circuit said in *Coalition For Economic Equity v. Wilson* that the equal protection clause was not violated by the repeal of legislation or policies "that were not required by the Federal Constitution in the first place." *Id.* at 706. So stating, the Ninth Circuit was quoting from *Crawford v. Board of Educ. of the City of Los Angeles,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), decided at the same time as *Seattle.* The Supreme Court there said:

> We [reject] the contention that once a state chooses to do "more" than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment.

Crawford, 458 U.S. at 535, 102 S.Ct. 3211. The Supreme Court also repeated its holding "that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id.* at 538, 102 S.Ct. 3211. And, "[i]n short, having gone beyond the requirements ***1025** of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Id.* at 542, 102 S.Ct. 3211.

[20] The same things may be said of this initiative. Since there is no requirement in the federal constitution for bilingual education, the voters of California were free to reject bilingual education. Were they also free to set higher requirements for a future repeal of English immersion education and a return to bilingual education? Or stated conversely, are plaintiffs' equal protection rights violated because it could be more difficult for them to get something to which they are not constitutionally entitled, bilingual education? While those questions are unanswered by *Crawford,* or indeed directly by *Hunter* and *Seattle,* this court believes that the starting presumption must be in favor of the right of California voters to impose upon themselves requirements that are applicable to all citizens.

[21] Of course, the majority cannot impose a restriction upon the minority if there is intentional discrimination against the minority. But it is plaintiffs' burden to establish that intention. Plaintiffs decline to carry that burden, simply by saying that they are not arguing a "conventional" equal protection claim. However, the requirement of intent is not so easily discarded. The Supreme Court said in *Crawford,* at the same time as its *Seattle* decision: "[T]his court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown." *Id.* at 537–538, 102 S.Ct. 3211. And the Court again addressed the issue of discriminatory purpose in its opinion at 458 U.S. at 543–545, 102 S.Ct. 3211. So this court cannot so easily conclude that intentional discrimination is not a necessary element to plaintiffs' claims.

Addressing Proposition 227 more specifically, it does not appear from the face of the initiative that plaintiffs are in fact as burdened as their argument suggests. There are options to a future state-wide initiative campaign. Changes can be made by the legislature, albeit with two-thirds majority. There are also other options to, if not the outright repeal of Proposition 227, its impact on particular school districts or on particular students. Plaintiffs can still petition the local school boards, and indeed the state school board, for regulations dealing with the implementation of Proposition 227 and exceptions thereto. Also a waiver system is built into Proposition 227. And, in the event of an

actual deprivation of equal protection to an individual student, both the state and federal courts are available.

[22] Finally, even if Section 335 of Proposition 227 does violate the equal protection clause, that alone would not entitle plaintiffs to an injunction restraining all of Proposition 227 from being put into effect. Section 325 specifically provides that if any part of the initiative is found to be in conflict with federal law, the statute shall be implemented to the maximum extent that federal law permits, and any invalid portion would be severed from the remaining portions. Thus, even if this or a higher court were later to hold that the amendment provisions of Section 335 violate the equal protection clause, it could be severable from the remainder of Proposition 227. Proposition 227 could therefore be implemented without the structural provision for its amendment which plaintiffs challenge.

Plaintiffs' challenge to this portion of Proposition 227 is certainly not frivolous. However, for the reasons stated, the court believes that plaintiffs have not demonstrated a sufficient likelihood of success on the merits of this claim to justify an injunction against implementing all of Proposition 227.

XI. TIME FOR IMPLEMENTATION

Plaintiffs and certain *amicus curie* contend that Proposition 227 cannot adequately be implemented in the time remaining before the next school semester. They contend that immediate implementation will create administrative chaos and educational harm to LEP children, because more time is needed for the responsible agencies to issue regulations, develop and implement curricula, select text books, train teachers, assess students' language abilities, and coordinate class schedules.

Defendants present a record that the initiative can be adequately implemented in the ***1026** time remaining. The State Board of Education has already issued emergency regulations, taken steps for funding, and is considering waiver requests by school districts. Defendants also contend that school districts do not have to develop entirely new materials, because they can use text books and curricula that are already in use by some California schools. At least one major school district already has a contingency plan. Moreover, one group of intervenors argues that the students will be harmed more by postponing implementation, because the present bilingual education system is failing to adequately educate California's LEP children.

[23] There is a difference of opinion about the adequacy of the time for implementation. Indeed, plaintiffs raise some substantial problems related to implementation. It might well be good educational policy to postpone the effective date of the initiative for one year, to provide more time for a smooth transition. But this policy question is not within the province of the court to decide. The question of adequate time for implementation does not raise any violation of federal law or the constitution. It is inevitable in any change that there will be some bureaucratic hardship, some loss of continuity, and some temporary hardships. But such harms cannot be said to be irreparable rather than interim.

XII. RIPENESS REVISITED

[24][25] In bringing a facial challenge to Proposition 227 the day after its enactment, plaintiffs ask this court to bar all implementation of the initiative in an *anticipatory* manner. At most, plaintiffs have shown that Proposition 227 is *capable* of operating in a manner that might violate federal statutes or the constitution. But such a showing is insufficient for a successful *facial* challenge to an unimplemented statute. *See Metzenbaum v. Federal Energy Regulatory Commission,* 675 F.2d 1282, 1289–90 (D.C.Cir.1982).

> It is axiomatic that a statute is not facially invalid simply because it is possible to contemplate circumstances in which the application of the statute could result in [violation of federal law] where there is no evidence to support the claim that the terms of the statute in themselves produce that result.

Id. at 1289 (internal quotations and citations omitted). Courts regularly deny anticipatory review when further development by state officials may reduce or avoid constitutional problems, or change the nature of the issues presented. *See, e.g., Wheeler v. Barrera,* 417 U.S. 402, 426–27, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974) (constitutional issue not ripe until a specific plan is before the Court); *Young v. Klutznick,* 652 F.2d 617, 625–26 (6th Cir.1981) (issue not ripe where anticipated injury would not occur until state officials acted, and might not occur at all). This is particularly so where relevant programs have not yet been adopted or applied.

> No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applica-

> tions, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provision of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.

Nixon v. Administrator of General Services, 433 U.S. 425, 438, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (quoting *Watson v. Buck,* 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941)).

Because this challenge is similarly not ripe for adjudication on the merits, plaintiffs cannot now show that they are likely to succeed on their EEOA, Supremacy Clause, Title VI and Equal Protection claims. If the programs actually implemented under Proposition 227 violate federal laws or the constitution, plaintiffs can then initiate an "as-applied" challenge.

***1027** XIII. IRREPARABLE INJURY AND PUBLIC INTEREST

[26] "Under any formulation of the test [for preliminary injunctive relief], the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir.1987). Some LEP students will not receive their preferred instructional program, bilingual education, under Proposition 227. But all LEP students will receive instruction designed to teach English and reduce barriers to schools' instructional programs. At present the court is presented with the alleged differences between two educational theories, structured English immersion and bilingual education. The experts disagree over whether the implementation of Proposition 227 will *benefit* or *harm* LEP students. And the extent of any benefit or harm may well depend on specific programs actually implemented under the initiative. There is insufficient evidence to demonstrate that there will be harm, or that any actual harm would be irreparable.

[27] Consideration of the public interest also favors the implementation of Proposition 227. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Opinion in Chambers of Rehnquist, Circuit Justice). This reasoning applies even more strongly here, where the statute was enacted directly by the voters of the state. *See Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 698, n. 4 (9th Cir.1997).

XIV. OTHER ARGUMENTS

The intervenors and *amicus curie* have made numerous other arguments. The court need not discuss all of them, but will address a few.

The Frias intervenors argue that the present bilingual system in California is *itself* a violation of the constitution and federal law. The legality of California's bilingual education system, however, is not an issue raised by plaintiffs in their complaint or in this motion for preliminary injunction, and therefore need not be addressed here.

The *amicus curie* brief filed by the California Rural Legal Assistance Foundation, on behalf of migrant LEP students, argues that Proposition 227 will place special burdens upon them. They argue that because migrant children frequently change schools, their access to the core curriculum under Proposition 227 will become even more impaired, and that it will be difficult for their parents to be involved in their educations or to use the waiver process. However, these arguments really address the educational policy question as to which system of educating LEP children will work better for this group of children. And that question is not within the province of this court. Moreover, under the Proposition 227 system, migratory students still will receive the bilingual services and other benefits of the California Migrant Education Act and of federal funding.

The Meiklejohn Civil Liberties Institute makes several arguments which are not properly within the scope of this action or this motion for a preliminary injunction. There is no issue in this case of a violation of the United Nations Charter, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Civil and Political Rights. Moreover, the brief of this *amicus* implies that Proposition 227 was motivated by racial or national origin discrimination. But as this court has already stated, the objective of both sides in this dispute is the same—to educate all LEP children. The debate is over how best to do that. This *amicus* also argues that teachers have an absolute First Amendment right to teach whatever they want in the classroom. This court does not believe that the scope of the First Amendment goes that far. Courses and methods of instruction can be and are

12 F.Supp.2d 1007, 129 Ed. Law Rep. 220, 98 Daily Journal D.A.R. 10,951
(Cite as: 12 F.Supp.2d 1007)

governed by state and local school district regulations, without violation of the First Amendment rights of teachers.

XV. CONCLUSION

For the reasons discussed above, the court concludes that plaintiffs are unable to sustain their burden for a preliminary injunction. The low probability of success on the merits, ***1028** the speculative nature of future harm, and the public's interest in passing their state's initiative all preclude a preliminary injunction.

IT IS THEREFORE ORDERED that plaintiffs' motion for a preliminary injunction is denied.

N.D.Cal.,1998.
Valeria G. v. Wilson
12 F.Supp.2d 1007, 129 Ed. Law Rep. 220, 98 Daily Journal D.A.R. 10,951

END OF DOCUMENT

BILL ANALYSIS

CONCURRENCE IN SENATE AMENDMENTS
AB 1610 (Budget Committee)
As Amended October 7, 2010
2/3 vote. Urgency

ASSEMBLY:		(April 22, 2010)	SENATE:	28-6	(October 7, 2010)

(vote not relevant)

Original Committee Reference: BUDGET

SUMMARY : Provides the necessary statutory changes in the area of education in order to enact modifications to fiscal year (FY) 2009-10 and 2010-11 Budget Acts.

The Senate amendments delete the Assembly version of the bill, and instead:

K-12 Provisions:

1) Provide a revenue limit deficit factor of 18.25% to reflect a $133.7 million deficit for county offices of education (COEs) and a revenue limit deficit factor of 17.963% to reflect a deficit of $6.9 billion for school districts. These statutory factors are created to establish state intent to repay the K-12 per-pupil reductions in the future, including foregone cost-of-living adjustments (COLA's).

2) Combine the English Language Assistance Program (ELAP) funding with Economic Impact Aid (EIA) funding and repeals the ELAP statute. Clarifies that local educational agencies (LEAs) may continue using this funding for English language professional development.

3) Increase the amount of school district revenue limit funding scored towards a June to July deferral from $1.1 billion to $1.6 billion. (This funding is already deferred in practice, just not currently scored so there is no impact to school districts with this adjustment).

4)Defer $420 million from K-12 principal apportionment payments made in April to July and $800 million from K-12 principal apportionments made in May to July.

5)Authorize up to $100 million in school apportionment funds currently scheduled to be deferred from June to July, to continue to be paid in June, for school districts and charter schools who can demonstrate that absent this relief, they will be unable to meet June payroll obligations.

6)Limit state mandate costs for the existing pupil promotion and retention mandate, worth an estimated $3.1 million annually, by relieving school districts from performing activities reimbursable under the mandate, through July 1, 2013.

7)Suspend the statutory division of Proposition 98 funding among K-12 educational agencies, community colleges, and other state agencies for 2010-11, instead referencing the funding split reflected in the 2010-11 Budget.

8)Provide $210 million towards the approximately $1.8 billion in "settle-up" payments owed to schools for FY 2009-10. (In total, the budget provides $300 million towards this settle-up obligation, the balance of $90 million is appropriated in the budget act for 2010-11 mandate costs).

9)Limit state costs for the High School Science Graduation mandate claim (about $2 billion in past costs and $200 million annually in ongoing costs) by directing LEAs to use state apportionment and flexible categorical funding to cover related costs. Requires districts to first fund teacher salary costs for courses required by the state when determining the proportion of their budgets statutorily required to be expended for the salaries of classroom teachers.

10)Provide supplemental categorical block grant funding for new charter schools established in 2008-09, 2009-10 or 2010-11 that were unable to access categorical funds due to

flexibility provisions enacted as a part of the 2008-09 Budget Act.

11)Delete a statutory requirement that school districts submit teachers' applications to participate in a National Board Certification incentive program to the state Department of Education for review and approval. These incentives are no longer funded, so there is no need for districts to forward applications.

12)Authorize the Department of Education to allocate facilities grant funding to eligible charter schools for current-year costs, to the extent that any funds remain after reimbursing past-year costs.

13)Limit state mandate costs for the existing truancy mandate, under which the state pays districts $17 each, or about $15.9 million annually, to send form letters to parents of truants, by amending the mandate to require schools to use the most cost-effective method possible for notification, which may include electronic mail or a telephone call.

14)Authorize county court schools to qualify for Economic Impact Aid funding, beginning in 2010-11, which should enable them to draw an estimated $2.7 million to serve poor students and English-learners. States legislative intent that average daily attendance records of county court schools be reviewed as part of those schools' routine audits.

15)Limit future state costs for a pending special education "behavioral intervention plan" mandate (created by the Department of Education regulations, with outstanding claims of over half a billion dollars) by conforming California's statutory requirements to those in federal law.

16)Suspend, through 2012-13, the following education mandates: Removal of Chemicals, Scoliosis Screening, Pupil Residency Verification and Appeals, Integrated Waste Management, Law Enforcement Jurisdiction Agreements, Physical Education

Reports and Health Benefits for Survivors of Peace Officers and Firefighters.

17)Capture $726 million in program savings in 2009-10 in order to achieve state budget solution. Of this amount, $340 million reflects budgeted savings for the K-3 Class Size Reduction program and $386 million reflects natural savings from more that seven other categorical programs.

18)Align the appropriation of federal 'stimulus' funds with the amounts actually available to the state (up to $3 million more than formerly expected).

19)Authorize the continuation of about $906 million in inter-year K-12 payment deferrals (from June to July of 2011). Inter-year deferrals have been a part of the budget since 2004-05.

20)Provide a statutory appropriation mechanism for the K-3 Class Size Reduction program for the 2010-11 FY only to ensure that the program is fully funded.

21)Establish a zero percent COLA for K-12 programs in 2010-11. The actual cola of -0.39% will not be imposed, but instead will be applied as an offset to the deficit factors established in this measure.

22)Request the Department of Finance to exercise its statutory authority to request the Commission on State Mandates to adopt a new test claim to supercede the existing test claim for the CCC Collective Bargaining mandate.

23)Require the State Controller to confirm by December 1, 2010, that school districts have ceased to file claims under the School Accountability Report Card mandate for activities no longer required by statute, and to file a request with the Commission on State Mandates to amend the parameters and guidelines for that mandate, if schools have not ceased to

file such claims.

Higher Education:

24)Repeal legislative intent that no new General Fund augmentation be used for contributions to the UC Retirement Plan.

25)Shift $30 million in California Community Colleges Quality Education Investment Act (QEIA) from 2010-11 to ensure the state meets the 2009-10 State Fiscal Stabilization Fund maintenance of effort requirement for higher education.

26)Make technical corrections to the hardship waiver process for inter-year apportionment deferrals for community colleges in 2010-11.

27)Defer an additional $129 million of community college apportionment payments from January through June to July 2011 and defers $35 million from categorical programs and $25 million from Economic Development and Workforce Program for fiscal year 2010-11.

28)Suspend four community colleges mandates for during the remaining period of categorical program funding flexibility (through 2012-13).

29)Exclude the California Community Colleges' Career Technical Education program from categorical flexibility and provides $20 million in one-time funds.

30)State that the Trustees of the California State University shall not, and the Regents of the University of California are requested not to, allocate student-imposed athletics fees on purposes other than those voted on by the students.

Child Care and Development:

31)Limit child care development contractors' reserves to five percent of reimbursable contract amounts. Previously, there had been no limit on the size of the reserve for child care development contractors.

32)Extend the City and County of San Francisco's child care subsidy pilot program until July 1, 2015.

33)Reduce the maximum reimbursement for license-exempt providers from 90 percent to 80 percent of the 85th percentile using the 2005 regional market rate survey.

34)Reduce the Alternative Payment agencies' administrative allotment from 19 percent of original contract amount to 17.5 percent.

35)Urgency Clause. Declare this bill take effect immediately as an urgency statute.

AS PASSED BY THE ASSEMBLY , this bill was a vehicle for 2010 Budget legislation.

Analysis Prepared by Misty Feusahrens and Sara Bachez / BUDGET / (916) 319-2099

FN: 0007235

BILL HONIG
SUPERINTENDENT OF PUBLIC INSTRUCTION

FSB: 87/8-2

PROGRAM ADVISORY

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

DATE: August 26, 1987

PROGRAM: Five Education Programs Which Have Sunset

CONTACT: See Page 23

PHONE: See Page 23

August 26, 1987

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

From: Bill Honig, Superintendent of Public Instruction

Subject: EDUCATION PROGRAMS FOR WHICH SUNSET PROVISIONS TOOK EFFECT ON JUNE 30, 1987, PURSUANT TO EDUCATION CODE SECTIONS 62000 AND 62000.2

The purpose of this Advisory is to provide districts with advice related to the five categorical programs affected by the June 30, 1987 "sunset" provision of Education Code Section 62000.2.[1] The programs are: 1) Miller-Unruh Basic Reading Act of 1965, 2) School Improvement Program, 3) Indian Early Childhood Education, 4) Economic Impact Aid, and 5) Bilingual Education.[2]

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[1]Unless otherwise specified, all statutory references are to the Education Code.

A.B. 37 would have extended these five programs to June 30, 1992. The Governor vetoed A.B. 37 on July 24, 1987. The level of funding for each of the five programs under the 1987-1988 fiscal year budget was not affected by this veto.

[2]Education Code sections regarding the A.B. 777 School-Based Program Coordination Act (Sections 52800-52904) and the S.B. 65 School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Sections 54720-54734) have not expired. The Department is planning to issue an Advisory on these two programs as soon as possible in light of Sections 62000-62007.

GENERAL CONSIDERATIONS FOR THE PROGRAMS WHICH SUNSET:

There are eight general considerations which the Department believes are important to the continuing operation of the five affected programs. Each is discussed briefly below.

1. Flow of Funds to Each Program Does Not Change

The funds for the five affected programs will

> be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative pursuant to Sections 62000.1 to 62000.5, inclusive, both with regard to state-to-district and district-to-school disbursements. (Section 62002; emphasis supplied.)

In sum, the identification criteria and allocation funding formulas for the five programs have not been affected by Sections 62000-62007. All previous fiscal statutes and regulations continue to apply.

2. Funds Must Be Used For the "General Purposes" of Programs

Section 62002 requires that funds must be used "for the general purposes" or "intended purposes" of the program but eliminates "all relevant statutes and regulations adopted...regarding the use of the funds." (Emphasis supplied.) Because no previous education program has been required to operate under these conditions, there is no precedent to guide understanding of this statute. Section 62002 eliminates the specific statutory authorization for many of the operational procedures of each of the five programs. Thus, local schools and districts clearly have more overall programmatic discretion now that the specific program laws and regulations have expired. That discretion is not unlimited, however. There is the statutory requirement that the funds be used for the "general" or "intended" purposes of the program, and there are also federal legal requirements with which state and local educational agencies must comply. For example, categorical funds may not be used for general fund purposes. Funds for each of these five programs must be used to provide supplementary assistance, such as resource teachers, aides, and training materials, but may not be used for general fund purposes such as teacher salary increases. This Advisory provides guidance for each of the five programs in pages 6 - 22.

3. Parent Advisory Committees and School Site Councils Continue

Section 62002.5 provides:

> Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to the termination of funding for the programs sunsetted by this chapter. Any school receiving funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunsetting of these programs as provided in this chapter, shall establish a school site council in conformance with the requirements in Section 52012. The functions and responsibilities of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979. (Section 62002.5; emphasis supplied.)

This statute requires all presently operating parent advisory committees and school site councils to continue to operate with the same composition required prior to June 30, 1987. If a school receives new EIA (state compensatory education or limited English proficient) funds after June 30, 1987, and does not already have a school site council, the school must establish a school site council in conformance with former Section 52012--the statute which governs school site councils for the School Improvement Program under Section 62002.5.

4. Audits and Compliance Reviews Are Required

The Department must "apportion the funds specified in Section 62002 to school districts" and "audit the use of such funds to ensure that such funds are expended for eligible pupils according to the purposes for which the legislation was originally established for such programs." (Section 62003; emphasis supplied.) "If the Superintendent of Public Instruction determines that a school district did not comply with the provisions of [Sections 62000-62007], any apportionment subsequently made pursuant to Section 62003 shall be reduced by two times the amount the superintendent determines was not used in compliance with the provisions of [Sections 62000-62007]." (Section 62005; emphasis supplied.) "[I]f the Superintendent of Public Instruction determines that a school district or county

superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the Superintendent of Public Instruction may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year." (Section 62005.5; emphasis supplied.) The Department also continues to have legal obligations to supervise and enforce local school districts' compliance with the Equal Education Opportunities Act. (See 20 U.S.C. Sections 1703, 1720.)

Coordinated compliance reviews scheduled for 1987-88 are currently planned to be held; however, due to budget cuts it is likely that the validation review process will be modified. In addition, the Department plans to revise the Consolidated Programs Section of the Coordinated Compliance Review Manual related to compliance monitoring functions as mandated by Sections 62003, 62005, 62005.5 and 64001. Information regarding these changes will be communicated as soon as possible.

The Department currently is reviewing the status of findings of districts which were not in compliance with applicable statutes and regulations prior to June 30, 1987. Determinations will be made whether those findings will continue in view of Sections 62000-62007. Findings based upon the following criteria will be maintained: (1) the general purposes of the program, (2) the distribution of funds, or (3) Section 62002.5 relating to parent advisory committees and school site councils. Findings based upon specific statutes and regulations other than the three criteria listed in the previous sentence will be dropped.

5. Program Quality Reviews and School Plans Continue

Education Code Section 64001 establishes the requirement for program quality reviews and continues the requirement for school plans for schools receiving Consolidated Programs funds. Since this section of the Education Code is not affected by Sections 62000-62007, districts and schools must continue to schedule and conduct program quality reviews and develop and implement school plans as in the past. The Department of Education procedures and documents used to comply with Section 64001 will continue to be operative.

6. Use of Staff Development Days and the School-Based Coordinated Program Option

The authorization for schools with School Improvement (SI) Programs to use up to eight school days each year for staff

development and/or to advise students, yet receive full average daily attendance (ADA) reimbursement, is contained in former Section 52022. Since this section of the Education Code has expired, these days are no longer available to SI schools.

A major consequence of the expiration of the five categorical programs is to provide schools and districts with greater flexibility in operating the programs. Consistent with this purpose is the School-Based Program Coordination Act (Sections 52800-52888) which is available to coordinate the funding of any or all of the following six programs: 1) School Improvement Program, 2) Economic Impact Aid, 3) Miller-Unruh, 4) Gifted and Talented Education, 5) Staff Development, and 6) Special Education. One of the benefits of a school opting to participate in this program is that Section 52854 allows the school to use a maximum of eight school days per year for staff development and/or advising students and still receive full ADA reimbursement. The three basic steps a school must follow to participate in the School-Based Coordination Program are set forth below at pages 9-10.

7. Waivers of the Education Code

The State Board of Education has authority to consider waivers of the Education Code under two conditions: (1) under the general authority provided in Section 33050, and (2) under specific waiver provisions which are contained within some programs. Although the specific waiver provisions in the sunset programs have expired, the general waiver authority is still available to waive nonrestricted sections of the Education Code, including Sections 62000-62007.

8. Future Legislation May Affect Programs Which Have Sunset

In deciding the extent to which changes in the five programs which have sunset will be made, districts should remember that there may be efforts made in the Legislature to reinstate the same or similar statutory requirements for each of the programs. Whether those efforts will prove successful is very uncertain at this point.

SPECIFIC QUESTIONS AND ANSWERS CONCERNING THE FIVE PROGRAMS
General Introduction

The expiration of the five categorical aid programs on June 30, 1987, leaves many issues unresolved. In this portion of the Advisory, we attempt to answer some of the most frequently asked questions about the impact of Sections 62000-62007 on the use of funds for those programs. We shall provide more information as we resolve ambiguities in the interpretation of these sections.

With regard to each of the programs, the specific statutory and regulatory requirements have been discontinued. Some type of objective evidence of the appropriate use of funds for the "general purposes" of the particular program would, however, appear to be necessary.

I. MILLER - UNRUH BASIC READING ACT OF 1965:

Question 1: What is the general purpose of the program?

Answer: Former Section 54101 emphasized that Miller-Unruh funds are provided to employ and pay the salary of reading specialists for the purpose of preventing and correcting "reading difficulties at the earliest possible time in the educational career of the pupil." The Legislature intended "that the reading program in the public schools be of high quality." (Former Section 54101.) In order to achieve its intent, the Legislature enacted the Miller-Unruh reading program "to provide means to employ specialists trained in the teaching of reading." (Former Section 54101.)

Question 2: What is required now that the legislation has expired?

Answer: School districts participating in the program must employ reading specialists for programs designed to prevent and correct reading difficulties as early as possible. It is the opinion of the Department, with the concurrence of the Commission on Teacher Credentialing, that former Section 54101's purpose (i.e., that any district using Miller-Unruh funds "employ specialists trained in the teaching of reading") and intent (i.e., "to provide salary payments for reading specialists") currently require that a Miller-Unruh funded teacher hold a reading specialist credential issued pursuant to Section 44265 (i.e., a Ryan Act Specialist Credential). This opinion is based upon Sections 44001, 44831, 44253.5, 54101, and 62002. The statutes which established the Miller-Unruh Reading Specialist

Certificate (former Sections 54120 and 54121) have expired. The Commission on Teacher Credentialing plans to issue "coded correspondence" related to the credential requirement for "reading specialists" as now mandated by Section 62002 and former Section 54101. The Department has recommended to the Commission that it adopt regulations for the acceptance of the former Miller-Unruh Reading Specialist Certificate as fulfilling the minimum requirements for a reading specialist credential under Section 62002 and former Section 54101.

In addition, districts receiving Miller-Unruh funds are required to "cofund," with general funds, each reading position for which partial Miller-Unruh monies are received. For example, partial Miller-Unruh funding of ten reading positions must be used to employ ten reading teachers. Districts cannot aggregate Miller-Unruh funds and fill less than the specified number of Miller-Unruh positions because the cofunding requirement is a part of the allocation funding process preserved by Section 62002. (Section 62002; former Sections 54141, 54145.)

Question 3: What is not required now that the legislation has expired?

Answer: Four major program components are no longer statutorily required:

a) Participating districts are not required to address the specific priorities in former Section 54123 (e.g., first priority is supplementing instruction in kindergarten and grade 1). However, districts are required to describe how Miller-Unruh Program funds are being used to address the "earliest" prevention and correction of reading difficulties. (Former Section 54101.)

b) Districts are not required to monitor the caseload of the reading specialist. (Former Section 54123.)

c) Districts are not required to allot time to the specialist for diagnostic and prescriptive planning, staff development, and self-improvement. (Former Section 54123.)

d) Districts are not required to pay reading specialists a $250 stipend. (Former Section 54124.)

II. SCHOOL IMPROVEMENT (SI) PROGRAM:

Question 1: What are the general purposes of the program?

Answer: As former Section 52000 stated, the SI program is intended "to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school." These efforts are thus directed to the goal of improving the school's entire curriculum and instructional program for all students. The standards of quality contained in the Program Quality Review Criteria are the guides for the school's improvement efforts. They encompass curricular areas (i.e., English Language Arts, Mathematics, Science, History/Social Science, etc.) and non-curricular areas (i.e., learning environment, staff development, school-wide effectiveness, instructional practices, special needs, etc.). The school site council is required to develop an SI plan and a budget; the plan guides the implementation and evaluation of the school's improvement activities.

Question 2: What is not required now that the original legislation has expired?

Answer: The following four major components of the School Improvement Program are no longer in effect:

a) The requirement for a district master plan to guide the implementation of School Improvement. (Former Sections 52034 (b) through (i); former Sections 52011(a) and (b).)

b) The specific requirements of what a school plan must include. (Former Sections 52015, 52015.5, 52016, 52019.) There continues, however, to be a requirement for a school plan which is designed to meet the students' educational, personal and career needs through the implementation of a high quality instructional program. Improvement efforts in the plan include, but are not limited to, instruction, auxiliary services, school organization and environment. (Former Section 52000.)

c) The authorization to use up to eight school days each year for staff development and/or to advise

students and still receive ADA reimbursement. (Former Section 52022.)

d) The authorization to waive various sections of the Education Code that refer to School Improvement. (Former Section 52033.) Districts which desire to waive sections of the Education Code that remain in effect and involve School Improvement now must use the general waiver program and form.

Question 3: Are school site councils still required?

Answer: Yes, under Section 62002.5 (quoted on page 3 above) and Section 64001.

Question 4: Are the requirements for composition, functions, and responsibilities of the school site councils contained in former Section 52012 still in force?

Answer: Yes. Section 62002.5 requires that all parent advisory committees and school site councils which were in existence prior to June 30, 1987, continue. That is, Section 62002.5 requires that all current and future operating school site councils continue to operate with the same composition, functions, and responsibilities required prior to June 30, 1987.

Question 5: Are eight days of staff development available under Section 52022?

Answer: Because former Section 52022 was terminated by the sunset provisions, the specific authorization for SI schools to receive full average daily attendance reimbursement for a maximum of eight staff development days no longer exists. However, schools may exercise the option of placing the SI program under the authority of the School-Based Program Coordination Act (Sections 52800-52903). This portion of the Education Code was not affected by the sunset legislation and grants schools the authority to use up to eight school days a year for staff development and still receive ADA reimbursement for each day. (See Section 52854.)

Question 6: How can schools become School-Based Coordinated Program schools?

Answer: Districts and schools which choose to exercise this option must complete the following steps:

a) The local governing board must decide to grant permission to schools to participate and must adopt policies and procedures to guide both the distribution of information about and the formation of school site councils. The school site council must agree (vote) to come under the provisions of the School-Based Program Coordination Act and identify a funding source or sources to be a part of this option. The local governing board must then grant approval before any school may operate a School-Based Coordinated Program.

b) The school site council must develop or revise an existing school plan accordingly. The local governing board must then approve the new or revised plan.

c) The district must then notify the Consolidated Programs Management Unit in the State Department of Education of this change in status by submitting Addendum C contained in the Manual of Instruction for the Consolidated Program (Form SDE 100).

Note: There is no authority in the School-Based Coordinated Program provisions, as there was in the former School Improvement legislation, to use the eight staff development days to develop the school plan. The School-Based Program provisions authorize staff development days only for the implementation of a developed and approved plan. Within this context, all staff development activities and/or the advising of students must directly relate to the purposes of the program and must be specified in the school plan.

Question 7: Must a district continue to meet the minimum funding requirements for schools participating in the School Improvement program?

Answer: Yes. Section 62002 states that the allocation formulas in effect on the date that a program ceases to be operative shall continue to apply to the disbursement of funds. Since the minimum funding levels are a part of the allocation formulas,

districts must continue to meet the established funding levels for schools.

III. INDIAN EARLY CHILDHOOD EDUCATION:

Question 1: What is the general purpose of the program?

Answer: As stated in former Section 52060, the purpose of this program is to "improve the educational accomplishments of American Indian students in rural school districts in California." The intent is "to establish projects which are designed to develop and test educational models which increase competence in reading and mathematics." The American Indian parent community must be involved in planning, implementing and evaluating the educational program. (Former Section 52060.)

Question 2: Is an advisory committee required?

Answer: Yes. Each school district receiving funds for this program must establish a district-wide American Indian Advisory Committee for Native American Indian Education. Also, at each participating school, an American Indian parent advisory group must be established to increase communication and understanding between members of the community and the school officials. If there is only one school participating in the district, only one committee is required.

IV. ECONOMIC IMPACT AID--STATE COMPENSATORY EDUCATION:

Question 1: What is the general purpose of Economic Impact Aid, the State Compensatory Education (EIA/SCE) Program?

Answer: The general purposes of EIA/SCE are found in former Sections 54000, 54001, and 54004.3[3]

Former Section 54000 stated:

> It is the intent of the Legislature to provide quality educational opportunities for all children in the public schools. The Legislature recognizes that a wide variety of factors such as low family income, pupil

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

> transiency rates, and large numbers of homes where a primary language other than English is spoken have a direct impact on a child's success in school and personal development, and require that different levels of financial assistance be provided districts in order to assure a quality level of education for all pupils.

Former Section 54001 stated:

> From the funds appropriated by the Legislature for the purposes of this chapter, the Superintendent of Public Instruction, with the approval of the State Board of Education, shall administer this chapter and make apportionments to school districts to meet the total approved expense of the school districts incurred in establishing education programs for pupils who qualify economically and educationally in preschool, kindergarten, or any of grades 1 through 12, inclusive. Nothing in this chapter shall in any way preclude the use of federal funds for educationally disadvantaged youth. Districts which receive funds pursuant to this chapter shall not reduce existing district resources which have been utilized for programs to meet the needs of educationally disadvantaged students.

And former Section 54004.3 stated:

> It is the intent of the Legislature to provide all districts receiving impact aid with sufficient flexibility to design and administer an intra-district allocation system for impact aid which reflects the distribution and the needs of the needy population and assure the provision of services to students traditionally served by the educationally disadvantaged youth programs and bilingual education programs.

Question 2: What is not required now that the legislation has expired?

Answer: Unlike the other four categorical funding programs which expired on June 30, 1987, the statutory EIA/SCE program remains almost entirely intact. Nearly all of former Sections 54000-54059 are linked to the Economic Impact Aid funding formulas (the "EIA formula" and the "bounce file") contained in former Sections 54020-54028, which are preserved by Section 62002. In addition, the program options for EIA funds are permissive--other than the requirement inherent in former Section 54004.7 and Section 62002 that funds for LEP students must be expended first. Those permissive program options remain after the Economic Impact Aid Program terminated on June 30. Because EIA/SCE funds under Section 62002 must continue "to be disbursed according to the identification criteria and allocation formulas" in effect on June 30, most major components of the EIA/SCE program which were mandatory prior to June 30 are still mandatory.

Question 3: What is the relationship after June 30 between EIA/SCE and federal ECIA, Chapter 1 funds?

Answer: There are three major considerations in this area:

a) ECIA, Chapter 1, requires that programs in target schools be comparable to those in other schools. When EIA funds are used to meet the educational needs of educationally deprived students and are consistent with the purposes of Chapter 1, districts are allowed to exclude these funds when calculating comparability.

b) ECIA, Chapter 1, must supplement and not supplant state funded programs. When EIA/SCE programs are consistent with the purposes of Chapter 1, districts may exclude these funds from the requirement that Chapter 1 funds supplement, not supplant.

c) The allocation alternatives (Title 5, sections 4420 and 4421) developed as a result of ESEA, Title I, have been superseded by ECIA, Chapter 1. They are no longer mandated by any statute. However, they may serve as useful guidelines for district seeking models for the allocation of EIA/SCE funds.

Question 4: What flexibility does a school receiving EIA funds have now that it did not have before June 30, 1987?

Answer: All services which were allowable prior to June 30 are still permitted. For example, low achievement schoolwide programs, school security costs, and University/College Opportunity (UCO) programs remain viable options for the expenditure of EIA/SCE funds. In addition, school districts have the flexibility to design other programs for the use of EIA/SCE funds for eligible pupils which are consistent with former Sections 54000, 54001, and 54004.3.

V. BILINGUAL EDUCATION:

Question 1: What are the general or intended purposes of the bilingual education program?

Answer: Former Section 52161 specified eight general purposes of bilingual education programs. Section 62002 now makes each of these purposes a requirement for serving limited-English-proficient (LEP) students. They are:

1) "[T]he primary goal of all [bilingual] programs is, as effectively and efficiently as possible, to develop in each child fluency in English."

2) The program must "provide equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language."

3) The program must "provide positive reinforcement of the self-image of participating pupils."

4) The program must "promote crosscultural understanding."

5) California school districts are required "to offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools."

6) California school districts are required "to provide adequate supplemental financial support" in order to offer such bilingual learning opportunities.

7) "Insofar as the individual pupil is concerned participation in bilingual programs is voluntary on the part of the parent or guardian."

8) School districts must "provide for in-service programs to qualify existing and future personnel in the bilingual and crosscultural skills necessary to serve the pupils of limited English proficiency of this state."

Question 2: What responsibilities do districts have to meet federal legal requirements to provide appropriate services to LEP students?

Answer: The United States Supreme Court held in 1974 that LEP children were deprived of equal educational opportunities when instruction in a language they could understand had not been provided. (Lau v. Nichols (1974) 414 U.S. 563.) The Lau ruling has been codified in Section 1703(f) of the Equal Education Opportunities Act. That statute provides:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by--
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. (20 U.S.C. Section 1703(f); emphasis supplied.)

The federal cases which have interpreted 20 U.S.C. Section 1703(f) establish a three-part analysis of whether "appropriate action" is being taken to eliminate language barriers impeding the participation of LEP students in a district's regular instructional program. It is that:

1) The educational theory or principles upon which the instruction is based must be sound.

2) The school system must provide the procedures, resources, and personnel necessary to apply the theory in the classroom. That is, the programs actually used by the school system must be reasonably calculated to implement effectively the educational theory adopted.

3) After a reasonable period of time, the application of the theory must actually overcome the English language barriers confronting the students and

must not leave them with a substantive academic deficit.

(See generally Gomez v. Illinois State Bd. of Education (7th Cir. 1987) 811 F.2d 1030, 1041-1042; Castaneda v. Pickard (5th Cir. 1981) 648 F. 2d 989, 1009-1010; Keyes v. School District No. 1 (D. Colo. 1983) 576 F. Supp. 1503, 1516-1522.)

The above requirements apply to all school districts which enroll one or more LEP pupils. In addition, districts receiving ESEA Title VII funding must adhere to ESEA Title VII regulations. Districts operating Lau plans approved by the federal Office of Civil Rights should continue to comply with their plan; any changes should be submitted to OCR for review under Title VI prior to implementation.

Question 3: What are the minimum services which must be provided to LEP students after June 30, 1987?

Answer: Based upon (a) federal statutes and regulations; (b) applicable federal court decisions; (c) EIA/LEP identification criteria and allocation funding formulas; (d) former Section 52161; and (e) Sections 62000-62007, the following ten items appear to be the minimum services which the law requires districts to provide to LEP students:

- Identification of LEP students according to statutes and regulations in effect prior to June 30, 1987. (Section 62002; former Sections 52164; 52164.1; 52164.2; 52164.3; 52164.4; 52164.5; and 20 U.S.C. Section 1703(f).)[4]

- Assessment of the English and primary language proficiency of all language minority students. (Section 62002; former Section 52161; and 20 U.S.C. Section 1703(f).)

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

[4]Section 62002's reference to "identification criteria" preserves those criteria by which funds are allocated. Thus, the identification of LEP pupils continues to be governed by the current combination of statutes and regulations. They remain in effect until altered either by the Legislature or by the State Board of Education.

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

- Offering an instructional strategy which must include: 1) an English language development program "to develop in each child fluency in English" as "effectively and efficiently as possible" and 2) the provision of "equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language." (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); Castaneda v. Pickard (5th Cir. 1981) 698 F.2d 989, 1011; and Keyes v. School Dist. No. 1 (D. Colo. 1983) 576 F.Supp. 1503, 1518.)

- Provision of a procedure which ensures that the "participation of each student in bilingual programs is voluntary on the part of the parent or guardian." (Former Section 52161; Section 62002.)

- Provision of adequate practices, procedures, resources, qualified personnel, and staff development necessary to implement the general purposes of former Section 52161. (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1010, 1012-1013; and Keyes v. School Dist. No. 1 (D. Colo. 1983) 576 F.Supp. 1503, 1516-1518.)

- "[I]n-service programs to qualify existing and future personnel in the bilingual and crosscultural skills necessary to serve the pupils of limited English proficiency of this state." (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1012-1013.)

- Monitoring of the progress of each student toward developing both "fluency in English" and "academic achievement" by means of adequate testing and evaluation. (Section 62002; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 698 F.2d 989, 1014.)

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

achieve in the regular instructional program. (Sections 62002, 62005, 62005.5; former Section 52161; 20 U.S.C. Section 1703(f); and Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1010; and Keyes v. School Dist. No.1 (D. Colo. 1983) 576 F.Supp. 1503, 1518-1519.) The District must specify the measures by which it is assessing the adequacy of its programs in serving the needs of its LEP students. (Sections 62002, 62005, 62005.5; former Section 52161; and 20 U.S.C. Section 1702(f).)

- An established parent advisory committee (district and school level) functioning in the same manner as required prior to June 30, 1987. (Section 62002.5.)

Question 4: What is not required now that the specific statutes and regulations have expired?

Answer: Seven major statutory requirements are no longer required:

a) The definitions and specific requirements of program options (a)-(f). (Former Section 52163.)

b) The specific reclassification criteria. (Former Section 52164.6.)

c) The "triggering" mechanism for a bilingual teacher when ten LEP students with the same primary language are enrolled in the same grade level in K-6. (Former Section 52165.)

d) Bilingual classroom and Individual Learning Program (ILP) staffing requirements. (Former Section 52165.)

e) Classroom proportions of LEP students to non-LEP students. (Former Section 52167.)

f) The specific bilingual program-related credential or certificate and waiver requirements for staff assigned to previously required bilingual

programs. (Former Sections 52163, 52165, 52166, 52172, 52178, 52178.1, 52178.3, 52178.4.)[5]

g) The specific requirements for parent notification of a student's enrollment in and withdrawal from bilingual education programs. (Former Section 52173.)

Even though these specific requirements are no longer mandated, the eight general purposes of former Section 52161 must be integrated into whatever instructional program is implemented to serve LEP pupils.

Question 5: What effect do Sections 62000-62007 have on EIA/LEP funding?

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[5]When the district provides English language development and "academic instruction through the primary language," in order to implement the instructional strategy selected, the staff providing the instruction clearly must have the requisite language and academic skills to provide such instruction competently. The Department does not believe that this requires that every staff person have a specific bilingual credential or authorization. This opinion is based upon Sections 62000 and 62000.2 and their impact upon former Sections 52163, 52165, 52166, 52172, and 52178.

Whenever personnel holding bilingual certificates or authorizations are available, the Department strongly urges districts to assign them to classes in which "academic instruction through the primary language" is necessary. Similarly, bilingually-authorized teachers and langauge development specialists should be assigned to classes in which special English language development instruction is provided. (See Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1012-1013.)

Since the general and bilingual statutory provisions involving credentialing have not expired (e.g., Sections 44001, 44831, and 44253.5), the Commission on Teacher Credentialing has informed the Department that it believes the current requirements for bilingual credentialing may still be in effect in certain situations. The Commission has stated that it plans to issue "coded correspondence" related to bilingual certificates and authorizations soon.

Answer: None. State funding of EIA programs, including programs for LEP students, continues. In addition, the "standard dollar" provision which sets a local funding floor for LEP services remains in effect. EIA funds will continue to be disbursed according to the identification criteria and allocation formulas for the program in effect on June 30, 1987. However, the obligation to provide services to LEP pupils is not contingent upon receipt of state categorical funds, since each LEP student generates a given level of average daily attendance (ADA) dollars for instruction in the core curriculum and auxiliary services.

Question 6: Is it still necessary to fill out the R-30 annual language census?

Answer: Yes. Under Section 62002, the funding formula for EIA funds has not changed. That formula is based upon multiple criteria, including the identification criteria contained in the R-30 census data. Therefore, in order to receive EIA funds to fulfill the general purposes of former Section 52161, schools and districts must continue to fill out the R-30 census forms in accord with identification requirements in effect before June 30, 1987.

Question 7: What general advice does the Department have regarding changes in current bilingual programs?

Answer: The Department believes that districts should assess their current practices and consider modifying existing programs in ways which will result in improving LEP students' academic achievement in the regular instructional program. Districts should be guided in improving programs by reviewing the descriptions of minimum state and federal legal requirements provided in this Advisory. Consistent with the trend throughout education, recent legislation would have provided local districts with more options for policies and programs than those allowed by the previous statute. The Department supports this trend toward more program flexibility and effectiveness as described in the recent legislation. In the absence of specific programmatic requirements, districts may now consider changes in the following areas:

a) Instructional Methods. Districts are encouraged to consider a variety of approaches for serving LEP students, but any approach must be based upon sound educational theory and principles.

b) Staffing. Districts may change staffing patterns in an effort to deliver services in a more effective manner. Policies should be directed toward ensuring LEP students access to adequate and appropriately qualified staff who are provided with sufficient resources to accomplish their assignments.[6]

c) Classroom Composition. Alternatives to the strict classroom composition ratios of LEP and non-LEP students are now available. Districts are cautioned, however, to avoid approaches which promote prohibited segregation of LEP students.[7]

d) Parent Involvement. Districts may consider a variety of strategies for involving parents in the education of their children. In particular, each parent of an LEP student should 1) know what the alternative program choices are which the district is offering, 2) understand the nature of the alternatives, and 3) actively participate in an informal way in the selection of the program into which the child is placed. Schools are

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[6]See footnote 5 on page 19.

[7]It should be noted that there are existing federal prohibitions against segregating children within the school site. In Chapter 453, Statutes of 1986, the California Legislature addressed this issue last year and provided:

> The classroom proportion specified in subdivision (a) may be modified for the purpose of providing effective instruction for all pupils in core academic subjects. Pupils of limited English proficiency participating in programs established pursuant to subdivision (a), (b), or (c) of Section 52165 shall receive instruction for at least 20 percent of the school day in classes in which the proportions specified in subdivision (a) are met, and shall receive instruction in classes with pupils of fluent English proficiency for an increased portion of the school day, as their English language skills increase. (Former Section 52167(b).)

Although this section has expired, the Department believes that it provides a reasonable alternative for additional flexibility in classroom composition. Chapter 453 was signed by the Governor and passed by a bi-partisan vote of the Legislature.

encouraged, whenever possible, to obtain the written consent of each student's parents when placing the student in a bilingual education program. Students identified as LEP should receive appropriate services (as defined on pages 14-17) pending parental response.

It must be remembered that each of the eight general purposes of former Section 52161 must be integrated into the entire bilingual education program. (See pages 14-15 above.)

CONCLUSION

The Department is working to define more clearly the effects of Sections 62000-62007 on program operation and will provide additional information as it becomes available. Districts needing assistance interpreting this Advisory may contact any of the following Department staff:

1) Miller-Unruh Basic Reading--Janet Cole/Donovan Merck: (916) 322-5960 or 322-4981

2) School Improvement--Dennis Parker/Jim McIlwrath: (916) 322-5954

3) Indian Early Childhood Education--Andy Andreoli/Peter Dibble: (916) 322-9745

4) Economic Impact Aid/State Compensatory Education--Hanna Walker: (916) 445-2590

5) Bilingual Education--Leo Lopez: (916) 445-2872

6) Legal Issues--Allan Keown: (916) 445-4694

7) Waivers--Vicki Lee/Leroy Hamm: (916) 322-3428 or 323-0975

8) School-Based Pupil Motivation and Maintenance Programs (SB 65)--Maria Chairez: (916) 323-2212

9) Consolidated Programs--Bill Waroff: (916) 322-5205

10) School-Based Coordinated Programs--please contact the person(s) listed above regarding the applicable funding source(s)

Teacher credentialing questions should be directed to:

1) Reading--Sanford L. Huddy, Commission on Teacher Credentialing: (916) 445-0233;

2) Bilingual--Sarah Gomez, Commission on Teacher Credentialing: (916) 445-0176.

Questions which fall outside the scope of this Advisory should be addressed in writing to:

Bill Honig
Superintendent of Public Instruction
Attention: Sunset Advisory Group
721 Capitol Mall
P.O. Box 944272
Sacramento, CA 94244-2720

In addition, the Department plans to hold workshops to answer questions related to this Program Advisory according to the following schedule:

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

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

NOTE: - PLEASE BRING A COPY OF THIS PROGRAM ADVISORY TO THE WORKSHOP.

- PLEASE LIMIT THE NUMBER OF PERSONS ATTENDING EACH WORKSHOP TO TWO PER DISTRICT BECAUSE SPACE IS LIMITED

BILL HONIG
SUPERINTENDENT OF PUBLIC INSTRUCTION

CCP: 87/8-14

DATE: May 20, 1988

PROGRAM ADVISORY

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

PROGRAM: State Program for LEP Students

CONTACT: See Page 10

PHONE: See Page 10

TO: County and District Superintendents and Selected Program Directors

FROM: Bill Honig
Superintendent of Public Instruction

SUBJECT: **FIVE OPTIONS AVAILABLE TO DISTRICTS FOR ACHIEVING COMPLIANCE WITH THE STAFFING AND INSTRUCTIONAL REQUIREMENTS OF THE STATE PROGRAM FOR STUDENTS OF LIMITED ENGLISH PROFICIENCY (LEP)**

Introduction

The "sunset" statutes (Education Code Sections 60002-62005.5) replaced the Bilingual Education Act (sections 52161-52178.4) on June 30, 1987. We issued a "Sunset" Program Advisory on August 26, 1987 explaining this development. During September and October, the Department's 1987-88 Coordinated Compliance Monitoring Review (CCR) Manual was rewritten substantially to account for "sunset." Each of the five "sunset" programs was reworked completely, including the state's program for LEP students.

In January 1988, two events occurred: (1) the Department began conducting compliance reviews of local district programs and (2) the Attorney General issued Opinion No. 87-1001 which validated the Department's interpretation of the "sunset" statutes and their effect upon the authorizations issued by the Commission on Teacher Credentialing (CTC).

These novel and historic events have presented difficult challenges to everyone working with California's LEP students. Many people have asked us to clarify the legal requirements regarding the staffing of district LEP programs and supply guidance on how districts can comply with the "sunset" statutes. Answers to the following questions represent five options which districts have in meeting their LEP student program staffing and instructional requirements:

- May the educational results of a school district's instructional program for LEP students exempt a district from state legal requirements in the "sunset" era?

- Are the credentials and certificates associated with the instruction of LEP students issued by the CTC still valid measures of teacher competency?

- How may local school districts determine that teachers who do not hold CTC-issued authorizations are qualified to perform English language development and/or primary language instruction?

- When a district does not have a sufficient number of qualified teachers for its LEP instructional program, is a local plan to remedy the shortage of qualified teachers an acceptable compliance option and, if so, how will the Department evaluate such plans?

- What criteria will Department staff use to decide whether to recommend general waiver requests concerning LEP student instruction to the State Board of Education pursuant to Education Code Section 33050?

This advisory gives the best answers available to date on these five options for achieving compliance.

Exemption from State Legal Requirements by Demonstrating Educational Results

Question #1: **May the educational results of a school district's instructional program for LEP students exempt a district from state legal requirements in the "sunset" era?**

Answer #1: **Yes, as long as the school district can provide objective data that former LEP students are performing at academic parity with non-LEP students in a school.**

Discussion: The purpose of the state's program for LEP students in this "sunset" era is to assure that a district's program produces educational results for the participating LEP students. The Attorney General's January 20, 1988 Opinion recognized this explicitly:

> "The significant aspect for the Legislature as set forth in the 'sunset' legislation is the results of the program--maintaining and improving the quality of the program through greater flexibility and concentration of resources." (Opinion at p. 6.)

This legislative purpose is consistent with federal law, as the Attorney General also recognized:

> "The ultimate goal of the federal requirements is the same as expressed by the Legislature--obtaining results indicating that the language barriers confronting the students are actually being overcome." (Gomez v. Illinois State Board of Educ. [7th Cir. 1987], 811 F.2d 1030, 1042; Castaneda v. Pickard, [5th Cir. 1981], 648 F.2d 989, 1010.) (Opinion at p.6.)

The Castaneda case is the leading federal authority in this area. The third aspect of its three-part analysis of what constitutes "appropriate action" pursuant to 20 U.S.C. Section 1703(f) is whether a district's LEP program has "produced results indicating that the language barriers confronting students are actually being overcome." (Castaneda v. Pickard, supra, 648 F.2d at p. 1014.)

The Department believes that such equality of academic achievement can be demonstrated by scores on objective tests which compare the achievement of former LEP students who participated in a specific instructional program with non-LEP students in the same school site. Objective tests used to measure such academic achievement include standardized norm-referenced examinations and other valid and reliable assessments. The appropriate unit of analysis should be, in most cases, former LEP students of a particular language group. When mathematically possible, the number of students in the former LEP and comparison groups must be large enough for appropriate analysis. The burden of producing adequate objective documentation of such results lies with the district and must be met annually. If evidence of these results is not available, then the district's LEP instructional program must comply with all of the state legal requirements or the district must obtain a State Board waiver of the requirements.

If a district chooses not to exercise this option, there are four additional options available. Descriptions of these options may be found in the discussion sections of questions 2, 3, 4, and 5 below. Options may be selected independently or in combination.

Assignment of Teachers with CTC Authorizations

Question #2: Are the credentials and certificates associated with the instruction of LEP students issued by the Commission for Teacher Credentialing (CTC) still valid measures of teacher competency?

Answer #2: **Yes, pursuant to the Attorney General's Opinion.**

Discussion: The Attorney General specifically recognized that the CTC-issued credentials and certificates are still valid measures of teacher competency:

> "Having a bilingual education credential or certificate does, of course, evidence that the teacher is competent, and a school district may undoubtedly rely upon such authorizing credentials and certificates in employing its teaching staff." (Opinion at p.6.)

Therefore, a district may assign individual teachers who hold appropriate CTC-issued teaching authorizations to English language development and/or primary language instructional positions. Teachers who possess a bilingual teaching authorization (Bilingual-Crosscultural Specialist Credential, Bilingual Crosscultural Emphasis, or a Bilingual Certificate of Competence) or a Language Development Specialist Certificate are qualified to provide English language development instruction. Teachers who hold a bilingual teaching authorization from CTC are qualified to conduct primary language instruction. If all required positions in a district are filled by teachers who hold CTC-issued authorizations, then the district has met its staffing requirements. In addition to the placement of CTC-authorized teachers, districts should consider the options discussed below in the answers to questions 3, 4, and 5.

Local Designation of Other Qualified Teachers

Question #3: **How may local school districts determine that teachers who do not hold CTC-issued authorizations are qualified to perform English language development and/or primary language instruction?**

Answer #3: **School districts may designate other qualified teachers to perform English language development and/or primary language instruction according to the procedures and guidelines outlined in the following discussion.**

Discussion: Under federal case law, the Department has a legal obligation to "supervise (California's) local school districts;" to "establish minimums for the implementation of language remediation programs;" and to "enforce those

minimums." The Attorney General recognized these responsibilities in the following fashion:

> "As for each state, the federal law imposes an obligation to supervise its local school districts to ensure that the needs of students with limited English language proficiency are addressed. (Idaho Migrant Council v. Board of Ed. (9th Cir. 1981) 647 F.2d 69, 71.) General state guidelines in establishing and assuring the implementation of the state's programs are required. This state responsibility includes establishing the minimums for the implementation of language remediation programs and enforcing those minimums. (Gomez v. Illinois State Bd. of Educ., supra, 811 F.2d 1030, 1043.)" (Opinion at p.7.)

Pursuant to this legal responsibility, the Department is requiring all districts which receive categorical funding to submit the criteria they are using to determine the competency of teachers providing English language development and/or primary language instruction to LEP students in Part I of the district's Consolidated Application for Categorical Funding, Form SDE 100. Part I is due on June 1, 1988. However, if a district is unable to meet this deadline, the criteria may be submitted along with Part II of the application on or before November 1, 1988. The Department will determine the adequacy of all such local criteria, including the standards and procedures a district has selected to assess staff competency to instruct each LEP student. Those determinations will be based upon the following factors:

A. Local district competencies are structured to determine whether or not individual teachers possess the necessary professional ability to carry out their respective assignments;

B. Individual teachers providing English language development instruction are assessed in the requisite teaching methodology for that subject matter; individual teachers providing primary language instruction are assessed in the requisite skills in (1) bilingual teaching methodology and (2) proficiency in the primary language of LEP pupils being instructed. Examples of competencies are provided in the attachments to this Advisory and include: English Language Development Teaching Methodology (Attachment 1), Bilingual Teaching Methodology (Attachment 2), Primary Language Proficiency (Attachment 3), and Aural/ Oral Assessment Specifications (Attachment 4); and

C. Documentation of the assessment of individual teachers is maintained by the district.

Formal assessments may be bolstered by observations and interviews as long as the protocols for these processes conform to the factors listed above.

If a district experiences a shortage of qualified teachers to serve LEP students after employing the options detailed in the discussions of the answers to questions 2 and 3, the options described in the discussions of questions 4 and 5 are available as additional alternatives.

Plans to Remedy Shortages of Qualified Teachers

Question #4: **When a district does not have a sufficient number of qualified teachers for its LEP instructional program, is a local plan to remedy the shortage of qualified teachers an acceptable compliance option and, if so, how will the Department evaluate such plans?**

Answer #4: **Yes. The adequacy of a district's plan to remedy the shortage of qualified teachers will be evaluated according to the factors set forth below.**

Discussion: California faces a critical shortage of teachers qualified to conduct English language development and academic instruction through the primary language. There are approximately 615,000 LEP students enrolled in grades K-12, and their numbers increase dramatically each year. The Department realizes that this has placed many districts in a very difficult position.

When a district has not been able to hire a sufficient number of qualified teachers for its instructional program, federal law indicates that bilingual "aides may be an appropriate interim measure." (Castaneda v. Pickard, supra, 648 F.2d at p. 1013) The use of aides, however, "cannot...take the place of qualified bilingual teachers." (Id.) Sufficient numbers of qualified teachers may be obtained in primarily two ways:

(1) hiring teachers already qualified to teach in the district's LEP program; and
(2) inservice training of the district's current teachers (see LEP item 8, CCR Manual).

When a district has been unable to hire a sufficient number of qualified teachers, the district should have a plan to remedy that shortage. That is, federal law under 20 U.S.C.

Section 1703(f) requires a district to take "appropriate action" to obtain a sufficient number of qualified teachers. The Department believes that "appropriate action" in this situation mandates a long-range plan by which a district will remedy the shortage of qualified teachers. It will assist districts in developing such plans under its responsibility to "establish the minimums for the implementation of language remediation programs...." (Gomez v. Illinois State Board of Ed., supra, 811 F.2d at p. 1043.)

Districts are to submit their plans to the Department in Part I of the district's application for funding, Consolidated Categorical Aid Programs, Form SDE 100 and updated annually. Part I is due June 1, 1988. However, if a district is unable to meet this deadline, the plan may be submitted along with Part II of the application on or before November 1, 1988. The Department will evaluate these district plans based on the following information:

A. The number of teachers in each school in the district who:

- are needed to provide English language development and/or academic instruction through the primary language to LEP students;

- are currently qualified and assigned to provide such instruction; and

- are teamed on an interim basis with bilingual paraprofessionals to provide academic instruction through the primary language;*

B. Actions being utilized to (1) recruit and hire qualified teachers and (2) provide training opportunities to all teachers who are assigned to English language development and/or primary language instruction but who do not currently possess the appropriate authorization from CTC, or who have not met local district criteria for designation; and

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*NOTE: In response to a shortage of teachers qualified to perform academic instruction through the primary language, bilingual paraprofessionals may be teamed with regular teachers on an interim basis to meet this staffing requirement. (Castaneda v. Pickard, supra, 648 F.2d at p. 1014.) In these situations, bilingual paraprofessionals are to work under the direct supervision of teacher counterparts in terms of both the content and instructional methodology used for academic lessons in the primary language. (Education Code Section 45344(a).)

C. An evaluation plan to determine the effectiveness of hiring and training efforts, as well as a timeline indicating past accomplishments and future actions which are projected to result in full compliance by a specific date.

General Waiver Authority

Question #5: **What criteria will Department staff use to decide whether to recommend general waiver requests concerning LEP student instruction to the State Board of Education pursuant to Education Code Section 33050?**

Answer #5: **Department staff will use essentially the same criteria and procedures to process waivers on LEP student instructional issues as they use for all other requests under the general waiver authority. Additional instructions are located in the Department's Program Advisory on waivers dated February 17, 1988.**

Discussion: Under the general waiver authority (Education Code Section 33050), school districts may request an exemption of any requirement of the state's program for LEP students--with the exception of LEP pupil identification and language census procedures (see sections 33050 and 52164.1). The State Board of Education has the authority to approve waivers when a district wishes to implement alternative programs or services or when, even after good faith efforts to comply with a particular statute, a district is unable to obtain the human and material resources necessary to implement required instructional and support services.

The development, submission, and eventual approval of a waiver request represents a fifth option to meet staffing requirements. In some instances where there is a documented shortage of qualified teachers, a district may wish to waive the instructional requirement associated with a particular staffing requirement. For example, a district might be unable to obtain qualified staff to provide primary language instruction to small numbers of LEP students from various language groups scattered throughout several schools. In such a situation, the district might request a waiver to delete or reduce primary language instructional offerings and substitute specially-designed English medium instruction which, if approved, would automatically remove the accompanying statutory requirements for primary language teachers.

If a district decides to submit a general waiver request specifically related to state statutory requirements involving instructional services for its LEP students, then the following information will be required as part of the waiver application:

A. The identification of the state statutory requirement(s) for which a waiver is being solicited (e.g., an Education Code section or the text from an LEP item in the CCR Manual), including an explanation of the problems encountered which prevent compliance with the legal requirements;

B. A description of past and current actions as well as future plans to secure the human and/or material resources needed to comply with the state statute(s);

C. A description of the alternative programmatic and support procedures proposed as replacements for the original statutory requirements, including a rationale for the procedures selected as well as an explanation of how available resources will be utilized; and

D. An evaluation plan to determine the effectiveness of the alternative strategies.

Department staff will review this information to evaluate the merits of waiver requests before forwarding a recommendation for approval or denial to the State Board of Education. The basic criterion for the evaluation of the requests will be whether or not the proposed alternative procedures appear to meet the general purposes of the state's program for LEP students. Specifically, the waiver request should demonstrate that the alternative procedures have a high potential to meet the educational needs of the district's LEP students.

In addition, it must be remembered, that federal law imposes requirements on school districts and state educational agencies to provide adequate instruction to language minority students. While local school districts have substantial flexibility in responding to these federal mandates, a state educational agency is not authorized to waive, in part or in whole, any federal requirement. The Educational Opportunities Act of 1974 states in part:

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ---
>
> "(f) the failure by an educational agency to take appropriate action to overcome language

barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. Section 1703(f).)

The Civil Rights Act of 1964 states in part:

> "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (42 U.S.C. Section 2000d.)

Before applying for a waiver, a district must involve appropriate employee representatives and consult relevant advisory committees including the district and school level bilingual advisory committees. A public hearing must be held on the waiver request. Information and forms for requesting a waiver may be obtained from personnel in the Management Systems Development Unit (Leroy Hamm or Vicki Lee) at (916) 323-0975. Questions on the general guidelines for waivers affecting LEP students should be directed to the Bilingual Education Office (Terry Martinez) at (916) 445-2872.

General questions regarding this Advisory may be directed to staff members in the Office of Bilingual Education (916) 445-2872 or in the Consolidated Programs Management Unit (916) 322-5205.

ATTACHMENT 1

Suggested Competencies for Teachers: English Language Development Instruction

These competencies are suggested as indicators which should be considered when school districts select, adapt, or develop assessment instruments to determine the level of skills which individual teachers should possess in order to be designated to provide English language development instruction:

1. Knowledge of first and second language acquisition theories and teaching strategies, including knowledge of the elements of linguistics applied to second language learning and content teaching for LEP pupils;

2. Competency in teaching English as a second language in various educational settings;

3. Knowledge of and the necessary skills to utilize approaches for teaching the content of the core curriculum in English to students of limited English proficiency (such approaches include, but are not limited to, (1) "sheltered" subject matter instruction and (2) content-based ESL instruction);

4. Knowledge of techniques required to develop and reinforce second language acquisition, including the rationale for primary language instruction for students from non-English language background students;

5. Knowledge of the purposes, limitations, and administration of language proficiency and achievement tests, including nonverbal and informal assessment techniques;

6. Knowledge of existing pupil identification, assessment, and language redesignation requirements;

7. Knowledge of, and ability to evaluate and use, second language instructional materials;

8. Knowledge of the historical and contemporary status of language minority groups in California;

9. Knowledge of and respect for the cultural and language needs of language minority pupils;

10. Crosscultural skills necessary to interact effectively with children and adults from ethnolinguistic minority groups; and

11. Knowledge of the nature of and interrelationships between bilingual instruction, English as a second language, and other approaches related to instructing language minority students.

ATTACHMENT 2

Suggested Competencies for Teachers: Bilingual Teaching Methodology

These competencies are suggested as indicators which should be considered when school districts select, adapt, or develop assessment instruments to determine the level of skills which individual teachers must possess to be designated to provide academic instruction in the primary language:

1. General knowledge of bilingualism, second language acquisition, and language minority education;

2. Awareness of the rationale for primary language instruction for non-English language background students;

3. Knowledge of, and ability to apply, primary language instructional theory, approaches, and techniques;

4. Knowledge of primary language testing, diagnostic assessment, and placement;

5. Knowledge of the purposes, limitations, and administration of language proficiency and achievement tests, including nonverbal and informal assessment techniques;

6. Knowledge of existing pupil identification, assessment, and language redesignation requirements;

7. Knowledge of, and ability to use, primary language instructional materials and other resources;

8. Knowledge of and skills associated with instruction of specific subject matter or grade level core curriculum;

9. Ability to organize and manage primary language instruction including, when appropriate, the use of bilingual paraprofessionals;

10. Knowledge of the historical and contemporary status of the target language group;

11. Crosscultural skills necessary to interact effectively with children and adults from the target ethnolinguistic minority group; and

12. Knowledge of the nature of and interrelationships between bilingual instruction, English as a second language, and other approaches related to instructing language minority students.

ATTACHMENT 3

Suggested Competencies for Teachers: Primary Language Proficiency

These competencies are suggested as indicators which should be considered when school districts select, adapt, or develop assessment instruments to determine the level of proficiency which individual teachers must possess in the primary language of LEP students to provide such students with academic instruction in and through that language:

1. Individual teachers can understand and speak the target language as evidenced by the ability to:

   A. Use the language fluently and accurately on all levels pertinent to professional needs;

   B. Understand and participate in any conversation within the range of experience of a teacher with a high degree of fluency and precision of vocabulary;

   C. Be understood by the average native speaker even in unfamiliar situations (errors of pronunciation and grammar are infrequent);

   D. Handle informal interpreting from and into the language.

   Attachment 4 contains additional specifications for listening comprehension and oral communication skills.

2. Individual teachers can read and write the target language as evidenced by the ability to:

   A. Read and write all styles and forms of the language pertinent to professional needs;

   B. Read and write moderately difficult prose readily in any area directed to the general LEP student or parent;

   C. Select, adapt, develop, and use all materials in his/her field, including official and professional documents and correspondence;

   D. Read reasonably legible handwriting without undue difficulty; and

   E. Handle informal translation from and into the language.

ATTACHMENT 4

EXAMPLE OF AURAL/ORAL ASSESSMENT SPECIFICATIONS

	UNACCEPTABLE RANGE			PROFESSIONAL RANGE	
	1	2	3	4	5
A. Comprehension	Cannot be said to understand even simple conversation.	Has great difficulty following what is said. Can comprehend only "social conversation" spoken slowly and with frequent repetitions.	Understands most of what is said at slower-than-normal speed with repetitions.	Understands nearly everything at normal speech, although infrequent repetition may be necessary.	Understands everyday conversation and normal classroom discussions without difficulty.
B. Fluency	Speech is so halting and fragmentary as to make conversation virtually impossible.	Usually hesitant: often forced into silence by language limitations.	Speech in everyday conversation and classroom discussion frequently disrupted by the search for the correct manner of expression.	Speech in everyday conversation and classroom discussions generally fluent, with infrequent lapses while searching for the correct manner of expression.	Speech in every day conversation and classroom discussions fluent and effortless, approximating that of a native speaker.
C. Vocabulary	Vocabulary limitations so extreme as to make conversation virtually impossible.	Misuse of words and very limited vocabulary; comprehension quite difficult.	Frequently uses the wrong words; conversation somewhat limited because of inadequate vocabulary.	Infrequently uses inappropriate terms and/or must rephrase ideas because of lexical inadequacies.	Use of vocabulary and idioms approximate that of a native speaker.
D. Pronunciation	Pronunciation problems so severe as to make speech virtually unintelligible.	Very hard to understand because of pronunciation problems. Must frequently repeat in order to make himself or herself understood.	Pronunciation problems necessitate concentration on the part of the listener and occasionally lead to misunderstanding.	Always intelligible, though may have a definite accent and nonnative intonation patterns.	Pronunciation and intonation approximate that of a native speaker.
E. Grammar	Errors in grammar and word order so severe as to make speech virtually unintelligible.	Grammar and word-order errors make comprehension difficult. Must often rephrase and/or restrict himself or herself to basic patterns.	Makes frequent errors of grammar and word-order which occasionally obscure meaning.	Occasionally makes grammatical and/or word-order errors which do not obscure meaning.	Grammatical usage and word order approximate that of a native speaker.

None of the established exceptions to the APA apply to these provisions. The statutes contain no explicit exceptions for these rules. The Department may argue that the internal management exception should apply, but as detailed below, that exception applies only to actions *within* a state agency. The Advisories under review apply to local school districts and superintendents. While they may be "housekeeping" in a colloquial sense, that informal characterization cannot exempt the Department's requirements from the otherwise applicable requirements of the APA.

(4) Program Advisory 87/8-2, **the Categorical Funding Sunset Advisory**:

SUNSET ARGUMENT

Five long-standing "categorical" education programs ended on June 30, 1987, pursuant to "sunset" legislation.[167] The Department issued this "Sunset Advisory" to guide the school districts in carrying out their responsibilities in this unusual situation: the "specific categorical programs cease[d] to be operative and [specified] Sections . . . govern[ed] program funding" but *funding* did *not* cease as of the sunset date.

Does the Sunset Advisory contain standards or rules intended to have general application? Program Advisory 87/8-2 is addressed to "County and District Superintendents [¶] Attention: Consolidated Programs Directors and Directors of Indian Early Childhood Education Programs." The Department clearly intends this Advisory regarding "Five Education Programs Which Have Sunset" to apply generally to every program, school, and school district affected by the "sunsetting" of the programs the Advisory discusses.

Overall, the Advisory is generally a collection of standards or general rules. As discussed in detail above, the critical issue in determining whether or not material in an Advisory such as this one is "regulatory" is whether (1) it merely *restates* the applicable law or (2) it *adds to* or *embellishes* it.

The Advisory lists "eight general considerations which the Department believes are important to the continuing operation of the five programs."[168] The Advisory next addresses 23 "hypothetical" questions to illustrate how local school districts and schools are to handle the sunsetting of certain program provisions. We will follow the Advisory's format in discussing the sunset issues and whether the contents of the Advisory are "regulatory."

1. "Flow of funds to Each Program Does Not Change"[169]

The Department cites Education Code Section 62002, which maintains that the funds will continue to be disbursed "according to the *identification criteria* and *allocation formulas* . . . in effect on the date the program shall cease to be operative . . . . " (Emphasis supplied by Department.) Clearly, this section does no more than restate the applicable law.

2. "Funds Must Be Used for the 'General Purpose' of Programs"[170]

This section restates Education Code Section 62002. The Advisory reminds school districts and program administrators that the statute requires funds to be used "for the general [. . . or] intended purposes" of the program, but eliminates "all relevant statutes and regulations adopted . . . regarding the use of the funds." The sunset provisions, the Department points out, give local schools and districts some additional discretion, but their programs must still follow the statutory general or intended purposes of each sunsetted programs. This portion of the Advisory has not enlarged upon or embellished the terms of the statute.

3. "Parent Advisory Committees and School Site Councils Continue"[171]

After repeating Education Code Section 62002.5, this section adds that "this statute requires all *presently operating* parent advisory committees and school site councils to continue to operate *with the same composition* required prior to June 30, 1987."[172] (Emphasis added.) This statement goes beyond the statute in several ways: it requires all *presently operating parent advisory committees and school site councils* to continue operating; it requires these committees and councils to retain the same *composition*; and it requires them to do so consistent with what they did *prior to June 30, 1987*, the sunset date.

By contrast, the statute requires those committees and councils *"which are in existence pursuant to statutes or regulations as of January 1, 1979, [to] continue . . . ,"* not those in existence as of June 30, 1987. The statute continues:

> "The *functions and responsibilities* of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979." (Emphasis added.)

The committee's or council's "functions and responsibilities" do not necessarily include their "composition." Unless a statute or regulation equating these characteristics exists, these additional interpretations do more than restate the

statute. Thus, they are "regulatory."

4. "Audits and Compliance Reviews Are Required"[173]

This section restates the law regarding audits and compliance reviews in keeping with Education Code Sections 62002, 62003, and 62005, as mandated by Section 62000.[174] The Requester observes that

> "The 'advice' also makes it clear, at pages 3-4, that the interpretation set out in the program advisory will form the basis for compliance audits by the Department."[175]

The provisions of the audits section do not go beyond the statute in any way, except possibly by referring to the "Consolidated Programs Section of the Coordinated Compliance Review Manual." This Manual is not the subject of the request for determination, however, and no party provided it for our review. Therefore, we express no opinion as to whether any of its provisions are "regulatory."

5. "Program Quality Reviews and School Plans Continue"[176]

The Department notes that the sunset provisions do not affect Education Code Section 64001, which establishes the "requirement for program quality reviews and continues the requirement for school plans for schools receiving Consolidated Programs Funds." The Department states that its

> "procedures and documents used to comply with Section 64001 will continue to be operative."

Again, no party asked to make these "procedures and documents" part of the request for determination. Therefore, we can express no opinion as to whether they are procedures which are "regulatory" in character, whether properly adopted or not, or whether they consist of material which is not "regulatory." Whichever they are, this Advisory does not change their status.

6. "Use of Staff Development Days and the School-Based Coordinated Program Option"[177]

This section points out an alternative option, under the School-Based Program Coordination Act, to replace staff development days lost because the SI Program has sunset. This section does not interpret or embellish upon the applicable

statutes.[178]

7. "Waivers of the Education Code"[179]

This section simply restates the statutory provision that still allows waivers of the Education Code under certain circumstances, although the more specific waiver authority in the sunsetted programs has expired.[180]

8. "Future Legislation May Affect Programs Which Have Sunset"[181]

This section cautions school districts that they "should remember" there may be legislative efforts to reinstate the sunsetted programs, and to keep this possibility in mind as they decide how extensively to change their programs.[182] This provision, stating that districts "should remember" such efforts, appears to exemplify a statement using the form "should" in a non-"regulatory" sense.

Having summarized the eight "considerations," the Department next "attempt[s] to answer some of the most frequently asked questions about the impact of Sections 62000-62007 on the use of funds for those programs."[183]

"I. MILLER-UNRUH BASIC READING ACT of 1965:"[184]

This section contains three questions and answers regarding the reading program. The first defines the "general purpose" of Miller-Unruh funds by referring to the legislative intent,[185] consistent with Education Code Section 62002. Secondly, the Department sets out what is required of schools "now that the legislation has expired."[186] This section reconciles as far as possible the statutes requiring certified reading specialists (which persist) with the expiration of the provisions establishing the Miller-Unruh Reading Specialist Certificate. The Commission on Teacher Credentialing, not a party to this determination, is responsible for credential requirements. The Department notes that it has recommended to the Commission that it adopt regulations "for the acceptance of the former Miller-Unruh Reading Specialist Certificate as fulfilling the minimum requirements for a reading specialist credential under Section 62002 and former Section 54101."[187] The recommendation appears wise in that, without a regulation (or a statutory change), the Commission may not have the power to accept the Certificate.

The final paragraph of Answer 2 provides that

> " . . . districts receiving Miller-Unruh funds are required to 'cofund,' with general funds, each reading position for which partial Miller-Unruh monies

> are received. . . . Districts cannot aggregate Miller-Unruh funds and fill less than the specified number of Miller-Unruh positions because the cofunding requirement is a part of the allocation funding process preserved by Section 62002. [Citations omitted.]"[188]

This statement reflects the law that, following the sunset, funds will be disbursed following the allocation formulas for the program in effect when the program sunset. Not having been provided with all the material that sets the allocation formula in effect at the time the sunset took place, we cannot say whether that material is regulatory, statutory, exempt from the APA, or non-regulatory. Whatever its character, the restatement of the legal requirement in Question and Answer 2 is not in itself a "regulatory" interpretation of the law. That is, the program's sunsetting has not discontinued whatever the allocation calculations and requirements were before the sunset.

Question 3 asks: "What is *not* required now that the legislation has expired?" The Department then lists four major program components, distinguishing the specific requirements which have expired from the general purpose requirement which still remains effective. Once more, the Department is simply restating the legal impact of the sunset provision.

"II. SCHOOL IMPROVEMENT (SI) PROGRAM"[189]

First, the Department recites part of the legislative intent provision to show the program's general purpose.[190] The paragraph restates the intent statute, including the various areas, both curricular and "non-curricular," which the program is meant to improve, also based on the intent statute. The last sentence relies on the provision requiring parent advisory committees and school site councils to retain their responsibilities, as specified. The one problematic reference is to the "Program Quality Review Criteria" which are to provide the "standards of quality" to be "the guides for the school's improvement efforts."[191] As no party submitted to us or directed us to these "Criteria," however, we do not make any determination as to their character.

In Question and Answer 2, the Department lists four major SI Program components which are no longer required. Only one component presents any question as to whether it expands upon the law in effect. That is the second one, which concerns the school plan.[192] However, this section does not specify whether the "plan" must be written, or be in a particular format. Neither does it require the plan to contain any particular items (other than those listed in subdivision (c), the final sentence following subdivision (f) of Section 52000, the legislative intent

section, and as Section 64001, affecting applications for *all* categorical programs, may still require).[193] This provision does not embellish or enlarge upon the statute.

Question 3 asks whether school site councils are still required. The Department refers, without interpreting, to Section 62002.5, which specifies the circumstances under which the law still requires school site councils, and to Section 64001.[194]

Question 4 discusses whether the prior requirements for the "composition, functions, and responsibilities of the school site councils" are still in force.[195] The Department states that

> "Section 62002.5 requires that all parent advisory committees and school site councils that were in existence *prior to June 30, 1987*, continue. That is, Section 62002.5 requires that all current and future operating school cite councils continue to operate with the same *composition*, functions, and responsibilities required *prior to June 30, 1987*." (Emphasis added.)

As discussed above, Section 62002.5 refers to those committees and councils "in existence *pursuant to statutes or regulations as of January 1, 1979*." The Department appears to be interpreting Section 62002 to mean those committees and councils in existence on June 30, 1987 (the sunset date) and which were created under the law in effect on January 1, 1979. The statute does not say this. Section 62002.5 also refers only to the "*functions and responsibilities* . . . as prescribed by the appropriate law or regulation in effect *as of January 1, 1979*." (Emphasis added.) Section 62002 does not refer to the composition, nor does it refer to the sunset date except regarding schools which receive funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunsetting of those programs. Unless there is a statutory or regulatory provision superseding Section 62002.5, these provisions *do* interpret Section 62002.5 and are thus "regulatory."

Questions 5 and 6 cross-refer to General Consideration 6 regarding reimbursable staff development days. These provisions discuss how a school district may participate in the School-Based Coordination Program.[196] As the Department notes, this program did not sunset when the five enumerated categorical programs did. Thus, the Department cites the School-Based Program Coordination Act section which permits staff development time up to eight days each year to replace the specific staff development time provisions which sunsetted.[197]

Answer 6 then describes how schools may become "School-Based Coordinated Program" schools. The first two of the three mandatory steps on page 10 of the

Sunset Advisory generally follow the requirements of the relevant statutes.[198] The third provision requires districts to notify the state oversight unit by filing a certain form.[199] The Legislature has granted the Board of Education specific rulemaking authority to implement this program, but we were unable to find regulations on this procedure.[200] No party supplied us with the Manual of Instruction for the Consolidated Program or the Form SDE 100 mentioned. Thus, we have not reviewed these materials for their regulatory content or their compliance with Government Code Section 11347.5 or other provisions of the APA and cannot express an opinion as to the notification requirement or procedure. However, the Sunset Advisory in itself has no effect either way on the underlying material in the Manual or related procedures.

The "Note" following the three procedural steps appears to restate closely and arrange logically the provisions of Education Code Section 52854.[201] Thus, it contains no "regulatory" material beyond that which the statute requires.

Question 7 asks whether "a district must continue to meet the minimum funding requirements for schools participating in the School Improvement program."[202] Education Code Section 62002 requires the allocation formulas in effect on the sunset date to continue to govern fund disbursement. The Advisory's restatement of this plain legislative provision adds no further embellishment to the statute.

"III. INDIAN EARLY CHILDHOOD EDUCATION[203]

Question and Answer 1 describe the "general purpose" of the program by restating, without embellishing, its general legislative intent provisions. Question 2 clarifies the continued requirement for an American Indian Advisory Committee for this program and restates the legal requirements which existed as of January 1, 1979.[204] However, insofar as the Department intends Answer 2 to apply to committees or councils which were *not yet in existence* as of January 1, 1979, it enlarges upon Education Code Section 60002.5, which, as discussed above, applies to committees and councils in existence as of January 1, 1979, not as of the sunset date. Unless other provisions of statute or regulation were in effect at that time, requiring all groups receiving funds to establish advisory committees appears to be "regulatory," extending beyond the requirements of Section 60002.5.[205]

"IV. ECONOMIC IMPACT AID--STATE COMPENSATORY EDUCATION"[206]

Question and Answer 1 quote verbatim the intent sections regarding "Economic Impact Aid, the State Compensatory Education (EIA/SCE) Program."[207] Question

and Answer 2 point out that the "statutory EIA/SCE program remains almost entirely intact" because its provisions are nearly all linked to the funding formula or are permissive.[208]

Question 3 asks what the post-sunset relationship will be between EIA/SCE and federal ECIA (Education Consolidation and Improvement Act), Chapter 1, funds.[209] The Department replies with "three major considerations." First, the Department describes the interaction between ECIA and EIA/SCE program funds purporting to restate the federal requirements. In both paragraphs (a) and (b), the Department states that, under specified circumstances, districts may exclude EIA funds from two ECIA requirements: (1) that federal funds be used to supplement not supplant non-federal funds; and (2) that services in funded project areas be comparable to services provided elsewhere. These provisions are permissive and do not require the districts to do or refrain from doing anything. However, they do establish a general standard, and, insofar as they direct districts concerning how to account for their funds, they may be considered rules or standards of general application.

Paragraphs (a) and (b) *do* restate the federal law in effect at the time of the Advisory, providing the only legally tenable interpretation of the state's options as to how to treat the state and federal funds.[210]

The third paragraph, "(c)," contains the *de facto* repeal of two existing Department regulations.[211] Under most other circumstances, an agency's pronouncement that regulations currently contained in the CCR have been "superseded" would itself meet the definition of a "regulation." (A "regulation" includes revisions to a previously announced rule, and, if not adopted pursuant to the APA, would violate Government Code Section 11347.5 unless otherwise exempted.)[212] However, the Legislature repealed the statutory authority for the regulations, making them legally invalid.

The Department also states that the "superseded" regulations may serve as guidelines or models for the school districts. On its face, this language does not utilize, enforce, or attempt to enforce any guideline, order, or standard of general application; thus rendering it non-"regulatory."[213]

Finally, Question 4 asks what flexibility schools have regarding their EIA funds that they did not have before the sunset date. The sunset provision *removed* restrictions; it did not *impose* new ones. Therefore, as the Department explains in Answer 4, districts may provide services permitted before June 30, 1987, and may also design other programs "which are consistent with former Sections 54000,

54001, and 54004.3," the intent and administrative sections cited above.[214] This question and answer do not embellish upon the law in effect at the time.

"V. BILINGUAL EDUCATION"[215]

The Department quotes the relevant portions of the intent statute governing the bilingual education program to explain the general or intended purposes of the program as they remain after the sunset.[216] Question 2 asks what districts have to do to meet *federal* requirements to provide appropriate services to LEP (limited English proficiency) students. The Department responds by describing the current state of the federal law with respect to overcoming language barriers to equal educational opportunities.[217] The final paragraph requires districts to follow the already-applicable federal requirements without embellishing upon them.[218]

Question 3 asks what are the minimum post-sunset services which districts must provide LEP students? The Department lists ten items, with the appropriate citations to federal statutes and regulations, applicable federal court decisions, EIA/LEP identification criteria and allocation formulas preserved by the sunset provisions, and other applicable Education Code sections. It is self-evident that districts must still follow the requirements relating to identification of LEP students, as found in the first three items and as underscored by the federal requirements.

The fourth item requires an instructional strategy to achieve certain goals. The combination of the post-sunset requirement to fulfill the program's general purposes and the requirements of the federal law seem to mandate this advice.

The fifth through ninth items follow from the program's general purpose as expressed in the legislative intent provisions, as well as by the dictates of federal law.

The parent advisory committee requirement contained in the last item reflects Education Code Section 62002.5, except for the reference to the sunset date rather than January 1, 1979.

Question 4 asks what is *not* required in light of the sunset of the specific statutes and regulations. The Department lists seven major specific statutory requirements no longer applicable by the terms of the sunset legislation.[219] The Department reminds schools and districts that "whatever instructional program is implemented to serve LEP pupils" must address "the eight general purposes of former Section 52161," as is clear from Education Code Section 62002.[220] These provisions

reflect the sunset provision.

Question 5 asks what effect Education Code Sections 62000-62007 have on EIA/LEP funding. The Department's Answer reflects Section 62002, which continues funding based on the "identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative . . . ."

Question 6 asks whether it is still necessary to fill out the "R-30 annual language census." Again, relying on Section 62002, the Department points out that funding depends in part on identification criteria, which in turn relies on the language census.[221]

Question 7 asks for "general advice . . . regarding changes in current bilingual programs."[222] In response, the Department sets out four areas of *general advice* for general modification and improvement of bilingual programs, in keeping with the greater flexibility provided by the sunset (and consistent with the basic goal of improving academic achievement of LEP students.). The suggestions also caution that programs must still conform with federal law and the eight general purposes of state law.[223] Nothing in these provisions goes beyond making constructive suggestions and restating the applicable law which would limit or guide the districts in taking any of the Department's suggestions.

Conclusion regarding Sunset Advisory

In conclusion, much of the material in this Sunset Advisory is "advisory" in the sense of suggestion or persuasion, rather than "regulatory," that is, issuing or enforcing (or attempting to enforce) guidelines or standards of general application. Few provisions embellish upon the law that the agency administers, but rather, most restate and explain it. The Advisory tries to integrate the statutes which remain valid after the sunset of some but not other provisions which govern several of the categorical funding programs. In these instances, the Department is expressing the only legally tenable interpretation of the law or laws about which it is advising. The rules which do embellish upon the statute, interpreting, implementing or making specific the applicable law, and therefore impose regulatory requirements include:

1. Requiring parent advisory committees or school site councils which came into existence between January 1, 1979 and June 30, 1987, to continue in existence (General Consideration 3; also Question/Answer 4 regarding the SI Program; and Question/Answer 2 regarding the Indian Early Childhood

Education Program).

2. Interpreting the "functions and responsibilities" of these groups to include "composition," and requiring the groups to operate under the laws as of June 30, 1987, rather than January 1, 1979, if that is the intent of the third General Consideration (General Consideration 3 and Question/Answer 4 regarding the SI Program).

ANALYSIS UNDER THE TWO-PART TEST LEADS US TO CONCLUDE THAT THE PARTS OF THE CHALLENGED ADVISORIES AS ENUMERATED ABOVE ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

The next section of the determination will discuss whether any exceptions to the APA apply to the Department with regard to the challenged agency Advisories *which have been found to constitute "regulations."*

C.

DO THE CHALLENGED ADVISORIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

First, we will discuss exemption[224] issues which apply generally to all of the challenged Advisories. Then, we will discuss exemption issues unique to each of the challenged Advisories.

(1) Education Code section 33308.5 ("Program Guidelines") does not exempt departmental guidelines (so-called "advisories") from the APA

The Department's Response presumes that Education Code section 33308.5 ("program guidelines") constitutes a blanket exemption from all APA rulemaking requirements (such as public notice and comment, OAL review, and publication in the California Code of Regulations).

Section 33308.5, enacted in 1983, provides:

"(a) Program guidelines issued by the State Department of

California English Language Development Test - *CalEdFacts*

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Federal law (Title III of the Elementary and Secondary Education Act [ESEA]) and state law (*Education Code [EC]*sections 313 and 60810 through 60812) require a statewide English language proficiency test that local educational agencies (LEAs) must administer to students in kindergarten through grade twelve whose primary language is not English and to students previously identified as English learners (ELs) who have not been reclassified as fluent English proficient (RFEP). *California Code of Regulations*, Title 5, Section 10510, defines the test as the California English Language Development Test (CELDT).

The CELDT was developed to:

- Identify students with limited English proficiency.
- Determine the level of English language proficiency of those students.
- Assess the progress of limited English-proficient students in acquiring the skills of listening, speaking, reading, and writing in English.

Student Participation

LEAs are required to administer the CELDT to all students whose home language is not English within 30 calendar days after they enroll for the first time in a California public school. LEAs also are required to administer the CELDT annually to identified ELs until they are designated RFEP during the annual assessment window from July 1 through October 31. Additionally, Section 3302 of Title III of the ESEA (20 *United States Code* Section 7012) indicates that LEAs that receive Title III funds shall, not later than 30 days after the beginning of the school year or within two weeks of the child being enrolled in a language instruction program after the beginning of the school year, inform parents or guardians of the reasons for the identification of their child as an EL and that the child is in need of placement in a language instruction program.

Content and Format

The CELDT assesses the four domains of listening, speaking, reading, and writing in English and is aligned to the English-language development (ELD) standards adopted by the State Board

of Education (SBE). In California, *EC* Section 60810 has been amended to authorize early literacy assessment of ELs in kindergarten and grade one (K-1) commencing with the 2009–10 school year. The early literacy assessment must be administered for three years or until July 1, 2012. A report on the results of the administration of the early literacy assessment and the administrative process is due to the Legislature no later than January 1, 2013. The early literacy assessment was designed to be age and developmentally appropriate, and to the greatest extent possible, to minimize the testing burden on these young students.

Reporting and Using Results

In 2010, the SBE adopted performance level cut scores for the K–1 reading and writing assessments, modified the English proficient level for K–1 students given the inclusion of reading and writing scale scores, and allowed for differential weights in the calculation of the Overall performance level for K–1 students (45 percent each for listening and speaking, and 5 percent each for reading and writing).

The CELDT results are reported by the following performance levels: beginning, early intermediate, intermediate, early advanced, and advanced. The CELDT results show the overall English performance level attained by students as well as performance in each domain by level. Individual student reports and student data files are sent to the school district. Districts must inform parents of test results within 30 calendar days of receiving student results from the testing contractor, or, as indicated in the Student Participation section above, within two weeks of the child being enrolled in a language instruction program after the beginning of the school year.

CELDT data are used to calculate Annual Measurable Achievement Objectives (AMAOs) 1 and 2 as required by Title III. Each LEA receiving Title III funds is accountable for meeting the AMAOs established by the SBE beginning with the 2003–04 school year. The CDE provides LEAs with annual Title III accountability reports.

The CDE posts three types of reports (all assessments, annual assessments, and initial assessments) at four levels (state, county, district, and school) annually. Summary results are reported for all students and for a number of reporting categories that include gender, enrollment in specified programs, and primary languages. These results are posted on the CDE CELDT Web site.

Reclassification guidelines established by the SBE clarify the *EC* criteria in Section 313(d) to be used in reclassifying a pupil from EL to RFEP.

For more information regarding the CELDT, contact the CELDT Office by phone at 916-319-0784 or by e-mail at celdt@cde.ca.gov. Information is also available on the CDE CELDT Web site.

Questions: California English Language Development Test | celdt@cde.ca.gov | 916-319-0784
Last Reviewed: Wednesday, August 17, 2011

FINAL STATEMENT OF REASONS

PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THAT THE REGULATIONS ARE INTENDED TO ADDRESS

On June 2, 1998, the voters of California passed Proposition 227 establishing the English Language Education for Immigrant Children program (Education Code sections 300, 305, 306, 310, 311 315, 316, 320, 325, 330, 335, and 340). Proposition 227 took immediate effect and will become operative for all school terms which begin more than sixty days later - August 2, 1998 (Education Code section 330). For most local educational agencies, Proposition 227 became operative this year when summer recess ended and the fall semester began (generally, between August 24 and September 14, 1998).

Proposition 227 requires that "all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year."

The requirements of Proposition 227 are new and complex, dramatically changing the way English learners [formerly referred to as limited English proficient (LEP)] are to receive instruction in California schools. In the past, English learners received a variety of services to help them to learn the English language and their academic subjects, including instruction in their native language, use of specially designed class materials and teaching methods, and special assistance during the regular school day in learning English, separate from instruction on regular academic subjects. Proposition 227 requires that English learners be taught in English, virtually eliminating bilingual classes, and that English learners be moved to mainstream classrooms within one year. Local educational agencies and their staff need clear direction on implementing Proposition 227.

SPECIFIC PURPOSE OF THE REGULATIONS

The proposed regulations provide guidance for local educational agencies in the implementation of the English Language Education for Immigrant Children program. Because the English Language Education for Immigrant Children program as specified in Education Code section 300 et seq. has changed the way English learners will receive instruction, without guidance and clarification, local educational agencies may not implement the program as intended by California's voters.

Specifically, the proposed regulations clarify "school term," "informed belief of the school principal and educational staff," "a good working knowledge of English," and "a reasonable fluency in English;" provide guidance on the educational services to be provided to English language learners; describe the requirements for informing parents

and guardians on the placement of their children; and outline the procedures for receiving and administering funds for community based English tutoring to English language learners.

AUTHORITY AND REFERENCE

Authority for these regulations is found in Education Code section 33031 which is the State Board of Education's (State Board's) general authority to adopt rules and regulations for the government of the day and evening schools of the state.

Reference for these regulations is Education Code sections 300, 305, 306, 310, 311 315, 316, 320, 325, 330, 335, and 340; U.S. Code, Title 20, Section 1703(f); Lau v. Nichols (Supreme Court 1974) 414 U.S. 563, 94 S.Ct. 786; Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1009-1011; and Gomez v. Illinois State Board of Education (7th Cir. 1987) 811 F.2d 1030, 1041-1042.

NECESSITY

These regulations are needed to ensure that the English Language Education for Immigrant Children program as passed by the voters of California in Proposition 227 and as established in Education Code sections 300 et seq. is implemented correctly and promptly by local educational agencies. The rationale and justification for each of the proposed regulatory sections is provided below.

Section 11300. Definitions.

Education Code section 330 states that "This initiative shall become operative for all school terms which begin more than sixty days following the date at which it becomes effective." The Education Code does not contain a definition of "school term." Local educational agencies (LEAs) operate year-round, quarter, semester, and traditional school-year programs. To ensure that whatever the school-year programs the LEA operates, the term "school term" is understood, a definition is being provided in Section 11300.

To avoid confusion over the meaning of "sixty days following the date at which it becomes effective," the proposed regulation specifically identifies August 2, 1998, which is sixty days following election day (June 2, 1998).

Section 11301. Knowledge and Fluency in English.

Education Code section 305 states "Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms." Education Code section 306c states "'English language mainstream classroom' means a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English." There is no definition

of "a good working knowledge of English" or "reasonable fluency in English" provided in the Education Code.

Section 11301(a) provides some clarification for LEAs by indicating that "a good working knowledge of English" or "reasonable fluency in English" should be measured using a state-approved or locally developed assessment. The California Department of Education (CDE) is developing an assessment for measuring English language proficiency; however, the instrument is not complete. Until the state assessment is complete, and incorporated into these regulations, any of the available assessments are being recommended for use.

Education Code section 305 states: "Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. . . Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms." Section 11301(b) has been included in the regulations to ensure that LEAs and parents clearly understand that regardless of the provisions of Education Code section 305, Education Code section 310 provides parents with the opportunity to waive the requirements of Education Code section 305.

The language "At any time, including during the school year" was included in this regulation to clarify that parents may request that their child be moved from a structured English immersion classroom at any time, not just at the beginning or end of the school term. The language notifies LEAs that they must honor a parent's request pursuant to Education Code sections 310 and 311 no matter when during the school term the request is made.

Section 11301(c) clarifies for parents and LEAs that Education Code section 305 language: "not normally intended to exceed one year" permits an English learner to be in a structured English immersion classroom for more than one year. The intent of Proposition 227 is to limit enrollment in structured English immersion classrooms to one year; to move English learners into mainstream classrooms after one year; however, the language in Education Code section 305 is somewhat permissive. If the parents agree that their child should be in a structured English immersion classroom longer than one year because their child has not achieved a reasonable level of English proficiency as defined in Section 11301(a), the LEA may place the pupil in the immersion classroom.

For consistency, reference is made in this regulation to the definition of "reasonable level of English proficiency" provided in Section 11301(a).

Section 11302. Duration of Services.

Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1009-1011, Gomez v. Illinois State Board of Education (7th Cir. 1987) 811 F.2d 1030, 1041-1042, and U.S. Code, Title 20, Section 1703(f) clearly require that English learners continue to receive required educational services until they have demonstrated English-language proficiency comparable to that

of the average native speakers and can participate equally with average native speakers in the school's regular instructional program.

Section 11302 has been included in the proposed regulations to ensure that LEAs understand the federal requirements for teaching English to English learners. LEA responsibilities under federal law supersede responsibilities under state law. Without this section, LEAs may misunderstand the intent of Education Code section 305 and provide no additional services for English learners after one year of structured English immersion even though the pupil is not English proficient.

The title of this section was originally "Services for English Language Learners." The title was changed by the State Board upon the recommendation of the Office of Administrative Law attorney who reviewed the emergency regulatory file. The current title more accurately reflects the information in this section and transmits the concept that services to English language learners are to continue until the pupil has acquired English-language and academic proficiency.

Section 11303. Parental Exception Waivers.

This section has been added to the regulations to ensure that the rights of the parents of English-learning children are not violated. Section 11303(a) clarifies for LEAs that parents must be notified of their right to request a waiver of Education Code section 305 pursuant to Education Code sections 310 and 311. This regulation stresses the importance of clear, written notification to parents, who have a vested interest in the educational progress of their children and often to do not understand their rights. Subsection 11303(a)(3) was revised by the State Board to clarify that schools do not have to provide an alternative program requested by the parent if the alternative program is not currently offered at the school. The State Board understands the concerns of parents; however, schools do not have the financial resources to offer every alternative program. Schools have established curriculums and classes. Schools do not have to offer a program for which they currently do not have a class, teacher or curriculum.

Section 11303(b) provides a time frame and process for parental notification which is not provided in Education Code sections 310 and 311. The time frames are based upon the reasonable amount of time needed by LEAs to notify parents and adequate LEA response time to parents. The underlying rationale is that parents should be kept promptly informed of the their child's progress and placement and that parents' requests should be promptly responded to.

Finally, this regulation provides clarification of what information should be provided to the parent. The amount and type of information required in the regulation is based on a reasonable determination of the minimum information required for the parent to make a determination regarding the placement of his or her child.

Subsection 11303(d) clarifies Education Code section 311(a) by allowing LEAs to "use equivalent measures as determined by the local governing board" for pupils who have

not taken the standardized assessment. Pupils who are English proficient should be allowed to participate in mainstream classrooms. This provision allows LEAs to use measurements equivalent to the standardized assessment to justify the placement of the pupils in mainstream classrooms.

Section 11304. State Board of Education Review of Guidelines for Parental Exception Waivers

Education Code section 311(c) provides that LEAs may establish guidelines for not placing pupils with special needs in English language classrooms. Education Code section 311(c) also indicates that the guidelines may be subject to the review of the State Board of Education. This regulation clarifies for LEAs when they may be required to submit their guidelines to the State Board of Education and the purpose of the review.

Section 11305. Community Based English Tutoring.

Education Code section 315 provides funds for English language tutoring. Education Code section 316 provides that the State Board of Education may establish reasonable guidelines for the dispersion of the tutoring funds. Section 11305 contains reasonable guidelines for the English tutoring program.

Subsection 11305(b) requires LEAs to maintain evidence that adult program participants have pledged to provide personal English language tutoring to pupils with limited English proficiency. This requirement provides reasonable accountability for the program participants. Without some sort of certification or pledge of intent, the LEA would have no guarantee that the program participants will provide tutoring to pupils with limited English proficiency. The certification document provides a record of the program participant.

Subsection 11305(c) clarifies for LEAs the types of expenditures the funding may be used for. As in many parental and community involvement programs, the cost of transportation is allowable to permit the participation of parents and community members who otherwise may not be able to participate.

Subsection 11305(d) clarifies for LEAs that they are not eligible for tutoring funds until Proposition 227 becomes effective for the LEA. Since the effective date of Proposition 227 is connected to the school term which next begins following August 2, 1998 and school term starting dates vary from school to school, funding for the tutoring program is also connected to the school term start date. In other words, when the school begins its structured English immersion classes, the school may start to receive funding for tutoring.

PUBLIC HEARING AND COMMENTS

The State Board received many written comments during the 45-day comment period. The original written comments are located in the Public Hearing and Comments section

of the rulemaking file following the public hearing information. Many parents and concerned citizens testified at the public hearing. Tapes of the public hearing are located in the Public Hearing and Comments section of the rulemaking file.

The CDE's responses to the public comments are contained in Enclosure 1 attached to this Final Statement of Reasons. In addition, a detailed response to the written comment on the State Board's authority to adopt regulations on English language education from Waldemar Rojas, Superintendent, San Francisco Unified School District, is attached to Enclosure 1 as Attachment 1.

15-DAY COMMENTS

In response to the public comments made during the 45-day public comment period, the State Board changed the title of the regulations and Subchapter 4. to "English Language Learner Education." The title of Proposition 227, "English Language Education for Immigrant Children" was revised because not all English language learners are immigrants; many are U.S. citizens.

The State Board also amended the title of Section 11302, corrected the reference notation for Castaneda v. Pickard in Section 11302, revised the language in Section 11303(a)(3) to clarify that alternative programs requested by parents must be currently offered at the school, and added a clarifying "for" to 11303(d). These changes were made to the regulations to conform to the changes which were made to the emergency regulations. A 15-day notice of the changes was mailed to all who commented on the regulations or requested a copy of the changes. A copy of the 15-day notice and the mailing list is included in the 15-Day Notice section of the rulemaking file.

The State Board received written comments from five organizations and concerned citizens on the 15-day noticed changes to the regulations. The CDE's responses to the 15-day comments are contained in Enclosure 2 attached to this Final Statement of Reasons. The State Board made no further changes to the regulations.

DISCLOSURES

These proposed regulations do not impose a mandate on local agencies or school districts.

The State Board has determined that no alternative considered by the State Board would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to the affected private persons than the adopted regulations.

The proposed regulations will not have a significant adverse economic impact on businesses. The proposed regulations provide guidance for LEAs.

English Language Education Regulations
Input Analysis and Response
45 Day Comment Period

Title

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Maria Ochoa Los Angeles Unified School District	The title of the regulations needs to be changed to acknowledge that not all English language learners are immigrants. The current title does not accurately represent the student population to be served.	The title of the regulations was changed in response to this suggestion.	Among those students considered English language learners are many who were born in this country and are not immigrants.
Dolores Vasquez Association of California School Administrators	The title of the regulations should be changed because not all English Language learners are immigrants.	The title of the regulations was changed in response to this suggestion.	Among those students considered English language learners are many who were born in this country and are not immigrants.

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Enclosure 1

English Language Education Regulations
Input Analysis and Response
45 Day Comment Period

Knowledge and Fluency in English

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Vicky Bartley, Teacher	The soon to be designated test and the new English language development standards and should be designated for statewide accountability. Students should have some proficiency in English reading and writing to benefit from English mainstream instruction.	No modification of regulations. No modification of regulations.	Current Education Code sections 60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. AB 748 (Escutia) This issue is addressed in Sec. 11301which allows for the use of a variety of instruments in making the determination of reasonable fluency in English.
Jenny Ocón, Public Policy Associate, Northern California Coalition for Immigrant Rights	There should be a statewide standard that determines what the structural English immersion program should accomplish in regards to student achievement.	No modification of regulations at this time.	Current Education Code sections 60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. (AB 748, Escutia) (Chapter 936, 1997) The State Board plans to amend Section 11301(a) to cite the standards as soon as they are developed. This issue is addressed in Section 11301 and allows for the use of a

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			variety of instruments in making the determination of reasonable fluency in English.

English Language Education Regulations
Input Analysis and Response
45 Day Comment Period

Knowledge and Fluency in English

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Hon. Martha Escutia Assemblymember	In Section 11301(a) add a reference to the English language proficiency assessment required by Chapter 936, Statutes of 1997.	No modification of regulations at this time.	Current Education Code sections 60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. (AB 748, Escutia), (Chapter 936, Statutes of 1997) The State Board plans to amend Section 11301(a) to cite the standards as soon as they are developed.
Laura Landeros, Teacher	Section 11301 should state that English proficiency should be measured by the state instrument and standards to be developed. Locally developed assessments should be used only in the interim.	No modification of regulations at this time.	60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. (AB 748, Escutia), (Chapter 936, Statutes of 1997) The State Board plans to amend Section 11301(a) to cite the standards as soon as they are developed.
Dr. Maria Quezada, President California Association for Bilingual Education	Section 11301(a) fails to bring accountability of the structured English immersion program and student achievement because it fails to put into place a statewide standard to measure English	No modification of regulations at this time.	Current Education Code sections 60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. (AB 748 Escutia)

	learning. Calls for the inclusion of language referencing Chapter 936 of 1997 of the EC (AB 748, Escutia)		(Chapter 936, Statutes of 1997) The State Board plans to amend Section 11301(a) to cite the standards as soon as they are developed.
Dolores Vasquez Association of California School Administrators	Means of assessment should be aligned to the English Language Development Standards	No modification of regulations.	Current Education Code sections 60810-60811 already require the eventual use of standards and assessments instruments to be designated by the State Board of Education. (AB 748 Escutia) The State Board plans to amend Section 11301(a) to cite the standards when they are developed.

English Language Education Regulations
Input Analysis and Response
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Parental exception waivers

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Vicky Bartley, Teacher	If parents are denied waivers only on the basis of their children's English oral fluency, they should receive an explanation, and a description of the program their children will receive and be informed of the appeal process.	No modification of regulations.	These issues are dealt with in Section 11303(a) and (c) of the proposed regulations.
Jenny Ocón, Public Policy Associate, Northern California Coalition for Immigrant Rights	All parents' should maintain the right to choose an alternative program in the school or elsewhere. The regulations should not reduce or limit a parent's ability to choose an educational method that they feel is in the best interest of their child. Drop the use of the phrase "if relevant" regarding parent notification of waiver denial.	No modification of regulations. No modification of regulations.	The proposed regulations maintain a parent's right to request an alternative program when it appropriate and offered at the school. The parent always has the right to place his/her child in the school of their choice. Appeal procedures are not required by law.
Laura Landeros, Teacher	Parental waivers shall be granted unless it has been determined that an alternative program offered at the school would not be better for the overall educational development of the child. There needs to be a clear	No modification of regulations. No modification of regulations.	This issue is already dealt with in Section 11303(a)(3) of the regulations. Education Code Section 310.

	statement of parent rights to choose an alternative program or transfer their student to another school. In addressing parent notification of the denial of a waiver, the phrase"if relevant" should be changed to "always." School districts should have the responsibility of determining the best program for students.	No modification of regulations.	already affirms this parent right.. The inclusion of the term "if relevant" allows for necessary school district flexibility and discretion in implementing the law. Appeal procedures are not required by law. Under the proposed regulations districts do have the ultimate responsibility for choosing the child's program.
Hon. Tom Hayden Senator	Concerned over the disruptive nature of the 30-day waiting period before a child may be placed in an alternative program. A regulation should be adopted which minimizes the appeal process waiting period.	No modification of regulations.	Education Code section 311(c) requires that a child with special needs be placed in an English language classroom for a period of not less than thirty days.
Dr. Maria Quezada, President California Association for Bilingual Education	Section 11303(a)(3) will severely restrict parent choice to the programs only offered at the student's school. There is a restriction on transferring students to another school. Section 11303(c) should omit "if relevant" since it is always relevant to inform parents of the appeal process.	No modification of regulations.	There is nothing contained in either the Education Code or the proposed Title 5 regulations, which would prohibit a parent from transferring his child to another school. The inclusion of the term "if relevant" allows for necessary school district flexibility and discretion in implementing the law. Appeal procedures are not required by law.

Diane T. Chin, Executive Director Chinese for Affirmative Action	Regulations should not make it more difficult for parents to choose what they believe to be the appropriate education for their child.	No modification of regulations.	The regulations do provide for parent requests for alternative programs.
Maria Ochoa Los Angeles Unified School District	Regulations should maintain the parents' rights to an alternative program in the school or elsewhere. Waivers should be granted "unless the school principal and educational staff have substantial evidence the alternative program requested is not relevant." Drop the use of the phrase "if appropriate" regarding parent notification of waiver denial	No modification of regulations.	The proposed regulations reflect this point of view that there is a right to parent requests for an alternative program. The inclusion of the term "if relevant" allows for necessary school district flexibility and discretion in implementing the law.
Maria Ochoa Los Angeles Unified School District	The 30 day waiting period should only occur once, the first time that a parent has a waiver request granted. This should not be an annual occurrence.	No modification of regulations.	Education Code Section 311(c), requires a 30 day waiting period during that school year before a parental waiver request is granted.

Yolanda Lopez Grossmont Union High School District	In recognition of the two to three years it takes students to learn English, the regulations should give districts flexibility for multiple year waivers.	No modification of regulations.	There is nothing in the Education Code or proposed Title 5 regulations which prohibits parents from making waiver requests one year after the other. Education Code Section 311(c), which requires annual parent waiver requests.
Dolores Vasquez Association of California School Administrators	It should be the right of the districts to determine program types offered and waiver procedures.	No modification of regulations.	The proposed regulations reflect this point of view.
Mercedes de la Riva Carlsbad Unified School District	The United States and California Constitutions affirm parent choice and the right to select the appropriate program for their students. There is a right to have options; the regulations need to deal with the appeal process when a parental exception waiver is denied.	No modification of regulations.	The proposed regulations do not deal with the appeal process since it is not contained in the related Education Code sections. It is the responsibility of school districts to establish locally determined waiver procedures, pursuant to Education Code Section 311(c).
Maria Luisa Jimenez	Affirms parental right to choose best programs for students. Cites the case for her six children whose learning has been affected by not being proficient in English.	No modification of regulations.	The regulations do provide for parent requests for alternative programs. If alternative program requested is not available at the school. The pupil may attend another school where the program is offered.
Albert Martin Grossmont Union High School District	Given that the one year time limit is too short for an adolescent to become reasonably fluent in English, there should be	No modification of regulations.	Proposed regulation section 11302 acknowledges that students may need longer periods of time to learn English and calls

	a longer time frame stated. This longer time should be allowed without the necessity of a parent exception waiver.		on school districts to provide appropriate services to English learners until English proficiency and academic achievement are accomplished. The one-year time limit was established by Education Code section 305.
Gabriel Mendel Parents for Unity	Parental choice needs to be in the regulations. Parents have the right to appeal a waiver denial.	No modification of regulations.	The proposed regulations do not deal with the appeal process since it is not contained in the related Education Code sections. It is the responsibility of school districts to establish locally determined waiver procedures.
Eva Pacheco, Parent El Cajon School San Diego Unified School District	Proposition 227 has already done a lot of damage to our children. The regulations should make it clear what happens if a parental waiver request is turned down. In other words, how will the appeal process work?	No modification of regulations.	The proposed regulations do not deal with the appeal process since it is not contained in the related Education Code sections. It is the responsibility of school districts to establish locally determined waiver procedures.
Dolores Pineda Chair, District Bilingual Advisory Committee Alum Rock School District	Regulations must support a parent's right to choose and clearly delineate an appeal process.	No modification of regulations.	The proposed regulations do not deal with the appeal process since it is not contained in the related Education Code sections. It is the responsibility of school districts to establish locally determined waiver procedures.
Dolores Pineda Chair, District Bilingual Advisory Committee Alum Rock School District	Once an alternative program is requested by parents, it must be provided by the district.	No modification of regulations.	This would exceed the intent of the Education Code.
Miguel Garibal, Chair	Alternative programs should be	No modification of regulations.	Education Code section 310

District Bilingual Advisory Committee Evergreen School District	offered if 20 or more parents make the request. Bilingual education must be an option if parents want it.		already states that an alternative program shall be provided if 20 or more waivers are granted in a school at a specific grade level, or pupil must be allowed to transfer to a public school in which such a class is offered.
Judith Pelaez, Parent Montebello School District	Decision makers need to listen to parents' comments and respect their decisions.	No modification of regulations.	It is the intent of the Education Code and the proposed regulations that the parents' views be taken into account when placement decisions are made for English learners.
Margarita Mendez, Parent Corey School San Jose Unified School District	Regulations should state that a parent need only make a parental exception request once, not each year.	No modification of regulations.	Education Code section 310 requires annual parent waiver requests.
Araceli Patron, Parent San Jose Unified School District	There should be the guarantee of bilingual classes at all schools where parents ask for the waiver.	No modification of regulations.	Education Code section 310 already states that an alternative program shall be provided if 20 or more waivers were granted in a school at a specific grade level.
Araceli Patron, Parent San Jose Unified School District	The waiver should last for more than one year. It should be permanent.	No modification of regulations.	Education Code section 310 requires annual parent waiver requests.

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Input Analysis and Response
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Other issues

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
J. James Albert, Asst. Sup Corcoran USD	Asks for guidance in understanding the waiver provision, which he sees as undermining the purpose and spirit of the law and what overwhelmingly in English means.	The comments are directed at Proposition 227; do not modify regulations.	The State Board feels that the common use of the word "overwhelmingly" is applicable.
Niels A. Chew, President Sonoma Valley USD Board of Trustees	States that the law now calls on the district to assume additional and burdensome costs to deliver a higher level of service to English learners than before. Therefore, any new regulations should include the provision for reimbursing school districts for these additional costs.	No modification of regulations.	There are no additional costs as additional services to English learners are already required by Education Code, section 305.
Waldemar Rojas, Superintendent San Francisco Unified School District	Section 11303 mandates at least five new requirements on school districts for which no funding sources have been identified.	Do not modify regulations.	There are no additional costs as additional services to English learners are already required by Education Code, section 305.
Vicky Bartley, Teacher	The concept of "overwhelmingly in English" from the law needs to be quantified to avoid wide differences from district to district.	No modification of regulations.	The concept of "overwhelmingly in English" has not been defined in the proposed regulations in order to allow for necessary school district discretion and flexibility in implementing the

			law.
Jenny Ocón, Public Policy Associate, Northern California Coalition for Immigrant Rights	The regulations should not set a fixed definition of "overwhelmingly in English."	No modification of regulations.	The proposed regulations do not provide a definition of "overwhelmingly".
Jenny Ocón, Public Policy Associate, Northern California Coalition for Immigrant Rights	The Coalition supports the concept of district-wide waivers of the "sheltered English immersion program"	No modification of regulations.	Education Code sections 300-340 do not provide for the provision of district-wide waivers.
Hon. Tom Hayden Senator	Districts should have the flexibility to determine what "overwhelmingly in English" means.	No modification of regulations.	The State Board agrees with this suggestion.
Lori Santos, Chair National Coalition for Better Education	Wants to remove the CDE and Superintendent as the entities responsible for administering the community based tutoring program. Urges the SBE to adopt parameters and guidelines for the careful administration of the funds to assure accountability.	No modification of regulations.	Education Code section 316 specifically designates the Superintendent of Public Instruction to administer the funds for adult English classes and community tutoring. Appropriate guidelines are already in place for the effective monitoring of this program.

J. James Albert Corcoran U.S.D.

Requests guidance on interpretation of "nearly all" in English and in use of parental waiver process.

No modification to regulations. (Mr. Albert's request for guidance was forwarded to the Elementary School Division.)

Reference is to language in EC§ 305. which requires that children in public schools be taught English by being taught in English. The regulations do not provide guidance for determining "in (nearly all) English", in order to allow for necessary school district discretion and flexibility in implementing the law. The regulations were designed to allow maximum district flexibility.

Dr. Maria Quezada, President California Association for Bilingual Education	States that because Proposition 227 is a violation of state and federal law, the organization is opposed to the adoption of any regulations.Prop. 227 and its corresponding Education Code sections deprive language minority students of their civil rights in violation of the federal Equal Opportunities Act of 1974. An additional objection is that there are no program prototypes of the one-year immersion programs required by the new law.	No modification of regulations. This comment is directly at Proposition 227.	The proposed regulations have been developed in accordance with the appropriate state laws and procedures.
Dr. Maria Quezada, President California Association for Bilingual Education	The definition of "overwhelmingly in English" should be left to school districts.	No modification of regulations.	Suggestion is reflected in the proposed regulations which do not provide a definition of "overwhelmingly".
Diane T. Chin, Executive Director Chinese for Affirmative Action	We urge the Board to wait (not define overwhelmingly) and allow both students and teachers to adjust to this new learning environment.	No modification of regulations.	Suggestion is reflected in the proposed regulations.
Diane T. Chin, Executive Director Chinese for Affirmative Action	District-wide waivers of the law should be available to allow for the maintenance of effective current bilingual programs.	No modification of regulations.	Education Code sections 300-340 do not provide for the provision of district-wide waivers.
Francisca Sanchez, Director of Curriculum Alameda County Office of Education	Include in the permanent regulations strong statements to the effect that limited English proficient students must meet the	No modification of regulations.	Proposed regulation section 11302 deals with these issues and states that services shall be provided until the students'

	same state adopted grade level standards as native English speakers. There should not be a creation of two separate and unequal systems of education caused by implementing the new law.		demonstrate English language proficiency is that of native English speaking peers and until any academic deficits have been recouped.
Dolores Vasquez Association of California School Administrators	Current flexibility on programs under the emergency regulations is appreciated.	No modification of regulations.	The proposed permanent regulations were developed to continue to provide that flexibility.
Gabriel Mendel Parents for Unity	Regulations should allow for local flexibility in the determination of "overwhelmingly in English"	No modification of regulations.	Suggestion is reflected in the proposed regulations which do not define "overwhelmingly".
Lisa Miri Napa Valley Unified School District	There needs to be overall flexibility for implementation.	No modification of regulations.	Suggestion is reflected in the proposed regulations which provide school district flexibility.
Maria Cortes San Jose Unified School district	Believes in the value of bilingual education.	No modification of regulations.	The proposed regulations allow for bilingual education.
Tatiana Pineda Teacher, San Jose Unified School District President, California Association for Bilingual Education, San Jose Chapter	Primary language support is essential to the provision of equal access to the curriculum. Equal access is denied by using English only.	No modification of regulations.	Use of the primary language is not prohibited under the Education Code sections or the proposed regulations.
Tatiana Pineda Teacher, San Jose Unified School District President, California Association for Bilingual Education, San Jose Chapter	There should be flexibility in defining "overwhelmingly in English."	No modification of regulations.	Suggestion is reflected in the proposed regulations which do not define "overwhelmingly".

Tatiana Pineda Teacher, San Jose Unified School District President, California Association for Bilingual Education, San Jose Chapter	There needs to be a granting of district-wide waivers.	No modification of regulations.	Education Code sections 300-340 do not provide for the provision of district-wide waivers.
Araceli Patron, Parent San Jose Unified School District	School districts should decide the percentage of English to be used in the programs.	No modification of regulations.	Suggestion is reflected in the proposed regulations which do not specify a percentage of English to be used in the immersion classroom.
Waldemar Rojas, Superintendent San Francisco Unified School District	The State Board does not have authority to adopt sections 11300-11303.	Do not modify regulations.	The State Board has general authority to adopt regulations for the government of the schools of the State (Education Code section 33031). See also Attachment 1.
Waldemar Rojas, Superintendent San Francisco Unified School District	Section 11301(a) provides an identical meaning to 2 different phrases employed in Proposition 227.	Do not modify regulations.	The State Board, in adopting Section 11301(a), is attempting to clarify statute.
Waldemar Rojas, Superintendent San Francisco Unified School District	Section 11304(b) delete the second second sentence.	Do not modify regulations.	Education Code section 311(c) specifies that guidelines for examination and approval of special needs are ultimately subject to the review of the State Board. The second sentence is Section 11304(b) merely clarifies that the State Board review shall only be to ensure that the guidelines comply with Section 11303.

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Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Dan and Lupe Buell, San Diego, CA	The state standards for English language development and assessment instrument required under AB 748 (Escutia) should be included in the regulation.	No modification of regulations.	
Dan and Lupe Buell, San Diego, CA	There should be a reference to an English learner transferring to a mainstream classroom after participating in an alternative program under the waiver process.	No modification of regulations.	
Dan and Lupe Buell, San Diego, CA	Section 11301(b) should be revised.	Do not modify regs.	Comment is not related to 15-day changes.
Dan and Lupe Buell, San Diego, CA	Section 11301(e) should be revised.	Do not modify regs.	Comment is not related to 15-day changes.
Dan and Lupe Buell, San Diego, CA	Duration of services Section 11302(a) and (b) should be revised.	Do not modify regs.	Comment is not related to 15-day changes.

Enclosure 2

English Language Education Regulations
Input Analysis and Response
15 Day Comment Period

Parental exception waivers

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Dr. Maria Quezada, President California Association for Bilingual Education	Section 11303 (a) (3) should read: " Parental exception waivers shall be granted unless the school principal and educational staff have substantial evidence that an alternative program requested by the parent would not be better suited for the overall educational development of the pupil." Nowhere in the EC does it say that the granting of a waiver should be conditioned on the availability at the school of the program requested by the parent. This version of the regulations makes the parent request provision of the law meaningless.	No modification of regulations.	The proposed regulations reflect the point of view that parents have a right to request an alternative program for their child. The provisions of Section 11303 do not override Education Code section 310 which requires that individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer such a class.
Peter Roos, Attorney Deborah Escobedo, Attorney Multicultural Education, Training and Advocacy, Inc.	The proposed change is Section 11303(a)(3) violates Proposition 227. Education Code section 311 does not indicate that the decision to grant a waiver should include consideration of the availability of the desired program in the students school.	No modification of regulations.	The proposed regulations reflect the point of view that parents have a right to request an alternative program for their child. The provisions of Section 11303 do not override Education Code

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			section 310 which requires that individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer such a class. The State Board has determined that it would be a financial burden to require the school district to provide each program requested by 20 or more parents with pupils in the same grade level. Education Code section 310 clearly states that pupils shall be allowed to transfer to a public school where the preferred class is offered.
453 Dan and Lupe Buell, San Diego, CA	Parents should be able to re-enroll their students in an alternative program for additional years without having to wait for 30 days each year.	No modification of regulations.	Comment does not relate to 15-day changes.
Dan and Lupe Buell, San Diego, CA	In cases when a parental exception waiver has been denied, the parents shall be advised in writing for the reason(s) for the denial and advised of the appeal procedure.	No modification of regulations.	The proposed regulations do not deal with the appeal process since it is not contained in the related Education Code sections. It is the responsibility of school districts to establish locally determined waiver procedures. Appeal procedures are not required by law.

Forrest A. Ross, Director Language Acquisition Branch Los Angeles Unified School District	In the case of denial of requests, the school should provide "substantial evidence" why the program requested would not be better suited for the child's educational development.	No modification of regulations.	The proposed regulations maintain a parent's right to request an alternative program when it is appropriate and offered at the school. The State Board removed "substantial evidence" because it was vague and not easily defined.
Theresa Garcia California School Boards Association	Update section 11303(a)(3) by adding "available" before alternative program and "or in the district" after offered at the school.	The 15-day changes were made to correct the concern regarding parents being able to dictate the schools the programs the schools will offer. No change was made regarding "or in the district".	These comments do not appear to be directed to the 15-day changes. The comments are to be on earlier draft of the regulations. Education Code section 310 permits pupils (over 20) to transfer to other public schools.
Theresa Garcia California School Boards Association	Included subdivision (a) in referencing Education Code section 311(b) and (c) in section 11303(c).	Do not modify regulations.	The parent of a child eligible under Education Code section 311(a) would not been denied a waiver, therefore, the inclusion in section 11303(c) is not necessary.

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Input Analysis and Response
15 Day Comment Period

Community Based English Tutoring

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
John Kallenberg, President California Library Services Board	Regulations should specifically mention public libraries as among the educational entities eligible to receive and administer the funds for community-based English tutoring. Many libraries participate in the California Literacy Campaign and have a strong record in these types of programs.	No modification of regulations.	Education Code Section 316 states that the funds shall be disbursed locally at the discretion of local school boards. To include this suggested change in the proposed regulations would usurp local prerogatives in the handling of the funds. The proposed regulations do not preclude the disbursement of the funds by local school boards to libraries.

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Other issues

Commenter	*Statements/Comments*	*Response*	*Rationale/Justification*
Dr. Maria Quezada, President California Association for Bilingual Education	This set of regulations contains a substantive change from the previous draft. This change is in the area of parental exception waivers. Therefore there should be a more extensive period of review that 15 days.	No modification of regulations.	This set of proposed regulations does not include substantive changes to those regulations reviewed during the prior public comment period since the same topic of parent exception waivers was included.
Peter Roos, Attorney Deborah Escobedo, Attorney Multicultural Education, Training and Advocacy, Inc.	Same as Quezada above	No modification of regulations.	This set of proposed regulations does not include substantive changes to those regulations reviewed during the prior public comment period since the same topic of parent exception waivers was included.

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RESPONSE TO COMMENTS FROM SAN FRANCISCO UNIFIED SCHOOL DISTRICT (SFUSD) - LETTER OF SEPTEMBER 9, 1998

SFUSD challenges the adopted regulations contending that, with the exception of regulation Sections 11304 and 11305, the SBE has no statutory authority to regulate the schools for purposes of administration of Proposition 227; and that in any event, reliance on the SBE general regulation authority in Education Code section 33031 is misplaced because Proposition 227 is to be implemented by school districts.

SFUSD's position is meritless. The fact that school districts implement Proposition 227 is irrelevant. Title 5, California Code of Regulations (CCR) is replete with State Board of Education (SBE) regulations relating to statutory programs that are implemented by the school districts.

As early as 1912 the California Supreme Court held that the SBE's general regulation authority to regulate for the government of the public schools is sufficient by itself to adopt regulations that are applicable to school districts "unless constrained by some statutory provision." (San Francisco v. Hyatt (1912) 163 Cal. 346 at 354-355.) For example, the SBE could regulate in the area of school transportation fees solely based on the general regulatory authority of Education Code section 33031 had not such regulatory power was statutorily granted specifically to the school districts. (Salazar v. Eastin (1995) 9 Cal.4th 836, at 855-856.)

Proposition 227 does not contain a specific provision that the SBE shall or may adopt regulations for the purpose of implementing the proposition. However, such program-specific regulatory authority is not needed. For example, the Education Code specifically allows school districts to impose fees and charges on students in specific instances but is silent regarding any other possible fees. The Education Code does not grant to the SBE specific regulatory authority in the subject of fees. Yet, the Board adopted Section 350, Title 5, CCR prohibiting all fees, tuition or charges unless specifically authorized by law. In Hartzell v. Connell (1984) 35 Cal.3d 899, the court held that "[r]egulations concerning school fee policies fall well within the scope of the delegated power to adopt regulations 'for the government . . . of the day and evening secondary schools." (Citing Ed. Code § 33031). To hold . . . that administrative prohibitions are valid only when statutory . . . provisions independently prohibit the activities at issue would be to

eliminate any role for administrative discretionary." (Hartzell, supra, at pp. 914-1915.) Note that the regulatory scheme in Sections 11840-11844 is based solely on Education Code section 33031 as the authority (approved by OAL, Register 91, 3/28/91).

Even if Education Code section 33031 is not sufficient as authority for the SBE to regulate the implementation of Proposition 227, the Office of Administrative Law (OAL) recognizes implied authority. Section 14(a)(2) of Title 1, CCR provides that:

> "'Authority' shall be presumed to exist only if an agency cites in its 'authority' note . . . a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt . . . the regulation in order to achieve the purpose for which the power was granted."

Statutory power is granted by Education Code section 33032 which mandates the SBE to "study the educational conditions and needs of the state . . . [and] . . . make plans for the improvement of the administration and efficiency of the public schools of the state." Education Code section 33301(a) states that the "SBE shall be the governing and policy-determining body of the department [of education]" with respect to public education in California. (SBE v. Honig (1993) 13 Cal.App.4th 7420, 753.) Education Code section 62000.1 sunsetted a number of educational programs including bilingual education. However, funding of bilingual education "shall continue for the general purposes of that program as specified in the provisions of that program . . . " The general purpose of the bilingual act of 1976 is to "effectively and efficiently as possible, develop in each child fluency in English." (Ed. Code § 52161.) In that purpose the SBE has a policy development role. (Ed. Code § 52162.) The goal of Proposition 227 is likewise that "all children in California public schools shall be taught English as rapidly and effectively as possible." (Ed. Code § 300[f]; Prop. 227.) Thus the SBE has, within the meaning of OAL's regulation Section 14, Title 1, an implied power to regulate in order to achieve the purpose of developing English fluency in all children in the public schools.

In their comment letter of September 9, 1998, on page 2, SFUSD contends that the adopted regulations violate the "consistency" standard in Government Code section 11349.1. SFUSD states that "[p]roposed regulations by the State Board of Education are inconsistent with Proposition 227 itself. With exception of the two identified sections [Ed. Code §§ 311(c) and 316] Proposition 227 specifies that it is to be implemented and

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carried out by local schools." That argument goes to the issue of authorization for the SBE to regulate, not to consistency. SFUSD gives no examples of how the adopted regulations are not in harmony with or are in conflict with or contradictory to the provisions of Proposition 227. (Definition of "consistency," Gov. Code § 11349(d).) The fact that the school districts implement Proposition 227 is irrelevant. Nothing in Proposition 227 grants rule-making power to the school districts. (See Salazar v. Eastin, supra.)

RDW:ww

FINAL STATEMENT OF REASONS

Update of Initial Statement of Reasons

PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THAT THE REGULATIONS ARE INTENDED TO ADDRESS

Currently regulations providing guidance on English learners are found in Title 5, California Code of Regulations, Sections 4304, 4306, 4311, 4312, and 11300-11305. Title 5, Sections 4304, 4306, 4311, and 4312 are the provisions remaining from the bilingual education program which sunset June 30, 1987. In 1998, to implement Education Code sections 300-311 and 315 (Initiative Measure, Proposition 227), the State Board of Education (State Board) adopted Sections 11300-11305, relating to English language education for immigrant children.

SPECIFIC PURPOSE OF THE REGULATIONS

To provide one coherent system of regulations for English learners, the State Board is moving the Title 5 regulations providing guidance on English learners to one location. Specifically, the State Board proposes to delete Sections 4304, 4306, 4311, and 4312 and include the regulatory provisions in Sections 11303-11310 and 11315-11316. Sections 11303–11305 currently in Title 5 are being renumbered to more logically insert the provisions of Sections 4304, 4306, 4311 and 4312 after Section 11302.

Sections 11304-11305 were added to clarify procedures related to section 11303. Section 11305 is being renumbered to Section 11315 to provide additional room in the regulations for future guidance on reclassification and assessment of English learners. Section 11316 was added to clarify parent notification requirements as a result of the public comment process.

AUTHORITY AND REFERENCE

Authority for these regulations is found in Education Code sections 313(b), 33031, 49062, and 62000.2. Education Code section 313(b) gives the State Department of Education, with the approval of the State Board, authority to establish procedures for conducting the assessment required pursuant to subdivision (a) and for the reclassification of a pupil from English learner to proficient in English. Education Code section 33031 is the State Board's general authority to adopt rules and regulations for the government of the day and evening schools of the state. Education Code section 62000.2 established the program sunset date of June 30, 1987 for the Miller-Unruh Basic Reading Act of 1965, the school improvement program, economic impact aid, and bilingual education. Education Code section 49062 gives the State Board authority to adopt regulations regarding the maintenance of student records. Education Code sections 60640 and 60810 require the State Board to designate assessments to be given annually for academic achievement and English language development. Education Code section 48985 requires parent notification in the primary language whenever 15 percent of more of the pupils enrolled in a public school speak a single primary language other than English.

References for these regulations are Education Code sections 300-311 and 315, 62000 et seq., and 49062, 60640, 60810,and 48985.

NECESSITY

The primary purpose of this regulatory action is to consolidate all Title 5 regulations pertaining to the education of English learners in one location. In the very near future, the State Board and the California Department of Education will be adding to the regulations to provide guidance for conducting the assessment required pursuant to Education Code section 313(a) and for the reclassification of a pupil from English learner to proficient in English. For reclassification purposes, the range of performance will be measured by the linkage between the Standardized Testing and Reporting results and the English Language Development examination, which has not yet been completed.

In the meantime, the State Board would like to improve the system by providing one coherent system of law by moving the pertinent requirements in Title 5, California Code of Regulations, Sections 4304, 4306, 4311, and 4312 to the English learner education regulations in Sections 11300 et seq.

Section 4304. Census.
This section is being repealed and its provisions are being moved to Section 11307 of the English learner regulations. Federal programs for English learners and Economic Impact Aid funding mechanisms are dependent upon the census of English learners.

Section 4306. Reclassification.
This section is being repealed and its provisions are being moved to the English learner regulations. Specifically, the requirements in the opening paragraph and subdivisions (b) and (c) have been moved to Section 11303, and appear in the opening paragraph, and (c) and (a) and respectively. Subdivision (a) was deleted.

The opening paragraph of Section 4306 has been restated in the opening paragraph of Section 11303. Section 4306(b) has been clarified and restated in Section 11303 (c), subsections (1) and (2). Section 4306(c) has been restated in Section 11303(b). Section 4306(a) was deleted.

In addition to the assessment of language proficiency, subdivision (a) incorporates the requirement of Education Code section 313(a) to assess the English language development of English learners, and specifically includes reading and writing, which are an integral part of English language development. Subsection (a) also incorporates the English language development test pursuant to Education Code section 60810.

Section 4306(d) is restated in Section 11304.

Section 4306(e) is restated in Section 11305.

Subdivision (d) has been added to Section 11303 to ensure that the reclassification process includes the evaluation of pupil performance required by Section 11302(b).

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Section 4311. Academic Assessment.
Section 4311 has been deleted and its provisions restated in Section 11306.

Section 4312. Advisory Committees.
Section 4312 has been deleted and its provisions in subdivisions (a), (b), (c,) and (d) have been restated in Section 11308(a), (b), (c), and (d), respectively.

Section 4312(a) has been rewritten to clearly present the provisions of Education Code section 62002.5.

Sections 4312(b)(c) and (d) have been deleted and their provisions restated in Sections 11308 (b)(c) and (d).

Section 4312(c), subsection 7 has been revised as a result of the public comment process.

Section 11303. Reclassification.
As explained above, the provisions of Sections 4306(b) and (c) are restated here.

Section 11304. Monitoring.
The provision of Section 4306(d) is restated here.

Section 11305. Documentation.
The provision of Section 4306(e) is restated here.

Section 11306. Assessment.
The provision of Section 4311 is restated here.

Section 11309 Parental Exception Waivers.
Section 11303 has been further clarified and renumbered here.
Section 11303(a) has been divided into Section 11309 (a) and (b).
Section 11309(a) clarifies the requirements for notifying parents of their rights and the local process for requesting a waiver.
Section 11303(a), subdivisions 1, 2, and 3 were restated and renumbered as section 11309(b), subdivisions 1, 2, and 4, respectively.
Section 11303(a), subdivision 3 was added to clarify the roles school staff and parents have with respect to recommendations for waivers for alternative programs.
Section 11303(b) was renumbered as Section 11309(c).
Section 11303(c) was renumbered as Section 11309(d), and revised to clarify elements of the appeal process.
Section 11303(d) was renumbered as Section 11309(e).

Section 11310. State Board of Education Review of Guidelines for Parental Exception Waivers.
Section 11304 has been renumbered as 11310.

Section 11308. Advisory Committees.
The provisions of Section 4312(a), (b), and (c) have been restated here.

Section 11315. Community Based English Tutoring.
Section 11305 has been renumbered. Space in the numbering of these sections has been provided between Section 11310 and 11315 for insertion of additional assessment and reclassification requirements.

Section 11316. Notices to Parents or Guardians.
This section was added to the regulations through the public comment process. Section 11316 is a reference to the provisions of Education Code section 48985.

DISCLOSURES

These proposed regulations do not impose a mandate on local agencies or school districts.

The State Board has determined that no alternative considered by the State Board would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to the affected private persons than the adopted regulations.

The proposed regulations will not have a significant adverse economic impact on businesses. The proposed regulations provide guidance for local educational agencies, which are not small businesses.

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July 15, 2002
OAL Regulations Summary

The Board approved the proposed English Learner regulations to go out for public comment at the November 8, 2001 meeting.
The 45 day public comment period was Nov. 20-Jan. 10, 2002.
4 comments received

1st 15 day notice Jan. 17-Feb. 1, 2002
(Changes *italicized underlined* and ~~*italicized strikeout*~~ to sections: **11309 (a))**
6 comments received (many signature on petition)

2nd 15 day notice Feb. 20-March 7, 2002
(Changes **bold double underline** to sections: 11316)
The regulations and notices were translated into Spanish
17 comments received

3rd 15 day notice March 13-March 28, 2002
(Changes ***bold italicized single underline*** and ~~***bold italicized strikeout***~~ to sections:
3 (2 late) comments received

4th 15 day notice May 3-May 17, 2002
(Changes shaded underline and ~~shaded strikeout~~ to
Section: 11309 Delete lines 10-18)
6 comments received (plus 2 late)

Regulations were adopted at SBE meeting on May 30, 2002.

Summary of Issues

Comments from 45-Day Notice (November 20, 2001-January 10, 2002)				
Commentor	**Date**	**Section/s**	**Comments**	**Response from State Board of Education**
Senator Richard Polanco	Dec. 20, 2001	Not specific	*I am requesting postponement of the items on the State Board's January agenda pertaining to English learners.*	SBE did not adopt regulations, and sent them out for a 15-day notice.
Maria Quezada California Association for Bilingual Education	Dec. 15, 2001	11309(a) Various sections	*Language decreases a parent's role or ability to choose an alternative program for their children when 20 or more parents at a grade level request that same program. It leaves the decision-making authority to an administrator at the school or district level.* Other sections should remain as is.	SBE deleted the entire section 11309(a) from the proposed regulations. No response needed for comment as it did not request change or clarification.
Salgado and Associates, Inc. Mario Salgado on behalf of 57 individuals	Jan. 9, 2002	11303	*Regulations do not ensure that children will be adequately assessed.* *Regulations do not have a minimum and consistent statewide redesignation criteria that will ensure that will ensure that students will be able to participate effectively in a curriculum designed for pupils for the same age whose native language is English.*	SBE will adopt statewide reclassification criteria after matched test data are available as is stated in Section 11303(d).
Rita Caldera LAUSD	Jan. 10, 2001	11303 11304 11306 11309	1. The proposed regulations do not specifically address several key reclassification issues identified by commentor; 2. *adopt a specific timeframe for monitoring reclassified student;* 3. *specify which assessment instruments will be used annually;* 4. ensure schools will not deny parent waivers solely on the grounds it does not have the personnel to provide the EL educational program options the parent has requested.	1. SBE will adopt statewide reclassification criteria after matched test data are available. SBE adopted guidelines for determining CELDT scores needed for reclassification 2. Setting a timeline would be beyond SBE's statutory authority. 3. Specific ELD and academic assessment instruments to be used annually are stipulated in Education Code Section 60810 et. seq. 4. Section 11309 was modified to include language regarding parent choice.

Comments from 1st 15 day notice Jan. 17-Feb. 1, 2002				
Commentor	**Date**	**Section/s**	**Comments**	**Response from State Board of Education**
Deborah Escobedo Mary Hernandez (META), Anamaria Loya, (La Raza Centro Legal, Inc.) William S. Koski (Stanford Law School) on behalf of 12 organizations, and Jack Daniel, Cynthia Rice on behalf of 2 individuals	Jan. 31, 2002	11309 11308 11303	1. *Subsections are incorrectly alphabetized* 2. *11309 (a) Recommend change the word "any" to "the" as was agreed upon in a meeting.* 3. *11309(b)(3) delete word "solely" from line 15.* 4. *Proposed regulations are inconsistent with Education Code 62002.5. 62002 provides in pertinent part that parent advisory committees shall be established pursuant to the statutes or regulations in effect as of January 1, 1979. The law in effect at that time was 52176. The prior reg. Section 43123 explicitly made reference to EC section 52176. Proposed Section 11308 should not delete the reference to Section 52176.* 5. *11303 does not contain clear criteria for all school district to consistently follow for reclassification of EL students. Recommend using the following minimum criteria: the Early advanced CELDT score and meet grade level standards on the standards-based exams in Language Arts, Math and Reading.*	1. Subsection labels were corrected 2. Entire subsection 11309 (a) was deleted. 3. Entire section 11309 (b)(3) deleted. 4. Reference was not reinstated because it refers to a law that has sunset. 5. SBE will adopt statewide reclassification criteria after matched test data are available from STAR assessments and CELDT as is stated in Section 11303(d).
Shelly Wickwire	Jan. 31, 2002	11309	Commentor asked various procedural questions and did not provide comments about the regulations. *What is the obligation of the district or site to provide an alternative program? When and under what circumstances must a district furnish an alternative program?*	Schools are required to operate an alternative program if there are 20 or more students at a given grade level who receive a waiver, pursuant to Education Code Section 310.
Patricia de Cos	Jan. 31, 2002	11303 11308 11309	1. *Should the regulations include a section to identify the criteria to redesignate a FEP student?* 2. *It is unclear how often a district master plan, school site master plans and a district wide needs assessment on a school-by-school basis will occur. Does the SBE expect these processes to occur annually?* 3. *Will parents be notified that they must request a*	1. SBE will adopt statewide reclassification criteria after matched test data are available as is stated in Section 11303(d). 2. The SBE does not regulate the timeline for developing local plans and needs assessments referred to in this section. Master plans may

			description of the structured English immersion program and any alternative courses of study? *4. Section (c) (3) – clarify "should shall be may."* *5. (f) line 20 should be "are" instead of "is."*	provide district wide guidance for a number of years whereas needs assessments may be needed more frequently, depending upon changes at the local level. 3. Upon being notified of student program placement based on test results, districts are required to provide parents with a full written description of the structured English immersion program and any alternative courses of study. 4. Section (c)(3) was deleted. 5. (f) line 20: "is" was changed to "are."
Devorah Duncan	Feb. 1, 2002	11309	*I am strongly opposed to the restriction of parental rights to request alternative programs. The changes made by the SBE to the regulations were never discussed publicly.* *I am opposed to diminishing the rights of parents of English learner advisory committees.*	The language regarding parent advisory committees remains unchanged from the prior regulations. The deletion of Education Code that has sunset does not diminish the rights of parent advisory committees.
Manuel S. Klausner	Feb. 1, 2002	11309(2) 11309(4) 11309(3)	1. Commentor believes that: *English learners younger than 10 must spend the first 30 days of each school year in an English immersion program before their parents can apply for a bilingual education waiver.* *2. Proposed regulations allow school administrators and teachers to initiate parental waiver requests. Proposition 227 requires that the parents of limited English students be the ones to initiate any waiver requests* *3. Students who are granted bilingual education waivers need not be offered a class at their local school; they need only be provided the right to transfer to some other public school that does offer a bilingual education program.*	1. Language regarding the requirement for placing students in an English immersion classroom was deleted. The SBE decided to let the language of the statute speak for itself and does not address the issue in the regulations. 2. Regulations were changed to clarify that administrators and teachers could recommend, not initiate a waiver. 3. Section 11309(3) was deleted from the regulations.
Petition from San Diego City CABE Chapter with 29 signatures	Feb.4, 2002	11303	*Request SBE to establish statewide for reclassification, criteria including the CELDT.* Petition also requested revisions to assessment administration unrelated to content of regulations.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
Holly Jacobson CSBA	Feb.4, 2002	11309	CSBA supports the adoption of the EL regulations as of this date. Commentor made references to alternative	The comments were received after the Public Notice period from January 17-February 1,

			programs and 30-day English immersion placement.	2002. Therefore, no response is necessary.
Laurie Olsen	Feb.4, 2002	11308 11303	*1. ensure that DELACS are maintained and protected;* *2. set a statewide standard for reclassification.* Commentor also requested revisions to assessment administration unrelated to content of regulations.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary
JoAnne Slater	Feb.4, 2002	11308 11309 11303	*1. Reinstate the language that maintains legal rights for DELACs;* *2. Accept the language that guarantees access to parental exception waivers and alternative programs; and* *3. Set a statewide standard for reclassification to include a minimum score of Early Advanced on the CELDT, and a level of Proficient on the CST in Language Arts (including writing), Math, and Reading.*	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
Esmeralda Villegas	Feb. 4, 2002	11308 11309	Commentor concerned that the regulations: 1. *diminish the rights of EL parent advisory committees (DELACs); and* 2. *restrict parental rights to alternative programs.*	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
Rose Casselman ACSA	Feb. 5, 2002	11303	ACSA supports the adoption of the EL regulations as of this date.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
Jane Manely	Feb. 5, 2002	11309 11303	*1. Uphold the parental exception law of Proposition 227;* 2. *Create a statewide standard for reclassification.*	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary
Maria S. Guasp	Feb. 5, 2002	11303	Requested support from SBE to establish statewide criteria for reclassification. Commentor requested revisions to assessment administration unrelated to content of regulations.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
Robin D. Lovell	Feb. 5, 2002	11308	Urged the SBE to: *reinstate the language that maintains legal rights for DELAC Committees.* Commentor also requested revisions to assessment administration unrelated to content of regulations.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.
23 signatures from individuals	Feb. 5, 2002	No section	Commentors submitted copies of form letters to Governor expressing dissatisfaction with the process	The comments were received after the Public Notice period from January 17-February 1,

			for adopting regulations.	2002. Therefore, no response is necessary
Petition with 132 signatures	Not dated. Received after Feb. 2, 2002	11309	Petitioners requested the SBE to enforce the rights of parents to get waivers for immersion schools.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary
Clara Park David Na Younghee Na	Feb. 5, 2002	11308 11309 11303	1. *Reinstate the language that maintains legal rights for DELACS;* 2. *Leave/Accept the language that guarantees access to parental exception waivers and alternative programs; and* 3. *Set a statewide standard for reclassification.* Commentors also requested revisions to assessment administration unrelated to content of regulations.	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary
Petition from parents and residents of Madera County 5 signatures	Feb. 5, 2002	11308 11309 11303	4. *Reinstate the language that maintains legal rights for DELACs;* 5. *Put in place language that guarantees access to parental exception waivers and alternative programs; and* 6. *Establish a statewide standard for reclassification*	The comments were received after the Public Notice period from January 17-February 1, 2002. Therefore, no response is necessary.

Comments from 2nd 15 day notice Feb. 20-March 7, 2002				
Commentor	**Date**	**Section/s**	**Comments**	**Response from State Board of Education**
Ralph Pacheco	Feb. 26, 2002	No specific section cited	The comments were vague and not specifically related to the English learner regulations.	Only Section 11316 was subject to the Public Notice. The comments did not address this section, and were therefore irrelevant. No response is necessary.
Daniel Aizen	Feb. 27, 2002	11309 11303	*1. Guarantee parental choice in the waiver process. Ensure that in schools where 20 or more parents in the same grade level receive a waiver in which they have requested primary language instruction, a school will be required to provide an alternative program with primary language instruction.* *2. Adopt clear and enforceable statewide reclassification standards for reclassification.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Petitions from 530 individuals	March 1, 2002	11309 11303	*1. Adopt regulations that guarantee parental choice in the waiver process;* *2. Ensure that in schools where 20 or more parents in the same grade level receive a waiver in which they have requested primary language instruction, a school will be required to provide an alternative program with primary language instruction (not an individualized learning plan); and* *3. Adopt clear and enforceable statewide reclassification standards for reclassification.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Don Bridge, Judy Hart, Curtis Washington CTA	March 7, 2002	11303 (b) 11316	*Evaluation of a student's classroom performance should be done by an authorized teacher.* *Notices to all parents/guardians should be provided in a manner that is easily understandable This includes and is in addition to Education Code section 48985.*	Only Section 11316 was subject to the Public Notice. The first comment was therefore irrelevant and no response is necessary. The SBE requires notices to be in a language parents understand as required by Education Code Section 48985. Also, a spoken description of available programs must be provided to parents upon request, Section 11309(b)(1).

Miriam Warren	March 6, 2002	11309 11303	Parents want the SBE to: *Adopt amendments to the regulations guarantee parental choice in waiver process, ensure that schools comply to provide alternative programs, and adopt enforceable statewide standards for reclassification. Do not water down the CELDT by removing the Reading/Writing and retelling portions, use the full CELDT as the single minimum standard for reclassification.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Hector and Maria Rico	March 5, 2002	11309 11303	*Adopt amendments to the regulations that guarantee parental choice in the alternative program waiver process;* *Ensure that schools with 20 or more parents of children in the same grade level receive a waiver in which they have requested primary language instruction to provide primary language instruction; and* *Adopt clear, rigorous and enforceable statewide standards for reclassification of LEP students.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Claudia Lerner	March 5, 2002	11309	The comments were very vague and did not refer to specific section of the regulations. Commentor seeks clarification for what components are in an alternative program.	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Christina Wong Chinese for Affirmative Action	March 1, 2002	11309	*Ensure that school districts do not restrict their alternative programs to courses taught exclusively in English.* *Ensure that schools with 20 or more parents of children in the same grade level receive a waiver in which they have requested primary language instruction to provide primary language instruction.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Mariuccia Iaconi	February 28, 2002	11309	*…Do not permit the rights guaranteed under Prop. 227 to be restricted regarding waivers.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Mara Iaconi	February 28, 2002	11309	*…Do not restrict rights guaranteed to parents. Prop. 227's waiver provisions must be continued to be enforced.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.

Deborah Escobedo Mary Hernandez (META), Anamaria Loya, (La Raza Centro Legal, Inc.) William S. Koski (Stanford Law School) Kyra A. Kazantzis (Public Interest Law Firm, Law Foundation of Silicon Valley) on behalf of 15 organizations, and Jack Daniel, Cynthia Rice on behalf of 2 individuals	March 5, 2002	11309 11303 11308	Replace 11309 (a) with specific changes. Retain language in 11309(b) regarding 30 day placement in English Language Classrooms Set minimum, enforceable statewide standards for the reclassification of English learners. Do not delete the citation for Education Code Section 52176.	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Maria Quezada CABE	March 6, 2002	11303 11308 11309	*Regulations do not establish a minimum statewide standard for reclassificatio.n.* *The deletion of Ed. Code Section 52176 was inappropriate and wholly inconsistent with Section 62002.5.* *Language is now too restrictive.* Commentor proposed various changes.	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Francisco Estrada MALDEF	March 7, 2002	11309	Commentor requested specific changes to 11309(a)(b).	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Alma Van Nice	March 4, 2002	11303	*Request support to establish statewide reclassification criteria. Changes to CELDT should only come about after a thorough process of field-testing and a consensus of results is achieved before full implementation.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary. .
Deborah Campoz	March 1, 2002	11309	Vague comments about the regulations with no specific citation. Commentor wrote that the regulations: *restrict the current options available...children will be forced to accept whatever alternatives school districts offer.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Elena Anaya	Feb. 27, 2002	11303 11309	*State Board should adopt clear and enforceable statewide standard for reclassification.* *SBE should enforce 227 guaranteed parental*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.

			rights: School districts should not restrict their alternative programs to courses taught exclusively in English, and ensure that in schools where 20 or more parents of children in the same grade level receive a waiver the school will be required to provide such children with primary language instruction.	
Jacquelyn B. Munoz on behalf of 15 other individuals	March 8, 2002	11303 11308 11309	*DELAC requests a 40-day initial assessment period.* *DELAC favorably reviewed this section.* *...appreciate the specificity of the proposed waiver procedure. Parents strongly approved the provision of 30 day placement...only one time.*	Only Section 11316 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.

Comments from 3rd 15 day notice March 13-March 28, 2002				
Commentor	**Date**	**Section/s**	**Comments**	**Response from State Board of Education**
Jennifer Worgan	March 18, 2002	11309	*Make it possible for parents to have the real, honest right to choose (the program) for their children.*	The SBE feels that the parents have an honest right to choose the program for their children. The waiver process in the regulations allows them to choose program alternatives to the extent provided by the law.
Michael Verrengia James reed	March 21, 2002	11309	*Administrators should not be involved in the decision-making about programs in which English learners participate. Language should...leave these decisions in the hands of the parents.*	SBE revised regulations to clarify that administrators could recommend, not initiate, enrollment in an alternative program.
Kenneth A. Noonan	March 22, 2002	11309	Commenter believes that the 30-day assignment to immersion classes is for each school year.	Only Section 11309 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Deborah Escobedo Mary Hernandez (META), Anamaria Loya, (La Raza Centro Legal, Inc.) William S. Koski (Stanford Law School) Kyra A. Kazantzis (Public Interest Law Firm, Law Foundation of Silicon Valley) on behalf of 15 organizations, and Jack Daniel, Cynthia Rice on behalf of 2 individuals	March 27, 2002	11309(b)(3) and (5)	*Delete in its entirety Section 11309(b)(3) lines 15-18 at page 9.* *Delete the phrase "offered at the school" in Section 11309(b)(5) line 9 at page 10.*	The SBE deleted the entire section referenced in comments.
Jacqueline Munoz on behalf of 15 other individuals	After March 15, 2002	11309(b)(3)	*While our district maintains our commitment to providing an alternative, the DELAC felt the requirement of 20 or more waiver requests at a grade level effectively removes the impetus for schools districts to provide program consistency and commitment. ...the requirement ensures that*	The SBE has no authority to adopt regulations that go beyond the law or are contrary to the law. The suggested language is inconsistent with Education Code Section 311.

			ELL students will receive the schooling in racially and linguistically isolated classrooms.	
Lilia Stapleton	March 29, 2002	11309	The comments did not specifically reference any section of the regulations.	The comments were received after the Public Notice period from March 13-28, 2002. Therefore, no response is necessary.
JoAnne Slater	April 22, 2002	11309	Commentor supports the language proposed in another letter from META. Requests deletion of 11309(b)(3), lines 15-18 on page 9.	The comments were received after the Public Notice period from March 13-28, 2002. Therefore, no response is necessary.
Karen Cadiero-Kaplan	April 24, 2002	11309 11303	The commentor supports the one time only assignment of English learners to English settings once a student is in a bilingual program or other alternative. The commentor also made vague references to API and redesignation criteria.	The comments were received after the Public Notice period from March 13-28, 2002. Therefore, no response is necessary.

Comments from 4th 15 day notice May 3-May 17, 2002

Commentor	Date	Section/s	Comments	Response from State Board of Education
R.L. Secinaro	Dated April 24, 2002 FAXed May 7, 2002	No section cited	Commentor made vague objections regarding regulations and Proposition 227. There were no references to any sections of the proposed regulations. The commentor stated "*the Department of Education is thwarting the will of the people in regards to Proposition 227...*"	The SBE has the legal responsibility to adopt regulations that guide schools and districts in how they implement all the provisions of Proposition 227. These regulations clarify the law and thus help it to be implemented. In no way is the law impeded by the regulations.
JoAnne Slater	May 17, 2002	11309	Opposed to deletion of Section 11309 lines 10-14 and lines 15-16.	The SBE did not reinstate lines 10-16. The SBE determined that the statute, Education Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Walt Dunlop	May 13, 2002	11303	Requested the *SBE to require English learners to pass the English Language Arts component of the High School Exit Exam as one criterion for reclassification.*	Only Section 11309 was subject to the Public Notice. The comments were therefore irrelevant and no response is necessary.
Drew Kravin	May 17, 2002	11309	Requested that the SBE retain Section 11309, lines 10-18.	The SBE did not reinstate lines 10-18. The SBE determined that the statute, Education

				Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Anne Ginnold	May 17, 2002	11309	Requested that the SBE retain Section 11309, lines 10-18.	The SBE did not reinstate lines 10-18. The SBE determined that the statute, Education Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Juanita Parker	May 17, 2002	11309	Requested that the SBE retain Section 11309, lines 10-18.	The SBE did not reinstate lines 10-18. The SBE determined that the statute, Education Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Marcus Martel	May 17, 2002	11309	Requested that the SBE retain Section 11309, lines 10-18.	The SBE did not reinstate lines 10-18. The SBE determined that the statute, Education Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Deborah Escobedo Mary Hernandez (META), Anamaria Loya, (La Raza Centro Legal, Inc.) William S. Koski (Stanford Law School) Kyra A. Kazantzis (Public Interest Law Firm, Law Foundation of Silicon Valley) on behalf of 15 organizations, and Jack Daniel, Cynthia Rice on behalf of 2 individuals	May 17, 2002	11309	Opposed to deletion of Section 11309, lines 10-14.	The SBE did not reinstate lines 10-14. The SBE determined that the statute, Education Code Section 311(c), adequately addresses the topic and thus the Board has chosen not to regulate in this area. The statute speaks for itself.
Holly Jacobson	May 22, 2002	11309	*Reinstate lines 10-14, page 9 of the proposed*	The comments were received after the Public

CSBA			*regulations.*	Notice period from May 3-17, 2002. No response is necessary.
Senator Richard Polanco	May 30, 2002	11309	Opposed to: *SBE permitting schools to require LEP students to spend 30 days at the beginning of each school year in an English immersion program.*	The comments were received after the Public Notice period from May 3-17, 2002. No response necessary.

Comments Received Prior to any Public Notice Period

Commentor	Date	Section	Comments	Response from State Board of Education
Rose Casselman Association of California School Administrators	Sept. 17, 2001	11303	*ACSA urges the board to consider specifying the statewide average of native English Speakers when drafting the regulatory language for the comparison requirement when reclassifying English Language Learners as proficient.*	The comments were not received during any Public Notice period. No response is necessary.
Carolyn Post	Oct. 11, 2001	11303	*I urge you to amend the guidelines and regulations and establish a statewide standard for reclassifying English Language Learners.*	The comments were not received during any Public Notice period. No response is necessary.
Mary Hernandez Multicultural Education Training and Advocacy, Inc.	Nov. 7, 2001	11309	Section 113909(a) *The new language... decision – making authority for selecting between LEP educational options may well be wrested from parents and reposed in school administrators, who will be able to render parental choice meaningless by eliminating any real options. Such a result would be completely contrary to the design for Proposition 227 to empower parents.*	The comments were not received during any Public Notice period. No response is necessary.
California Association of Bilingual Education (CABE)	Nov. 8, 2001	11309	*The proposed regulations before the state Board contain new language (section 11309a) that appear minor but is indeed a significant revision.* Requested that: *these proposed regulations be ... modified so that the newly added language is removed.*	The comments were not received during any Public Notice period. No response is necessary.
Peter F. Schilla Californians Together	Nov. 8, 2001	11309	*Include all of the items of agreement on the Parent Waiver regulation outlined in the letter from Mary Hernandez to Rae Belisle dated Oct. 30, 2001.*	The comments were not received during any Public Notice period. No response is necessary.

		11308	*Renumber the old regulations but make no word changes to the text of those regulations. Deleting references to Education Code sections is a major substantive change which we strongly oppose*	

ADDENDUM TO FINAL STATEMENT OF REASONS

The Addendum provides additional information requested from the Office of Administrative Law regarding the proposed Title 5, English learner regulations. A comprehensive summary of comments from the public hearing held on January 10, 2002 is attached.

It should be noted that the development of these regulations was a lengthy process that included 4 public notice periods. In considering the regulations, the State Board of Education (SBE) was working with very controversial issues in which various parties demonstrated a great deal of passion and commitment. The SBE was very sensitive to the views of the communities affected and took the time to consider the broadest possible range of comments before adopting the final proposed regulations. In doing so, the SBE had to make a number of changes, including the deletion of its own suggested language. The four 15-Day Notices were necessary for the following reasons:

First 15-Day Notice: Following the public hearing, a 15-day comment period was required because the SBE deleted language that was unnecessary because it did not help to clarify the law.

Second 15-Day Notice: Following the 15-day comment period, a second 15-day comment period was required because the SBE added a new section to the regulations that strengthened access to information for parents who speak languages other than English.

Third 15-Day Notice: A third 15-day comment period was required because the language was added to more clearly define the role of the principal and educational staff regarding the waiver process, to clarify the circumstances under which an alternative program must be taught.

Fourth 15-Day Notice: A fourth 15-day notice was necessary because the SBE decided that language previously added had generated differing opinions regarding its validity. Consequently, the SBE decided to remove any language that could possibly cause confusion, and allow the statute to speak for itself

Summary of Oral Comments from Public Hearing Item #31 January 10, 2002			
Commentor	**Section**	**Comments**	**SBE Response**
Mary Hernandez (META)	All sections	Joined with the Latino Caucus of the Legislature in asking that the SBE delay the English Learner regulations process.	The SBE is sending them out for another comment period so people will have time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments from the public, including parents, for consideration prior to adopting the regulations.
Nikki Cichocki-Bartlett (CTA)	11303(a)	Assessment for oral language proficiency and reclassification should be based on skills of listening, speaking, reading and writing. Els should not be reclassified below the early-advanced level on the state test.	The SBE adopted guidelines for determining CELDT scores needed for reclassification. The criteria include all 4 skill areas (listening, speaking, reading and writing), and do not recommend reclassification if the overall score is below the early-advanced level on the CELDT.
	11309	Supports proposed changes that will be made regarding the parental waivers.	The SBE is proposing regulations that reflect a strong role for parental rights and choice, while at the same time stay within the law.
thy McCreery (ACSA)	11303	Still have concerns about the reclassification guidelines. Support the idea of revisiting it later.	At a later date, the SBE will adopt statewide reclassification criteria after matched test data are available as is stated in section 11303(d).
	11309	Support parental exception waivers section.	The SBE is proposing regulations that reflect a strong role for parental rights and choice, while at the same time stay within the law.
	All sections	Requested that the regulations move forward.	The SBE moved the regulations process forward by sending them out for another public comment period.
Holly Covin (CSBA)	All sections	Support moving the regulations forward.	The SBE moved the regulations process forward by sending them out for another public comment period.
	11309	Supports the parental exception waiver section since it is explicit in stating that schools must offer alternative programs for Els.	The SBE is proposing regulations that reflect a strong role for parental rights and choice, while at the same time stay within the law.
Martha Zaragoza-Diaz (CABE)	All sections	Request delay in regulations process so there is additional time to review them.	The SBE did not adopt the regulations today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have additional time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations.

Marta Valenga (Antioch parent)	All sections	Request delay in regulations process.	There was no final decision regarding the regulations today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations.
Pilar Mejia (SF CABE and Latin American Teachers Association)	All sections	Request SBE to delay decision so immigrant parents will have time to review the regulations.	There was no final decision regarding the regulations today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have time to review it and provide more feedback to the SBE. Also, the regulations were translated into Spanish so more immigrant parents could understand them.
Francisca Buso	All sections	Request SBE to delay regulations decision.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have time to review it and provide more feedback to the SBE.
Joaquina Gomez (LAUSD parent)	11309a	Postpone regulation decision regarding parent rights.	There was no final decision regarding the regulations today (Jan. 10, 2002). The SBE is sending the regulations out for another comment period so people will have time to review them and provide more feedback regarding parent rights to the SBE.
Rosa Tamayo (Montebello parent)	11309a	Postpone regulation decision. Allow more time for individuals to make comments.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have more time to review them and provide more feedback to the SBE. Since over 30 people signed up to speak at the hearing, the SBE maintained that individual public comments be kept to 1 minute. Those who needed translation would receive more time. Written comments will also be considered.
No name stated (San Francisco parent)	All sections	Made general objections about education in California. Requested the SBE not to adopt regulations that "go against English learners or their parents".	The SBE has the legal responsibility to adopt regulations that guide schools and districts in how they implement all the provisions of Proposition 227. The regulations are not intended to go against students or their parents, but to clarify existing law. More public comments will be considered.
Rebecca Bello (San Francisco parent & tutor)	All sections	Delay or postpone decision regarding Proposition 227 regulations.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have more time to review them and provide

			more feedback to the SBE
No name stated	All sections 11309	Postpone decision. Give us time to understand the issues of English learners (eg. Reclassification) Presented SBE with letters from parents.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have more time to review them and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations, including the petitions presented at the meeting.
Alejandro Paez (President of APAL)	All sections 11303	Postpone regulations process. Parents do not have access to this type of information (reclassification). They are not permitted to participate in decision regarding this issue. There is no adequate reclassification for students. The regulations say that parents don't have any rights in the reclassification of their children. The alternative is described in which the principal assumes the role of the parent.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have more time to review them and provide more feedback to the SBE. The SBE is proposing regulations that reflect a strong role for parental rights and choice, while at the same time stay within the law. The notices and regulations were translated into Spanish and disseminated. Translation is available at the SBE meetings for parents wishing to address the SBE. The regulations also specify the role of parents at the local level. The SBE will adopt statewide reclassification criteria after matched test data are available as is stated in section 11303(d). The regulations reflect a parent role in the reclassification process. The regulations describe the role of both the educational staff and the parents in the reclassification process. Parents must be involved in the procedures by receiving notices and being encouraged to participate in the process.
Jorge Perez (San Francisco parent)	All sections	Commentor made a general objection to regulations. Requested SBE to "stop these regulations".	The SBE has the legal responsibility to adopt regulations that guide schools and districts in how they implement all the provisions of Proposition 227.
Yolanda Gomez (Corona Norco parent)	All sections	Request to postpone or delay all regulations that affect all bilingual students.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending them out for another comment period so people will have more time to review them and provide more feedback to the SBE.
Hermelinda Gonzalez (parent from Los Angeles)	All sections	Request more time so parents and the whole community can come together and work on it.	The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the

			regulations. The SBE is sending them out for another comment period so parents and communities will have more time to review them and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations
Rosalia Salinas (San Diego COE)	11309	Urged SBE to delay any decisions today-particularly in the area of parent waivers.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have more time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations.
Rafael Flores (Parent)	11309	Delay or postpone regulations regarding parent waivers.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have more time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations.
Ignacio Andrade (Porterville Parent)	All sections	Request SBE to postpone decisions. It is hard for parents to obtain and information (in Spanish) about English learner programs.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have more time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations. The SBE translated and disseminated the proposed regulations and notices into Spanish so many more parents would have access to the information. The regulations (Section 11316) define the circumstances for which notices in the primary languages of parents must be disseminated at the local level.
LeoncioVasquez	All sections 11309	Requested that SBE delay their decisions about regulations today. Parents should all get the power to decide what type of education their children should receive.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have more time to review it and provide more feedback to the SBE. The SBE is proposing regulations that reflect a strong role for parental rights and choice, while at the same time stay within the law.
Unable to discern name esno USD parent)	11309	Parents should have power –opportunity to decide what type of education their children	The SBE is proposing regulations that reflect a strong role for parental rights

		receive.	and choice, while at the same time stay within the law.
.mpia Dominguez (Fresno parent)	All sections	Delay any decision on whatever is on your agenda.	The regulations were not up for approval today (Jan. 10, 2002). The SBE is sending it out for another comment period so people will have more time to review it and provide more feedback to the SBE. The SBE wants to obtain the broadest possible range of comments for consideration prior to adopting the regulations.
Victor Castro (Porterville Parent)	None	Gave his time to next speaker.	N/A
Raul Pickett (Porterville)	All sections	Expressed general objections about the proposed regulations and his local education system. Stated that "these regulations shouldn't be considered - they're appalling."	The SBE has the legal responsibility to adopt regulations that guide schools and districts in how they implement all the provisions of Proposition 227.
Pascual Flores (Porterville parent)	All sections	Commentor discussed his experience growing up within the school system with no special help. His kids are now in this situation.	The SBE has the legal responsibility to adopt regulations that guide schools and districts in how they implement all the provisions of Proposition 227. These regulations will clarify parental choices under the law.
Peggy Barber (LAUSD)	11303 11304 11309	SBE should set a state standard for reclassification. It should take into account language proficiency and material learned in the content areas. Supports the requirements to monitor students for at least 2 years after redesignation so they don't fall through the cracks. Supports parental waiver language in regulations.	The SBE will adopt statewide reclassification criteria after matched test data are available as is stated in section 11303(d). The SBE is proposing regulations that include the monitoring of student progress after redesignation, and that reflect a strong role for parental rights and choice, while at the same time stay within the law.

Instructions for the Spring Language Census (Form R30-LC)

Reporting Year: 2011

California Department of Education
Educational Demographics Office

February 2011

Table of Contents

General Information

What Is the Language Census?
The Language Census is collected each spring. The purpose of the survey is to collect background and programmatic data on students from non-English-language backgrounds enrolled in public schools in California and to collect data on the staff that provide services to English learners (ELs). These data are collected on the R30-LC form and submitted electronically. The submission of the R30-LC is required by the California *Education Code* (*EC*) Section 52164, the No Child Left Behind (NCLB) Act, and federal case law.

How is the Information Used?
Information collected through the Language Census is designed primarily for use by the California Department of Education (CDE) to produce state and federal reports. Language Census data are also used to compute funding for Title III, the Community-based English Tutoring (CBET) program, Economic Impact Aid (EIA) for English Learners, and the English Language Acquisition Program (ELAP).

Additional uses of Language Census data include projections of future English learner enrollments and teachers that provide instructional services to English learners. Data from the Language Census may also serve local needs, such as class load analyses, program design, and to determine school staffing needs.

Language Census data, after review and certification, are also made available to educational institutions and the general public on the Data and Statistics Web page at http://www.cde.ca.gov/ds/.

For assistance accessing data, please contact the Educational Demographics Office at 916-327-0219.

Who Completes the Language Census?
Submission of the Language Census for each school is a local educational agency (LEA) responsibility, and data must be submitted for every public school (grades kindergarten through twelve). The following list shows the types of schools that are required to submit Language Census data:

- All traditional public schools
- California Education Authority schools
- Charter schools (required under federal case law)
- Juvenile hall/court schools
- County community schools
- Community day schools
- Continuation schools
- Alternative schools of choice
- Opportunity schools
- LEA reports special education students sent to one or more nonpublic, nonsectarian (NPS) schools

Who Does Not Complete the Language Census?
The following types of schools do not submit Language Census data:

- Preschools
- Children's centers
- Adult schools
- Regional occupational centers
- State Special schools
- Private schools

Changes to the Language Census for 2011
The only change to the Language Census this year is the addition of four new languages; Kannada, Marathi, Tamil, and Telugu.

In addition to data being collected through the Language Census, data will also be collected through CALPADS Fall 2 and Spring 1 data collections.

Similar to last year, the detailed counts of ELs and fluent English proficient (FEP) students by grade and language will not be included in this collection. Instead it will be collected through the CALPADS Spring 1 collection.

Significant Dates - 2011
The following are significant dates for the 2011 Language Census data collection process.

Date	Topic
February	Language Census coordinators receive materials from the CDE.
March 1	**Language Census Information Day.**
March 25	Language Census data due to the CDE.
April 8	The CDE notifies LEA superintendents if Language Census data are not received by this date.
April 29	Final date to submit amendments to the CDE.

Language Census Materials, Collection of Data, and Data Submission Options

Language Census Materials

All materials necessary for completion of Language Census data, as well as additional reference materials are available on the Language Census Instructional Materials Web page at http://www.cde.ca.gov/ds/dc/lc/index.asp.

The following materials should be used or referenced when collecting and submitting Language Census data:

- Language Census Software
- Forms and instructional materials
- Instructions for the Spring Language Census
- List of Expected Schools
- Software news and updates
- Software file layout
- School-level instructions for using the Software
- Letters from the CDE
- Language Census coordinator information

List of Expected Schools

The List of Expected Schools is a list of schools in your LEA that are expected to submit Language Census data. This list may also be used to notify the CDE of closed and/or inactive schools. The county/district superintendent's signature is required for closed or temporarily closed schools. If there are any updates, the completed list may be returned to the Educational Demographics Office by fax at 916-327-0195, or by mailing it to:

Educational Demographics Office
California Department of Education
1430 N Street, Suite 6308
Sacramento, CA 95814

To obtain a copy of the List of Expected Schools, visit the Language Census Coordinator Login Page at http://dq.cde.ca.gov/dataquest/lclogin.asp.

Collection of Language Census Data

Each LEA has designated a local contact to receive Language Census correspondence, collect data, and return the Language Census data to the CDE. Language Census data are collected on March 1, 2011, and the data are due to the CDE on March 25, 2011. If data cannot be collected on March 1, 2011, because the school is on a year-round or multitrack schedule and is not in session on March 1, 2011, data for students and staff should be collected on the last day in session before March 1, 2011, or on the first day back after March 1, 2011, whichever date is closer. Combine the data for students and staff that are in session on March 1, 2011, with those who are off track on March 1, 2011.

Submission of Language Census Data

Language Census data are submitted electronically by either using the Language Census Data Entry Assistant (LCDEA) software or by logging in to the Language Census Coordinator Login Web page and submitting data via the Internet. The two submission options are described below.

Submission Using the LCDEA Software

The LCDEA software is used by LEAs to submit Language Census data for each of their schools. It is also to be used by independently reporting charter schools to submit data. R30-LC paper forms are **NOT** to be submitted to the CDE.

The software must be downloaded from the Language Census Software News Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp. In order to use the software, you must have Internet access and Windows 95 (or later versions of Windows). The software is **not Macintosh compatible**.

See the Appendix for a quick guide to using the software. For more information on using the software and to obtain software updates, please visit our software news Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp.

Submission Using the Coordinator Login Page

The Coordinator Login page is only to be used by independently reporting charter schools and LEAs that **do not have Language Census data to report** for any of their schools as of March 1, 2011.

To use the Coordinator Login page to complete your Language Census data submission, follow the steps below.

Step	Action
1	Go to the Coordinator Login Web page at http://dq.cde.ca.gov/dataquest/lclogin.asp.
2	Enter your password.
3	Select the option to certify that you do not have data to report.
4	Follow the prompts on the screen and enter the appropriate information.
5	Click on the submit button.
6	Print the confirmation page and file it for your records. You do not need to submit this or any other paperwork to the CDE.

Contact Information

Please contact the following CDE staff for assistance with the Language Census data collection.

Data Submission Assistance
Dorothy Aicega 916-327-0208 - daicega@cde.ca.gov
Shana Yeary 916-327-5927 - syeary@cde.ca.gov

Software Assistance
Phyllis Wilburn 916-327-0211 - pwilburn@cde.ca.gov

English Learner Program and Policy Information
Language Policy and Leadership Office, 916-319-0845

Glossary of Terms

Adults
Adults include students 21 years of age or older and students 19 years of age or older who have not been continuously enrolled in kindergarten on any of grades one to twelve, inclusive, since their 18th birthday.

Alternative Course of Study
An alternative course of study setting is one in which ELs are taught English and other subjects through bilingual education techniques or other generally recognized methodologies permitted by law. The students enrolled in this setting have been: (1) granted a parental exception waiver pursuant to *EC* 310 and 311; or (2) enrolled in any alternative education program operated under the State Superintendent of Public Instruction's waiver authority (*EC* 58509) when such an alternative for ELs was established specifically to waive one or more sections of *EC* 300–340; or (3) enrolled in a charter school program which offers any alternative course of study for ELs.

Bilingual Certificate of Competence (BCC)
A BCC is a California Commission on Teacher Credentialing (CCTC) certificate that authorizes the holder to provide English-language development (ELD), specially designed academic instruction in English (SDAIE), and primary language instruction to ELs in the subject area and grade level of the prerequisite credential. This certificate is no longer initially issued but remains valid and appropriate to serve ELs.

Bilingual Crosscultural Language and Academic Development (BCLAD)
A BCLAD is a CCTC credential that authorizes the holder to provide ELD, SDAIE, and primary language instruction to ELs in the subject area and grade level of the prerequisite credential.

Bilingual Paraprofessional
A bilingual paraprofessional is an aide fluent in both English and the primary language of the pupil or pupils of limited English proficiency and provides primary language support. Such paraprofessionals should meet district criteria that ensure they are (1) able to understand, speak, read and write English and the primary language; and (2) are familiar with the cultural heritage of the ELs.

Bilingual Specialist
The Specialist Instruction Credential in Bilingual Crosscultural Education Instruction authorizes the holder to provide ELD, SDAIE, and primary language instruction to ELs. There is no restriction to subject area or grade level of the prerequisite credential.

California Education Authority School
The California Education Authority (CEA), formerly known as the California Youth Authority (CYA), is the last stop within the juvenile justice system and receives students adjudicated from the juvenile and adult court systems. The legislature established this education authority as a statewide correctional school district in 1997.

California English Language Development Test (CELDT)
The CELDT is a required state test that must be administered to students whose primary language is other than English to assess English language proficiency.

The CELDT (instituted by *Education Code (EC)* sections 313 and 60810[d]) has three purposes: (1) to identify students who are limited English proficient; (2) to determine the level of English-language proficiency of students who are limited English proficient; and (3) to assess the progress of limited-English-proficient students in acquiring the skills of listening, reading, speaking, and writing in English. Additionally, the CELDT meets the requirements of Title III of the No Child Left Behind Act of 2001.

CELDT Scoring
The CELDT report for each student provides the following:

- An overall English performance level and scale score for all domains of the test combined.
- A scale score and a performance level for each domain tested (listening, speaking, reading, and writing).
- A comprehension score that is an average of the scale scores for listening and reading. (No performance levels are available for combined scale scores because combined scores are derived from scale scores for which performance levels are provided.)

CELDT Overall Performance Levels
The State Board of Education (SBE) established five performance levels for measuring a student's proficiency in English, based on the CELDT scores. Those levels and descriptors are listed below.

- **Beginning –** Students performing at this level of English-language proficiency may demonstrate little or no receptive or productive English skills. They are beginning to understand a few concrete details during unmodified instruction. They may be able to respond to some communication and learning demands, but with many errors. Oral and written production is usually limited to disconnected words and memorized statements and questions. Frequent errors make communication difficult.
- **Early Intermediate –** Students performing at this level of English-language proficiency continue to develop receptive and productive English skills. They are able to identify and understand more concrete details during unmodified instruction. They may be able to respond with increasing ease to more varied communication and learning demands with a reduced number of errors. Oral and written production is usually limited to phrases and

memorized statements and questions. Frequent errors still reduce communication.

- **Intermediate –** Students performing at this level of English-language proficiency begin to tailor their English-language skills to meet communication and learning demands with increasing accuracy. They are able to identify and understand more concrete details and some major abstract concepts during unmodified instruction. They are able to respond with increasing ease to more varied communication and learning demands with a reduced number of errors. Oral and written production has usually expanded to sentences, paragraphs, and original statements and questions. Errors still complicate communication.
- **Early Advanced –** Students performing at this level of English-language proficiency begin to combine the elements of the English language in complex, cognitively demanding situations and are able to use English as a means for learning in content areas. They are able to identify and summarize most concrete details and abstract concepts during unmodified instruction in most content areas. Oral and written production is characterized by more elaborate discourse and fully-developed paragraphs and compositions. Errors are less frequent and rarely complicate communication.
- **Advanced –** Students performing at this level of English-language proficiency communicate effectively with various audiences on a wide range of familiar and new topics to meet social and learning demands. In order for students at this level to attain the English-proficiency level of their native English-speaking peers, further linguistic enhancement and refinement are still necessary. Students at this level are able to identify and summarize concrete details and abstract concepts during unmodified instruction in all content areas. Oral and written production reflects discourse appropriate for content areas. Errors are infrequent and do not reduce communication.

Certificate of Completion of Staff Development (CCSD)
The Certificate of Completion of Staff Development authorizes the holder to provide ELD and SDAIE to ELs in the subject area and grade level of the prerequisite credential.

Charter School
A charter school is a public school that may provide instruction in any of grades kindergarten through twelve. A charter school is usually created or organized by a group of teachers, parents, and community leaders or a community-based organization and is usually sponsored by an existing local public school board or county board of education. A charter school is generally exempt from most laws governing school districts, except where specifically noted in the law.

Community Day School
Community day schools serve mandatorily and other expelled students, students referred by a School Attendance Review Board (SARB), and other high-risk youth. The laws specific to community day schools are in *EC* sections 48660-48667.

County Community School
County community schools are operated by county offices of education to serve students in four categories: students who are expelled from their regular schools, students who are referred by a SARB or at the request of the pupil's parent/guardian, students who are referred by a probation officer (pursuant to *Welfare and Institutions Code* sections 300, 601, 602, 654) or who are on probation or parole and not in attendance in any school, and students who are "homeless" children. The educational programs are authorized by *EC* sections 1980-1986.

Although many students graduate from county community schools, the programs are designed to help students in transition to an appropriate educational, training, and/or employment setting upon their release or after the court terminates its jurisdiction.

Crosscultural Language and Academic Development (CLAD)
A CLAD is a CCTC certificate that authorizes the holder to provide ELD and SDAIE instruction to ELs in the subject area and grade level of the prerequisite credential.

Education Specialist (special education) Credential, Internships, Short-Term Staff Permits (STSPs), or Provisional Internship Permits (PIPs) with EL Authorization
An Education Specialist credential authorizes providing services to special education students and in the area of ELD and SDAIE to ELs in the subject area and grade level of the specialist credential. PIPs and STSPs are issued on a year to year basis.

Emergency Authorization for Bilingual Education
An emergency authorization for bilingual education is a CCTC credential that authorizes the holder to provide ELD, SDAIE, and primary language instruction to ELs in the subject area and grade level of the prerequisite credential on a year to year basis.

Emergency CLAD
An emergency authorization for bilingual education is a CCTC credential that authorizes the holder to provide ELD and SDAIE to ELs in the subject area and grade level of the prerequisite credential on a year to year basis.

English Language Development (ELD)
ELD is English-language development instruction appropriate for the EL's identified level of language proficiency. Such instruction is designed to promote the effective and efficient acquisition of listening, speaking, reading, and writing skills of ELs.

English Language Mainstream Class - Parental Request
An English language mainstream setting with parental request is one in which ELs who have **not** met local district criteria for having achieved a "good working knowledge" (also defined as "reasonable fluency") of English are enrolled in an English-language mainstream class and are provided with additional and appropriate services on the basis of a parental request.

***Note*:** *CCR T5*, Section 11301(b), permits a parent or guardian of an EL to request, at any time during the school year, that a child placed in structured English immersion be transferred to an English-language mainstream class and be provided with additional and appropriate services.

English-Language Mainstream Class - Students Meeting Criteria
An English language mainstream setting with student meeting criteria is one in which ELs who have met local district criteria for having achieved a "good working knowledge" (also defined as "reasonable fluency") of English are enrolled and provided with additional and appropriate services. For example, a school district may organize its English-language mainstream setting (with additional and appropriate services) to accommodate those ELs who score at the advanced intermediate and advanced levels on the CELDT (*EC* 305; *CCR T5* 11301 and 11302).

English Learner (EL)
Students for whom there is a report of a primary language other than English on the state-approved "Home Language Survey" and who, on the basis of the state-approved California English Language Development Test (CELDT), have been determined to lack the clearly defined English language skills in the domains of listening, speaking, reading, and writing necessary to succeed in the school's regular instructional programs.

Fluent-English-Proficient (FEP) Students
Students whose primary language is other than English and who have met the district criteria of proficient in English (i.e., those students who were initially identified as FEP [IFEP] and students reclassified from EL to FEP [RFEP]). All FEP students (IFEP and RFEP) are reported every year as long as they are enrolled at the school.

General Elementary or Secondary Credential (ELD only)
Holders of a General Elementary and Secondary credential may provide only ELD instruction to ELs. This authorization is no longer initially issued but remains valid and appropriate to serve ELs.

Home Language Survey
The home language survey (HLS), required by *EC* Section 52164.1, is a part of the Language Census collection process required by the *California Code of Regulations, Title 5* (*CCR T5*), Section 11301(b). This form is administered by the school and is to be completed by the pupil's parent or guardian only at the time of first enrollment in a California public school indicating language use in the home. If the HLS indicates a language other than English, the students must take the CELDT within 30 days of initial enrollment so the students can either be designated as fluent English speakers or as English learners.

Juvenile Hall/Court School
Juvenile hall/court schools provide an alternative educational program for students who are under the protection or authority of the juvenile court system and are incarcerated in juvenile halls, juvenile homes, day centers, juvenile ranches, juvenile camps, or regional youth educational facilities. Students are placed in juvenile hall/court schools when they are referred by the juvenile court. County boards of education administer and operate the juvenile hall/court schools authorized by *EC* sections 48645-48645.7.

These programs meet the educational needs of students who have been incarcerated or placed in group homes, camps, or ranches as well as students who have been expelled from their home district schools because of a status offense or other infraction or behavior governed by the *Welfare and Institutions Code* or *Education Code.*

Language Code
A language code is a two-digit number assigned to each primary language identified in California public schools. See the R30-LC form in the Appendix for the set of codes used in the Language Census data collection.

Language Development Specialist (LDS) Certificate
An LDS certificate is a CCTC certificate that authorizes the holder to provide ELD and SDAIE instruction to ELs in the subject area and grade level of the prerequisite credential. This certificate is no longer initially issued but remains valid and appropriate to serve ELs.

Multiple or Single Subject Credential, Internship (university or district), Provisional Internship Permits (PIP), or Short-Term Staff Permits (STSP) with EL Authorization or CLAD Emphasis
A CCTC credential that authorizes the holder to provide ELD and SDAIE instruction to ELs within the authorization of the multiple or single subject credential. PIPs and STSPs are issued on a year to year basis.

Nonpublic, Nonsectarian School (NPS)
NPS schools are included in the Language Census data collection for reporting EL and FEP students who are sent to these types of schools for special education services that the district cannot provide.

A NPS school is a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an individualized education program and is certified by the CDE. It does not include an organization or agency that operates as a public agency or offers public service, including, but not limited to, a state or local agency, an

affiliate of a state or local agency, including a private, nonprofit corporation established or operated by a state or local agency, or a public university or college. A NPS school also shall meet standards as prescribed by the Superintendent and board.

Parental Request for English Language Mainstream Class
A parental request for English language mainstream class is a verbal or written request on the part of parents or guardians to have their child transferred from a structured English immersion setting and placed in an English-language mainstream class and provided with additional and appropriate instructional services as authorized by CCR T5, Section 11301(b).

Parental Exception Waiver from English-Language Classrooms
A parental exception waiver from English-language classrooms is a written request from parents or guardians of ELs who petition for enrollment in a bilingual education class or other generally recognized alternative course of study. Pursuant to *EC* sections 310 and 311, districts are required to process parental exception waiver requests.

Primary Language
The primary language is the language the student first learned, the language spoken by the student, or in the case of students too young to speak, the language spoken most frequently by adults in the home. The primary language, also known as "native language," should be identified only once during the course of a student's school career and should never change.

For students in grades K-12, the primary language is identified at the local level from information gathered on the Home Language Survey and other indicators determined at the local level. For prekindergarten students, this is identified at the local level from either the "Home Language Survey" if available, or the "Child Development Services and Certification of Eligibility" form, using the "Native Language" section. If these two forms are not available, and no other reliable resource for this information is available, then use the language spoken most frequently by adults in the home.

Whenever American Sign Language (ASL) or another sign language is the **only** language other than English reported on the Home Language Survey the student should not be assessed for English language proficiency. Please refer to part 1 instructions for reporting primary language for additional information on assessing students with ASL in their backgrounds.

Primary Language Instruction
Primary language (L1) instruction is instruction taught by teachers primarily through the EL's primary language. In self contained classrooms (typically kindergarten through grade six), L1 instruction must be provided, at a minimum, in language arts (including reading and writing) and mathematics, science, or social science. In departmentalized classrooms (typically grades seven through twelve), L1 instruction must be provided, at a minimum, in any **two** of the following areas: language arts, mathematics, science, and social studies.

Primary Language Support
Primary language support is the use of the student's primary language to clarify meaning and facilitate comprehension of academic content taught through SDAIE or mainstream English. L1 support is not the same as primary language instruction as defined above.

Reclassification
Reclassification takes place when a student meets all state and local criteria for demonstrating English proficiency. Students are reclassified according to the *Guidelines for Reclassification of English Learners* adopted by the State Board of Education (SBE) (September 2002 and updated in September 2006) and demonstrate English language proficiency comparable to that of average native English speakers. (*EC* Section 313(d)).

School districts are to develop student reclassification policy and procedures based on the four criteria set forth in *EC* Section 313(d), as well as guidelines approved by the SBE. The four criteria established by *EC* Section 313(d) are:

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

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

3. Parental opinion and consultation.

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

Senate Bill (SB) 1969 Certificate of Completion of Staff Development
The SB 1969 Certificate of Completion of Staff Development is a locally-issued document that authorizes the holder to provide ELD and SDAIE to ELs in the subject area and grade level of the prerequisite credential. This certificate is no longer initially issued but remains valid and appropriate to serve ELs.

Sojourn Authorization for Bilingual Education
A sojourn authorization for bilingual education is a CCTC credential that allows the holder (usually a foreign-exchange teacher) to provide primary language instruction

to ELs.

Special Temporary Certificate in Multiple Subject, Single Subject, and Education Specialist (previously known as Individualized Internship) with EL Authorization, BCLAD Emphasis, or CLAD Emphasis
This certificate authorizes the holder to provide ELD, SDAIE, and primary language instruction to ELs as appropriate to the EL, BCLAD or CLAD authorization on the document and in the subject area and grade level of the credential. This authorization is no longer initially issued but remains valid and appropriate to serve ELs.

Specially Designed Academic Instruction in English (SDAIE)
SDAIE is an instructional approach in English used to teach academic courses, such as mathematics and social science to ELs, and is designed to increase the level of comprehensibility of the English-medium instruction.

State Special School
State Special Schools are schools that provide intensive, disability-specific educational services for students who have visual or auditory impairments and whose primary learning needs are related to their visual or auditory impairment.

State Special Schools are statewide resources that offer expertise in the low-prevalence disabilities of visual and auditory impairments through innovative model programs, assessment, consultation and technical assistance, professional development, research and publications, advocacy, and outreach.

Structured English Immersion
A Structured English Immersion setting is one in which ELs who have not yet met local district criteria for having achieved a "good working knowledge" (also defined as "reasonable fluency") of English are enrolled in an English-language acquisition process for young children in which nearly all classroom instruction is in English, but the curriculum and presentation are designed for children who are learning the language.

Supplementary Authorization for English as a Second Language (ELD only)
A supplementary authorization in English as a Second Language (ESL) is an authorization from CCTC added to a valid prerequisite credential that allows the holder to provide only ELD instruction to ELs. This authorization is no longer initially issued but remains valid and appropriate to serve ELs.

Instructions for Completing the Language Census (R30-LC)

Submission, Contact, and Certification

School Identification Information
The county-district-school (CDS) code and school name are used to identify which school the data are for. The following options are available for obtaining school identification information when providing site copies to each school:

- LEAs can use the LCDEA software to print forms, which contain the school identification information for each school. This is the preferred method because the information is accurate.
- If the LEA decides to print a blank Language Census paper form from the Language Census Instructional Materials Web page, they should use the "Language Census List of Expected Schools" as the source for the CDS code and school name. This list was included in the mailing in February.

Submission Options

- **If there are no data to report as of March 1, 2011:** Check the first box in the submission section. **Note:** If you send students to NPS schools, but none of the students are ELs or were reclassified in the past year, check this box for the NPS school. If you do not send students to NPS schools, delete the NPS school from the software.
- **If there are one or more EL or reclassified students enrolled as of March 1, 2011:** Check the second box in the submission section and complete Parts 2, 3, and 5. Note, the other portions of this form will be reported through either the California Longitudinal Pupil Achievement Data System (CALPADS) or the California Basic Educational Data System (CBEDS).

Contact Information
Enter the name and phone number of the person completing the form as well as the name and job title of the person certifying the data. The contact person must be able to verify the submitted data and to provide assistance to CDE staff if errors or inconsistencies are found with the data.

Primary Language Codes
Only those codes listed for the primary languages on page 1 of the R30-LC form may be used in Part 5.

English Learner (EL) and Fluent-English-Proficient (FEP) Students (Part 1)

The total school wide counts of English learners will be collected in Part 2, row 2. Detailed counts of ELs and FEPs by grade and language, previously collected on the Language Census, will not being collected on the Language Census this year. This detailed data will be obtained from the CALPADS spring submission of student-level data.

English Learners' Instructional Information (Part 2)

Part 2, Row 2 – Count of English Learners
Report the count of all identified ELs enrolled as of March 1, 2011.

If an EL is concurrently enrolled in more than one school in a district, the student is to be counted only once, in the school in which they receive the majority of their educational program.

Include in your count of ELs, any long-term independent study students. Long-term independent study students are to be reported at the school in which they are enrolled.

LEA special education students who are sent to NPS schools for special education services that the LEA cannot provide should also be reported on the Language Census. School code "0000001" has been added to the Language Census software for reporting information on LEA special education students who are sent to one or more NPS. If these students are also ELs, report them on the Language Census by completing Parts 2 and 3. If you send students to NPSs, but none of them are EL/FEPs, check the first box in the submission section and submit a Language Census for the NPS. If you do not send students to NPSs, delete this school from the software.

Foreign exchange students are to be treated as any other student and should be counted appropriately in the Language Census collection if they are found to be ELs or FEPs.

Adults enrolled in a kindergarten through grade twelve (or ungraded) public education program must also be assessed for English language proficiency and provided services as appropriate. These students are to be included in the count of ELs reported on the Language Census form. Adult education students not in a K-12 public education program and adults in correctional programs (inmates) are not included in this data collection. Please refer to the glossary for a definition of adults.

Please note that American Sign Language (ASL), by itself, would not trigger assessment of English language proficiency. When determining the primary language and level of English language proficiency of students who have ASL in their backgrounds, the following should be considered:

1. If the only language other than English reported on the Home Language Survey is ASL, the student should not be assessed for English language proficiency. The pupil may have a hearing impairment and should be referred to special education. It is also possible that the student has normal hearing but has learned to sign because one or more parents have a hearing impairment. In this situation, most students will be classified as English only (monolingual English) for the purposes of the Language Census.

2. If there is a language other than English, besides ASL, reported on the HLS (such as Spanish), the CELDT, or an alternative instrument, should be administered. Even if the pupil has a communicative disorder, he or she may be able to sign in a version of sign language from the home country, or they may be able to read lips of speakers of a language other than English. The district, with the assistance of the EL and special education staff should decide jointly on the assessment process, classification, and subsequent instruction. If the student is found to have a primary language other than English (and/or ASL), such as Spanish, the pupil should be categorized as an EL or FEP student depending on the outcome of the English proficiency assessment.

Part 2, Section A – Structured English Immersion Instructional Setting
While there are several types of settings English learners can be placed in (i.e., Alternative Course of Study, English-Language Mainstream Class - Students Meeting Criteria, English Language Mainstream Class - Parental Request, and other individualized settings), for the purposes of the Language Census, only report the number of English learners who are placed in a Structured English Immersion setting. Refer to the glossary for a definition of Structured English Immersion, as well as definitions of the other types of EL settings noted above.

Part 2, Row 3 – Structured English Immersion
Report the number of English learners who are placed in a structured English immersion setting. Row 3 does not have to equal to the total number of ELs. Refer to the glossary for a definition of Structured English Immersion

Part 2, Section B – English Learners Receiving Instructional Services
Report the type of instructional services ELs receive. Only count each EL once and choose the row that most closely describes the services received by him/her.

The total number of ELs reported in row 10 must equal the total number of ELs reported Part 2, row 2**.** The software will make these calculations automatically and provide an error if the EL totals from do not match.

Part 2, Row 4 – English-Language Development (ELD)
In this row, count ELs who receive **at least one period** of ELD instruction but none of the other instructional services noted in rows 5–7. In this row, count only those ELs receiving ELD instruction from teachers reported in part 5. Refer to the glossary for a definition of ELD.

Part 2, Row 5 – ELD and Specially Designed Academic Instruction in English (SDAIE)
In this row, count ELs receiving, in addition to ELD as described in row 4, **at least two academic subjects** required for grade promotion or graduation taught through SDAIE. These ELs are not receiving primary language support or instruction as described in rows 6 and 7. Count in this row only those ELs receiving ELD and SDAIE from teachers reported in Part 5. Refer to the glossary for a definition of SDAIE.

Part 2, Row 6 – ELD and SDAIE with Primary Language Support
In this row, count ELs receiving, in addition to ELD and SDAIE as described in rows 4 and 5, primary language (L1) support for **at least two academic subjects** required for grade promotion or graduation. Primary language support is not the same as primary language instruction as defined in row 7. Count in this row only those ELs receiving ELD and SDAIE instruction from teachers reported in Part 5 and who concurrently receive L1 support from the same or another instructor or a bilingual paraprofessional.

***Note*:** Primary language support may be provided by any teacher or any bilingual paraprofessional who is supervised by a credentialed teacher. No specialized credentials or certificates are required.

Part 2, Row 7 – ELD and Academic Subjects Through Primary Language Instruction
In this row, count ELs receiving, in addition to ELD as described in row 4, **at least two academic subjects** required for grade promotion or graduation taught through primary language instruction. Count in this row only those ELs who receive ELD and primary language instruction from teachers reported in Part 5. ELs reported in this row may also receive SDAIE as described in row 5. Refer to the glossary for a definition of primary language instruction.

Part 2, Row 8 – Instructional Services Other Than Those Defined in Rows 4–7
In this row, count ELs receiving some type of instructional service that, while specifically designed for ELs, is an instructional service that does **not** correspond exactly to the program descriptions of rows 4–7. Instructional services reported on row 8 are those that vary either quantitatively and/or qualitatively from rows 4–7. For example, enter in row 8 ELs receiving only **one** period of

SDAIE or primary language support or primary language instruction but not the **two** periods required for reporting in rows 5, 6, or 7.

Also enter in row 8 ELs receiving any services specified in rows 4–7 when those services are provided by a staff member other than an authorized teacher reported in Part 5. ELs reported in row 8 may, but are not required to, receive the EL instructional service from teachers reported in part 5.

Also report in row 8 those ELs who do not receive any of the services described in rows 4–7 but who receive another type of instructional service specifically designed for ELs, such as an individualized educational program (IEP) developed for a special education EL.

Part 2, Row 9 – Not Receiving Any English Learner Services
In this row, count all the remaining ELs who have not been counted previously in rows 4–8. These ELs are not receiving any specialized instructional services as specified in rows 4–8.

Part 2, Row 10 – Total English Learners
Enter the sum of rows 4–9. The software will automatically make this calculation and will provide an error if the total is not the same as the count of ELs reported in Part 2, row 2.

Students Reclassified (Part 3)

Part 3, Row 11 – Students Reclassified
Enter the total number of ELs reclassified as FEP since the last census (March 1, 2010). Include those who are no longer enrolled at the school (i.e., graduated or moved). Refer to the glossary for a definition of reclassification.

In reporting the number of ELs and reclassified ELs, schools should use the official CELDT scores provided by the publisher. If the publisher's scores are not available by March 1, 2011, the school should use its hand-scored results for Language Census reporting purposes.

Students who have not been assessed by Language Census Information Day cannot be counted on the Language Census report. If the reclassification process for CELDT annual testers has not been completed on or before March 1, 2011, students continue to be counted as ELs on the Language Census report.

If a student is reclassified from a school that has closed since the last census, do not report the student at the closed school. If the student has transferred to a school within the same district, report the student's reclassified status at their current school in the district. If the student transfers to a school in another district, do not report the student as reclassified. If the student exits the school after reclassification (e.g., graduates, drops out, etc.) and then the school closes, do not report the student at any school.

Parental Exception Waiver from English-Language Classrooms (Part 4)

Counts of parental exception waivers will be obtained from the CBEDS fall submission of School Information Form (SIF) data collected last fall. Therefore, these data are not being collected on the Language Census.

Teachers Providing Services to ELs (Part 5)

Part 5 reflects the staffing requirements for services to ELs as described in the Categorical Program Monitoring (CPM) Instruments, which are available on the CPM Instruments Web page at http://www.cde.ca.gov/ta/cr/cc/08instruments.asp.

Report only those teachers providing services to ELs in ELD, language arts, mathematics, science, and/or social studies counted in Part 2, rows 4 through 8 including team teachers, job sharing teachers, and teachers on block scheduling who are assigned to ELs as of March 1, 2011.

Per *EC* section 60603 (5), for Language Census reporting purposes, teachers should only reflect services provided to ELs in the subject areas mentioned above. If a teacher holds a CCTC bilingual, SDAIE, or ELD authorization and is **not providing direct instruction to ELs in any of the subjects mentioned above, do not report the teacher** in Part 5.

If the regular classroom teacher is not available on Language Census Information Day but will return on or prior to March 25, count the regular classroom teacher on the Language Census. If the regular teacher will not return until after March 25, count the long-term substitute or the teacher who has responsibility for the class if they hold appropriate EL authorization and are providing EL services.

Count each teacher only once. If a teacher provides both primary language instruction **and** ELD and/or SDAIE, **count him/her only once in section A**. If a teacher holds a bilingual authorization and provides only ELD and/or SDAIE, **count him/her in section B**. Report persons in whole numbers regardless of full-time or part-time status (no fractions or decimals). If a teacher works at more than one school, report the person at the school in which he or she spends the majority of time providing EL instructional services. If the teacher spends an equal amount of time serving EL at more than one site, choose only one site and report all of their time at that site.

Part 5, Check Box 1 – Check here if there are teachers at this site who hold a CCTC bilingual, SDAIE, or ELD authorization, and are not providing services to ELs in ELD, language arts, mathematics, science, and/or social studies.
Do not report these teachers in Part 5. Only count teachers who provide services to ELs.

Part 5, Check Box 2 – Check here if there are ELs receiving services from teachers reported at another site.
Do not count these teachers at this site. Only count teachers at the site where they spend most of their time.

Part 5, Section A – Teachers Providing Primary Language Instruction to ELs

Identify the number of teachers who provide primary language instruction to students who were counted in Part 2, rows 7 and 8. If a teacher provides primary language instruction in more than one language, choose the language in which he/she instructs the most. Do not report this teacher more than once, do not use decimals to report the time, and do not list both languages on one line as a combination.

Part 5, Rows 14–21, Columns (a) and (b) – Language of Instruction
Enter the two-digit language code and language name for each language of instruction provided to ELs by a teacher. Use only the languages and codes shown on the Primary Language Code list on page 1 of the R30-LC form. Indicate a primary language or code only once in this section and combine all the teachers for that language on one line.

If a teacher provides services to ELs who have a primary language other than English and it is not on the list, enter code 99, *"All other non-English languages."* Combine all languages with a code of 99 onto one line.

Part 5, Rows 14–21, Column (c) – Teachers with a CCTC Bilingual Authorization
Report the number of teachers who provide primary language instruction to ELs and who hold a valid CTC EL authorization. Refer to the Appendix for a listing of authorizations for primary language instruction.

Part 5, Rows 14–21, Column (d) – All Bilingual Paraprofessionals (Aides)
Counts of bilingual paraprofessionals (aides) will be obtained from the CBEDS fall submission of School Information Form (SIF) data collected last fall. Therefore, these data are not being collected on the Language Census.

Part 5, Row 22 – Total Teachers Providing Primary Language Instruction
Enter the total number of teachers providing primary language instruction to ELs enrolled in the school (the sum of rows 14–21). The software will automatically make this calculation.

Part 5, Section B – Teachers Providing ELD and/or SDAIE Instruction to English Learners

The purpose of Part 5, section B is to collect data on teachers providing SDAIE and/or ELD exclusively. In cases where teachers provide SDAIE and/or ELD **in addition to primary language instruction**, these teachers should be reported in Part 5, section A, rows 14–21 only. Do not report any teachers who provide primary language instruction in Part 5, section B, rows 23–25.

In this section include teachers who hold any valid CCTC credential, certificate, or authorization to provide ELD and/or SDAIE. Refer to the Appendix for a listing of authorizations for ELD and SDAIE.

Part 5, Row 23 – SDAIE and ELD
Report the number of teachers who provide both SDAIE and ELD. Do not report teachers in this row if you have already reported them in section A, rows 14–21, as providing primary language instruction.

Part 5, Row 24 – SDAIE Only
Report the number of teachers who provide only SDAIE. Do not report teachers in this row if you have already reported them in section A, rows 14–21, as providing primary language instruction.

Part 5, Row 25 – ELD Only
Report the number of teachers who provide only ELD. Do not report teachers in this row if you have already reported them in section A, rows 14–21, as providing primary language instruction.

Part 5, Row 26 – Total Teachers Providing ELD and/or SDAIE Instruction to English Learners
Enter the sum of rows 23–25. The software will automatically make this calculation.

Part 5, Section C – Summary of Teachers Providing Instructional Services to English Learners

This section summarizes data reported above. The summary should help you verify that no teachers have been counted more than once. Duplicate counts have been the most frequent error in Part 5 in prior years.

Part 5, Row 27 – Total Number of Teachers Providing Instructional Services (Sum of Row 22 and Row 26)
Enter the sum of rows 22 and 26. The software will automatically make these calculations.

A teacher should not be counted more than once in Part 5 The total entered in row 27 should not represent a duplicate count of teachers.

APPENDIX

CONTENTS

Instructions: Please refer to the "Instructions for the Spring Language Census (Form R30-LC), Reporting Year: 2011" and the "Frequently Asked Questions" for assistance in completing this form. These documents should be used while conducting the census and completing this form. These documents are available on the Language Census Instructional Materials Web page at http://www.cde.ca.gov/ds/dc/lc/.

Software: Language Census (LC) data must be submitted to the California Department of Education (CDE) using the LC Data Entry Assistant (LCDEA) software provided by the CDE. Internet access and Windows 95 (or later versions of Windows) are required in order to use this software. Please check the Language Census Software News 2011 Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp for more information on the LCDEA software.

Contacting the Department of Education

Data submission assistance:
Dorothy Aicega, 916-327-0208 daicega@cde.ca.gov
Shana Yeary, 916-327-5927 syeary@cde.ca.gov

English learner program and policy information:
Language Policy and Leadership Office, 916-319-0845

LCDEA software assistance:
Phyllis Wilburn, 916-327-0211 pwilburn@cde.ca.gov

Educational Demographics Office

Address: 1430 N Street, Suite 6308
Sacramento, CA 95814
Phone: 916-327-0219
Fax: 916-327-0195
E-mail: eddemo@cde.ca.gov

Language Census data are due on or before March 25, 2011.

Select one of the submission options below:

☐ **No Language Census data to report as of March 1, 2011.**
Complete the contact information and certification and submit by March 25, 2011.

☐ **One or more English learner (EL) or reclassified students are enrolled as of March 1, 2011.**
Complete the contact information, certification, and parts 2, 3, and 5 and submit data by March 25, 2011.

Contact Information
Printed name of person completing the form
Phone
Date

Certification of Language Census	
Certification – By electronically submitting the data to the CDE, I hereby certify that the data reported on this form are accurate.	
Printed Name	
Title	Date

Primary Language Codes (only these codes may be used in part 5)

Code	Language	Code	Language	Code	Language
56	Albanian	24	Hungarian	45	Rumanian
11	Arabic	25	Ilocano	29	Russian
12	Armenian	26	Indonesian	30	Samoan
42	Assyrian	27	Italian	52	Serbo-Croatian (Bosnian,
61	Bengali	08	Japanese		Croatian, Serbian)
13	Burmese	65	Kannada	60	Somali
03	Cantonese	09	Khmer (Cambodian)	01	Spanish
36	Cebuano (Visayan)	50	Khmu	46	Taiwanese
54	Chaldean	04	Korean	63	Tamil
20	Chamorro (Guamanian)	51	Kurdish (Kurdi, Kurmanji)	62	Telugu
39	Chaozhou (Chiuchow)	47	Lahu	32	Thai
15	Dutch	10	Lao	57	Tigrinya
16	Farsi (Persian)	07	Mandarin (Putonghua)	53	Toishanese
05	Filipino (Pilipino or Tagalog)	64	Marathi	34	Tongan
17	French	48	Marshallese	33	Turkish
18	German	44	Mien (Yao)	38	Ukrainian
19	Greek	49	Mixteco	35	Urdu
43	Gujarati	40	Pashto	02	Vietnamese
21	Hebrew	41	Polish	99	All other non-English languages
22	Hindi	06	Portuguese		
23	Hmong	28	Punjabi		

Site Copy
Do not submit to the CDE

County-District-School Code:__________________________

School Name:__________________________

Part 1

English Learner (EL) and Fluent-English-Proficient (FEP) students
No longer collected through Language Census, now collected through the California Longitudinal Pupil Achievement Data System (CALPADS)

Not Collected

Primary Language			Grade Level (Do not enter zeros)														Row
Language Name	Code	Type	Kdgn	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	Ungr	Total
(a)	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**	**(i)**	**(j)**	**(k)**	**(l)**	**(m)**	**(n)**	**(o)**	**(p)**	**(q)**	**(r)**
		EL															
		FEP															
		EL															
		FEP															
		EL															
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		EL															
		FEP															

		Kdgn	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	Ungr	**Total**
	Grade level	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**	**(i)**	**(j)**	**(k)**	**(l)**	**(m)**	**(n)**	**(o)**	**(p)**	**(q)**	**(r)**
1	**School Totals – EL**															
2	**School Totals – FEP (IFEP + RFEP)**															

Part 2	**English Learners' Instructional Information** Complete sections A and B. **DO NOT** include FEP students in this section.

2	**Count of English Learners** Enter the count of English learners enrolled at the school as of March 1, 2011.	**2**	

A	**Structured English Immersion Instructional Setting** While there are several types of settings English learners can be placed in (i.e., Alternative Course of Study, English-Language Mainstream Class - Students Meeting Criteria, English Language Mainstream Class - Parental Request, and other individualized settings), for the purposes of the Language Census, only report the number of English learners who are placed in a structured English immersion setting.		
3	Number of English learner students who are in a **Structured English Immersion setting** supported by an authorized teacher. (Row 3 **does not** need to equal to the total ELs indicated in row 2 above.) A Structured English Immersion setting is one in which ELs who have not yet met local district criteria for having achieved a "good working knowledge" (also defined as "reasonable fluency") of English are enrolled in an English-language acquisition process for young children in which **nearly all classroom instruction is in English**, but the curriculum and presentation are designed for children who are learning the language.	**3**	

B	**English Learners Receiving Instructional Services** Choose the row that most closely describes the services received by English learners. Count each English learner only once.		
4	English learners receiving English language development (ELD) services from teachers reported in part 5	**4**	
5	English learners receiving ELD and specially designed academic instruction in English (SDAIE) from teachers reported in part 5	**5**	
6	English learners receiving ELD and SDAIE services from teachers reported in part 5 and primary language (L1) support	**6**	
7	English learners receiving ELD and academic subjects through primary language (L1) instruction from teachers reported in part 5 (Might also be receiving SDAIE)	**7**	
8	English learners receiving English learner instructional services other than those defined in rows 4-7 (may or may not be receiving services from teachers reported in part 5)	**8**	
9	English learners **not receiving** any English learner instructional services	**9**	
10	**Total English learners** (Sum of rows 4 through 9 - must be equal to total English learners indicated in row 2 above)	**10**	

Part 3	**Students Reclassified as FEP since March 1, 2010** Enter the total number of English learners reclassified as fluent-English-proficient students since the last census (March 1, 2010). Include any students reclassified in the last 12 months who are no longer enrolled at the school (i.e., graduated or moved).		
11	Number of ELs reclassified as FEP students since the last census (March 1, 2010).	**11**	

Part 4	**Parental Exception Waiver from English Language Classrooms** **No longer collected through Language Census, now collected through the California Basic Educational Data System – Online Reporting Application (CBEDS-ORA**)		
12	Enter the total number of requested parental exception waivers (new and renewals) that have either been granted or denied pursuant to *Education Code* sections 310 and 311.	**12**	
13	Enter the total number of parental exception waivers from line 12 above that have been granted.	**13**	

Not Collected

County-District-School Code:_____

Site Copy
Do not submit to the CDE

School Name:_____

Part 5 Teachers Providing Services to English Learners

☐ Check here if there are teachers at this site who hold a California Commission on Teacher Credentialing (CCTC) bilingual, SDAIE, or ELD authorization, and are not providing services directly to English learners in ELD, language arts, mathematics, science, and/or social studies. (DO NOT count these teachers below.)

In part 5.A and part 5.B ONLY report English learner teachers who provide services to English learners reported in part 2 rows 4 through 8. Each teacher should only be counted once in all of part 5. **If a teacher provides both Primary Language Instruction AND ELD and/or SDAIE, only count him/her once in section 5.A.** Refer to the Instructions for the Spring Language Census – 2011 for more information.

If teachers provide instructional services to ELs at more than one site, report them at the site they provide most of their EL instructional services, or if their time spent providing EL instructional services is split equally, choose one site and report all of their time at that site. **DO NOT use decimals** to report these teachers, and **DO NOT count them at both sites**.

☐ Check here if there are ELs receiving services from teachers reported at another site. Do not count these teachers at this site.

A CCTC Authorized Teachers Providing Primary Language Instruction to ELs

Indicate the number of teachers who provide primary language instruction to English learners identified in part 2, row 7, and in some cases row 8. Do not report these teachers in Part 5.B below, even if they provide ELD and/or SDAIE. Counts of bilingual paraprofessionals are **no longer collected through the Language Census. They are now collected through CBEDS-ORA.**

	Language of Instruction		Staff Providing Primary Language Services	
	Code	Language Name	Number of Teachers with a CCTC Bilingual Authorization	Number of Bilingual Paraprofessionals (Aides)
	(a)	(b)	(c)	(d)
14				
15				
16				
17				
18				
19				
20				
21				
22	**Totals** (Sum of rows 14 - 21)			

Not Collected

DO NOT count these teachers in rows 23 – 25 below.

B CCTC Authorized Teachers Providing ELD and/or SDAIE Instruction to English Learners

Indicate the number of teachers who provide ELD and/or SDAIE instruction to English learners identified in part 2, rows 4 through 6, and in some cases row 8. Do not include teachers providing primary language instruction that were counted above in Part 5.A.

23	Number of CCTC authorized teachers providing **both SDAIE and ELD** instruction to English learners	23	
24	Number of CCTC authorized teachers providing **only SDAIE** instruction to English learners	24	
25	Number of CCTC authorized teachers providing **only ELD** instruction to English learners	25	
26	**Totals** (Sum of rows 23 – 25)	26	

C Summary of CCTC Authorized Teachers Providing Instructional Services to English Learners

Indicate the sum of CCTC authorized teachers providing primary language instruction and CCTC authorized teachers providing ELD and/or SDAIE. This total must not reflect a duplicate count of teachers.

27	**Totals** (Sum of rows 22 and 26)	27	

Credentials, Certificates, Permits, and Supplementary Authorizations Issued by the California Commission on Teacher Credentialing that Authorize Instruction to English Learners[1]

Document	*Types of Instruction Authorized* ELD[2]	SDAIE[2]	Primary Language Instruction[2]
Multiple or Single Subject Teaching Credential with English Learner Authorization or CLAD Emphasis	X	X	
Multiple or Single Subject Teaching Credential with a BCLAD Emphasis	X	X	X
Bilingual Crosscultural Specialist Credential	X	X	X
CLAD Certificate	X	X	
BCLAD Certificate	X	X	X
Language Development Specialist (LDS) Certificate[5]	X	X	
Bilingual Certificate of Competence (BCC)[5]	X	X	X
General Teaching Credential[3]	X		
Supplementary Authorization in English as a Second Language (ESL) or Introductory ESL[5]	X		
University Internship Credential with English Learner Authorization or CLAD Emphasis	X	X	
University Internship Credential with a BCLAD Emphasis	X	X	X
District Intern Credential with English Learner Authorization	X	X	
District Intern Credential with a BCLAD Emphasis	X	X	X
Special Temporary Certificate with English Learner Authorization or CLAD[5]	X	X	
Special Temporary Certificate with BCLAD[5]	X	X	X
Emergency CLAD Permit	X	X	
Emergency BCLAD Permit	X	X	X
Emergency Multiple or Single Subject Teaching Permit with English Learner Authorization or CLAD Emphasis[5]	X	X	
Emergency Multiple or Single Subject Teaching Permit with BCLAD Emphasis[5]	X	X	X
Provisional Internship Permit	X	X	
Short-Term Staff Permit	X	X	
Certificate of Completion of Staff Development[4]	X	X	
Certificate of Completion of Staff Development (SB 1969)[4,6]	X	X	

[1] Some of the authorizations have restrictions related to grade level and subject. See the appropriate leaflet or call the Commission for complete information about a document's authorization.

[2] ELD..... *Instruction for English language development*
SDAIE ..... *Specially designed academic instruction delivered in English*
Primary Language Instruction ..... *Instruction for primary language development and content instruction delivered in the primary language*

[3] No longer initially issued but may be renewed. Although the holder may legally be assigned to teach ELD, the Commission does not recommend this assignment unless the holder possesses skills or training in ELD teaching.

[4] Some of the authorizations have restrictions based on the methods used to qualify for the certificate. See the appropriate leaflet or call the Commission for complete information about the document authorization.

[5] No longer issued but holders of valid documents may continue to serve on these documents.

[6] Never resulted in the issuance of a certificate. The Commission served as repository of program completion information only.

Language Census Software Instructions

This set of instructions is a quick guide for using the Language Census Data Entry Assistant (LCDEA) software. It is intended to provide an overview of how to prepare for the Language Census data collection process and how to use the LCDEA software to submit your data electronically to the California Department of Education (CDE).

In order to use the software, you must have Internet access and Windows 95 (or later versions of Windows). The software is not Macintosh compatible.

Instructional Materials

Review the Language Census form and instructional documents, paying close attention to changes to the data collection.

Software Installation

Download the software from the Language Census Software News Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp and follow the instructions on the Download LCDEA Software Web page to install the LCDEA software onto your computer.

Once the software is successfully installed on your computer, a shortcut icon will be placed on your computer desktop.

Software Start Up

To start the LCDEA software, double click on the shortcut icon on your desktop. If an icon is not on your desktop, click on the "Start" button, then go to the "Programs" option, and select the “Language Census” program group and click on the “LCDEA” icon.

The first time the software starts, you will be prompted to select your district or independently reporting charter school, so that it can load your school(s) and pre-load languages reported last year.

Collecting Data

This section applies to districts and county offices of education only. It does not apply to independently reporting charter schools. Independently reporting charter schools may skip to the next section.

Make sure you have data for each of the schools that you are expected to submit data for. Follow the data collection process below, depending on how your district collects its data.

If data are…	Then…
Collected from each school using paper forms.	Follow the process below for collecting data.

Step	Action
1	District provides the R30-LC form and necessary instructional materials to each school. Pre-printed forms can be printed from the LCDEA, under the “Reports” menu, or blank forms can be printed from the Language Census Instructional Materials Web page at http://www.cde.ca.gov/ds/dc/lc/.
2	Schools complete the form and send to the district.
3	District receives completed forms from each school.

Collecting Data (Cont.)

<table>
<tr><th>And data are…</th><th>Then…</th></tr>
<tr><td>Keyed into the LCDEA by each school and then sent to the district.</td><td>Follow the process below for collecting data.
<table>
<tr><th>Step</th><th>Action</th></tr>
<tr><td>1</td><td>Schools download and install the software.

Refer to the instructions for using the LCDEA at the school site or on a network, which are located on the Language Census Software News Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp.</td></tr>
<tr><td>2</td><td>Schools key enter their data into the LCDEA.</td></tr>
<tr><td>3</td><td>Schools export their data from the LCDEA to create a data file for their school.</td></tr>
<tr><td>4</td><td>Schools send their data file to the district.</td></tr>
<tr><td>5</td><td>District receives data files from each school.</td></tr>
</table></td></tr>
<tr><td>Available electronically at the district.</td><td>Make sure the database contains Language Census data for each school in the district.</td></tr>
</table>

Compiling Data

Depending on how your district has collected its data, follow the appropriate procedure below for compiling data into the LCDEA.

<table>
<tr><th>If…</th><th>Then…</th></tr>
<tr><td>Data were collected using paper forms.</td><td>Key enter each school's data into the LCDEA by following the procedures below.
<table>
<tr><th>Step</th><th>Action</th></tr>
<tr><td>1</td><td>Open the LCDEA software.</td></tr>
<tr><td>2</td><td>Go to the "Edit" menu and select the "Edit/Select school" option.</td></tr>
<tr><td>3</td><td>Select the school you wish to work and press the "Edit R30 form" button.</td></tr>
<tr><td>4</td><td>Enter data by clicking on the appropriate tabs and entering data into each section. Each tab corresponds to a part on the form.

For schools that have no EL or reclassified students, go to the submission tab and check the "No data to report" box.</td></tr>
<tr><td>5</td><td>Repeat steps 1-4 above for each school until data for all schools have been entered.</td></tr>
</table></td></tr>
</table>

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Compiling Data (Cont.)

<table>
<tr><th>If…</th><th>Then…</th></tr>
<tr><td>Data are keyed into the LCDEA by each school and then sent to the district.

(Does not apply to charter schools)</td><td>Import each school's data file into the LCDEA by following the procedures below.
<table>
<tr><th>Step</th><th>Action</th></tr>
<tr><td>1</td><td>Open the LCDEA software.</td></tr>
<tr><td>2</td><td>Go to the "File" menu and select the "Import Data" option.</td></tr>
<tr><td>3</td><td>Choose the type of file you are importing.</td></tr>
<tr><td>4</td><td>Select one of the "Import File Options."
Note: For the first school you import, select the "replace existing data" option. For each additional school, select the "merge with existing data" option.</td></tr>
<tr><td>5</td><td>Select the range of schools to be imported. When importing schools individually, select the "select schools" option.</td></tr>
<tr><td>6</td><td>Locate the file you wish to import and select the "import" button.</td></tr>
<tr><td>7</td><td>Select the school you wish to import and select the import button.</td></tr>
<tr><td>8</td><td>Click on the "load data" button. You'll then get a message saying the import was successful. Click on the "OK" button.

Note: If there are errors in the data file, you will not be able to load the data. You can view errors at this point, or exit this function and resolve the errors prior to importing the file again.</td></tr>
<tr><td>9</td><td>Repeat steps 1-8 above until all of the files for your schools have been imported.</td></tr>
</table></td></tr>
<tr><td>Data are available electronically at the district/ charter school.</td><td>Import the data into the LCDEA.

Prior to Importing Make sure the data are in the specified file format supported by the software.

The LCDEA file layout is available from the Language Census Software News Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp.

Follow the procedures below to import the data into the LCDEA.
<table>
<tr><th>Step</th><th>Action</th></tr>
<tr><td>1</td><td>Open the LCDEA software.</td></tr>
<tr><td>2</td><td>Go to the "File" menu and select the "Import Data" option.</td></tr>
<tr><td>3</td><td>Choose the type of file you are importing.</td></tr>
<tr><td>4</td><td>Select one of the "Import File Options."
Note: To import a file containing data for all schools, select the "replace existing data" option.</td></tr>
<tr><td>5</td><td>Select the range of schools to be imported. When importing all schools together, select the "all schools" option.</td></tr>
<tr><td>6</td><td>Locate the file you wish to import and select the "import" button.</td></tr>
<tr><td>7</td><td>Click on the "load data" button. You'll then get a message saying the import was successful. Click on the "OK" button.

Note: If there are errors in the data file, you will not be able to load the data. You can view errors at this point, or exit this function and resolve the errors prior to importing the file again.</td></tr>
</table></td></tr>
</table>

Resolving Errors and Warnings

Once all data have been compiled into the LCDEA, you'll need to ensure that the data are free of errors and that all warnings have been verified and resolved if necessary.

An error report, which details all errors and warnings for each school, may be run by selecting the "Error Report" option in the "Reports" menu. You may also print a report that explains what each error and warning mean from the "Reports" menu by selecting the "Explanation of Errors" option.

All errors must be resolved before submitting the data. All warnings should be reviewed. Warnings will **not** prevent data submission.

Data Verification

Language Census data should be verified for accuracy and completeness prior to submission to the CDE.

Summary and school level reports are available in the "Reports" menu of the LCDEA and may be printed and used during the data verification process.

Data Submission

Once all errors have been resolved, warnings have been reviewed, and data have been verified, you are ready to submit your data to the CDE.

Follow the process below to submit your data.

Step	Action
1	Open the LCDEA software.
2	Click on the "File" menu and select the "Submit data via Internet" option.
3	Verify the information on the "Certification" screen and enter your contact and certification information, then select the "Next Step" button.
4	Click on the "Submit Data" button.
5	Once the data is successfully submitted, you will be prompted to view or print a summary report. You can also exit the software at this time. Note: Your Internet connection must have FTP capability in order to upload the data. If you cannot successfully submit your data through the Internet, you may e-mail your data to pwilburn@cde.ca.gov.

If you need assistance submitting your data, please contact the Educational Demographics Office at 916-327-0219.

Backing Up Data

Once your data have been sent to the CDE, please back up your data to a diskette for safekeeping by using the backup option that is available when you exit the LCDEA software.

We recommend that you keep the LCDEA software on your PC until mid-July in case CDE staff has any questions or the data have not been correctly transmitted to the CDE.

To remove the LCDEA software, use the original LCDEASET.EXE program. You will be prompted to remove the software.

You may also manually remove the LCDEA program by deleting the C:\LC2011 subdirectory (or if you did not use the default installation subdirectory, delete the subdirectory in which you installed the LCDEA).

Data Corrections

If you notice mistakes in your data submission, you may make changes in the software and resubmit the data via the Internet. Please refer to the significant dates section of these instructions for the final date to submit changes to the CDE.

Frequently Asked Questions (FAQs)

For additional information on the English learner program and policy, contact the Language Policy and Leadership Office at 916-319-0845.

General Questions About the Language Census

1. **How do I obtain the software that is used to submit the Language Census data?**

   The Language Census Data Entry Assistant (LCDEA) software is available for downloading from the Language Census Software News Web page at http://www.cde.ca.gov/ds/dc/lc/lcdeanews.asp. The California Department of Education (CDE) no longer provides the LCDEA software on a CD-ROM.

2. **What are Nonpublic Nonsectarian Schools (NPS) with a school code of 0000001?**

   A Nonpublic nonsectarian school is a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an individualized education program and is certified by the CDE. When a district contracts with a NPS to send their public special education students to an NPS for services, the local educational agency (LEA) should report students sent to the NPS on the Language Census if those students are English learners and/or fluent English proficient students.

   A generic named NPS school with a school code of '0000001' has been added to the Language Census software for reporting students sent to NPSs.

3. **Charter schools by definition are autonomous institutions. Why then do charter schools have to submit the Language Census?**

   Although charter schools have exemptions from some sections of the *Education Code,* English learners (also referred to as limited-English-proficient [LEP] students) have federal protections, including the ruling in several federal court cases, such as *Castaneda v. Pickard & Gomez v. Illinois State Board of Education*. In addition, pursuant to the No Child Left Behind Act, the U.S. Department of Education provides financial assistance to state educational agencies and LEAs based on enrollments of English learner students.

4. **Can charter schools report data independently or do they have to report through their authorizing agency?**

   If charter schools reported fall CBEDS and CALPADS data independently of their authorizing agency, they will also submit Language Census data independently; otherwise, they must report data through their authorizing agency. You may look up a charter school's submission method from the CALPADS and CBEDS Data Submission Web page at http://www.cde.ca.gov/ds/sp/cl/ap/selectdistrict.aspx.

5. **How are students reported on the Language Census if their California English Language Development Test (CELDT) results have not been received by Language Census Information Day?**

   Schools should use the official CELDT scores provided by the publisher when reporting Language Census data. If the publisher's scores are not available by Language Census Information Day, the school should use its hand-scored results for Language Census reporting purposes.

6. **Are students who have not been assessed or reassessed by Language Census Information Day included in the Language Census counts?**

   Data reported on the Language Census are to reflect information known about students and staff as of Language Census Information Day. Students who have not been assessed by Language Census Information Day cannot be included in the Language Census counts. If the reclassification process for CELDT annual testers has not been completed on or before Language Census Information Day, the students continue to be counted as ELs.

7. **Are services for English learners in before school programs or after school programs reported on the Language Census?**

   No, services for English learners in before or after school programs are not reported on the Language Census.

8. **May corrections be made to certified data?**

   Once Language Census data are certified and posted on the Internet, changes will not be made to the certified files, unless the inaccuracy is a result of a processing error by the CDE. If the inaccuracy is a result of the district submitting

incorrect data, the district can submit a notification of inaccurate data along with corrections, which will be kept on file at the CDE. A list of the effected schools will also be posted on the Notifications of Inaccuracies in Certified Data Web page at http://www.cde.ca.gov/ds/dc/cb/datachanges.asp. Please refer to the Data Modification Policy Web page at http://www.cde.ca.gov/ds/dc/cb/certpolicy.asp for more information on our policy and process for submitting changes.

9. **How does the translation requirement in California *Education Code (EC)* Section 48985 affect a district and its schools, specifically in the matter of parental notifications?**

   If 15 percent or more of the pupils enrolled in a public school that provides instruction in grades kindergarten through twelve speak a single primary language other than English, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in the primary language, and may be responded to either in English or the primary language.

   Reports for schools meeting the "15 percent and above" criteria are available on the DataQuest Web site, located at http://dq.cde.ca.gov/dataquest/. Instructions on how to access the "Language Groups that Meet the '15 Percent and Above' Translation Needs" report are outlined in the Annual Parent Notification Translation letter posted at http://www.cde.ca.gov/sp/el/t3/transllangab680.asp.

   To identify other districts and schools with common translation needs, refer to the data reports posted under the sub-heading, "Language Data for Districts and Schools," which is found on the Document Translation References Web page at http://www.cde.ca.gov/ls/pf/cm/transref.asp.

   For additional information on the translation requirement and *EC* Section 48985, please contact the English Learner and Accountability Unit at 916-319-0938.

Questions on Reporting ELs and FEPs (Part 1)

1. **Where do we report the count of English Learner and fluent-English-proficient (FEP) students by grade and language?**

   The count of ELs and FEPs by grade and language will be obtained from the California Longitudinal Pupil Achievement Data System (CALPADS) spring submission of student-level data. Therefore, these data are not being collected on the Language Census this year. A total count of English learners, however, will be collected in Part 2, row 2 this year.

Questions on English Learner Instructional Settings (Part 2A)

1. **Where are the number of ELs who are placed in instructional settings other than structured English immersion reported on the Language Census**

   The number of ELs placed in settings other than structured English immersion are no longer reported on the Language Census. Beginning in 2006-07, the Language Census data collection stopped collecting data on the number of ELs placed in various types of settings. The Language Census now only collects data on the number of ELs placed in a structured English immersion setting. This data is reported in Part 2.A of the Language Census.

2. **Is it possible for a student to be placed in a structured English immersion setting and not receive Specially Designed Academic Instruction in English (SDAIE)?**

   Yes. Although structured English immersion settings are settings in which nearly all instruction is in English, the settings are defined locally by the district. Therefore, some districts may have structured English immersion settings that do not include all the components of SDAIE.

3. **What is the difference between an EL mainstream setting and a structured English immersion setting?**

   EL mainstream settings are designed for ELs who have achieved a level of *reasonable fluency* in English, but still require additional EL services as appropriate. Structured English immersion settings, on the other hand, are designed for ELs who have not achieved *reasonable fluency* in English and who are enrolled in an English-language acquisition process in which nearly all classroom instruction is in English, but the curriculum and presentation are designed for children learning the language.

4. **What are examples of students who would not be placed in a structured English immersion setting but may still receive EL services?**

   One example of ELs who should not be placed in a structured English immersion setting are ELs who have a level of *reasonable fluency* in English. Since these ELs have not been reclassified, they still require EL services, such as ELD, SDAIE, or primary language support, but since they have reached reasonable fluency in English, they would not be placed in a structured English immersion setting. A mainstream setting may be more appropriate for these ELs.

   Another example is an EL whose parent or guardian has requested the student be moved from structured English immersion to English language mainstream even though they are less than reasonably fluent. The student is moved but still receives ELD targeted to his/her level of English proficiency.

   Another example of ELs who should not be placed in a structured English immersion setting are ELs receiving primary language instruction. Usually ELs receiving primary language instruction are placed in an alternative course of study setting, rather than a structured English immersion setting.

5. **Can students be placed in a structured English immersion setting and receive ELD and SDAIE from the same teacher?**

   Yes. In elementary schools, the same teacher in a self contained classroom may provide SDAIE and ELD instruction within the structured English immersion setting.

Questions on English Learner Instructional Services (Part 2B)

1. **What is the difference between "primary language (L1) support" in row 6 and "primary language (L1) instruction" in row 7 (Part 2, section B)?**

   "Primary language support" refers to the use of the primary language to support lessons that are taught mainly by using English. The use of bilingual paraprofessionals to support lessons taught in English by a classroom teacher would be an example of primary language support. Other examples would be clarifications or preview/review provided in the primary language by a teacher or aide. "Primary language (L1) instruction" refers to lessons taught directly and primarily in the primary language by a qualified teacher and supported by corresponding written materials in the primary language.

2. **Where should we report students who receive ELD plus two subjects in SDAIE and two subjects through primary language instruction (Part 2, section B)?**

   Since the instructional offerings meet the definition of row 7, ELD and academic subjects through the primary language (L1), report these students in row 7. This is the only row that contains the designation of "instruction through the primary language." The instructions to the Language Census clearly state that students who have instructional offerings, such as SDAIE, in addition to ELD and primary language instruction are to be reported in row 7. The closest competing definition is found in row 6, but the reference there is to ELD plus SDAIE and primary language *support*, not primary language *instruction*.

3. **What are examples of "Instructional services other than those defined in rows 4-7" (Part 2, section B, row 8)?**

   These would be instructional services for English learners that do not match the definitions of the services listed in rows 4-7. For example, report here students who are receiving the services listed in rows 4-7 but not in the quantity (only one period of SDAIE or primary language instruction) or quality required (e.g., the instructional services are provided by teachers who do not have the appropriate authorizations or who are not enrolled in the proper training program and consequently are not counted in Part 5).

4. **What instructional services are required for EL students who have achieved a *reasonable level of English language proficiency*, but have not met our school district's reclassification criteria?**

   All EL students must receive ELD instruction until they are reclassified. Students may be identified as having a *reasonable level of English language proficiency* based on the CELDT and/or school district assessments. Many students who have achieved a *reasonable level of English language proficiency* may also benefit from SDAIE in the core content areas. Until reclassified, EL students must receive ELD targeted specifically to their English proficiency level.

5. Where do we record the number of English learners who are also special education students?

When reporting special education English learners in part 2, choose the row that most closely reflects the type of service they receive. However, if the combined special education and English learner services are unique, record the number of students in row 8, under instructional services other than those defined in rows 4-7.

Questions on Staff Providing English Learner Services (Part 5)

1. How do we count teachers who provide services to English learners (Part 5)?

Teachers are to be counted only once. To determine where to record the number of teacher(s), first determine the teacher's specific assignment with English learners and whether the subject taught is ELD, language arts, mathematics, science, or social studies. Then classify the teacher according to the authorization held. For example, if a teacher is assigned to provide *at least one period* of primary language instruction (as defined in the instructions for Part 2, section B, row 7), count this teacher in the appropriate row in Part 5, section A, rows 14-21, according to the language of instruction. Any teacher providing primary language instruction should be reported only *once* in Part 5 even though the teacher, in addition to primary language instruction, may also be providing ELD and/or SDAIE. Teachers reported in Part 5, section A should NOT be reported again in Part 5, section B.

Teachers not providing primary language instruction but providing at *least one period* of SDAIE, ELD, or a combination of ELD and SDAIE in language arts, social studies, science, and/or mathematics should be reported in rows 23-25 depending on their specific assignment. Again, these teachers are to be counted only once.

Classroom teachers, resource teachers, and administrators who are assigned to provide instruction to English learners (e.g., primary language, ELD, and/or SDAIE) in subjects other than ELD, language arts, mathematics, science, and social studies, are *not* to be reported on the Language Census R30-LC form regardless of the credentials or certificates held.

2. If there is only a very small number of English learners in a school (for example, three), how do we count the qualified teachers who are assigned to these students, especially in a departmentalized setting such as our high school?

As with teachers in other settings, count only those teachers who are *actually assigned to provide one or more required instructional service to English learners* (ELD, SDAIE, or primary language instruction). For example, in the case of only three English learners in a departmentalized setting, if the students receive one ELD class but also receive one period each of SDAIE math, SDAIE social science, and SDAIE biology, then count all four teachers assigned to these classes. In this uncommon instance, there are actually more qualified teachers assigned than English learners served.

3. Are teachers who only provide primary language support to ELs reported on the Language Census?

No. There is no legal requirement for the California Department of Education to collect information on teachers who provide primary language **support**. If teachers who provide primary language **support** also provide ELD and/or SDAIE, they are only to be counted in Part 5B as providing ELD and/or SDAIE.

4. Are teachers reported on the Language Census who provide ELD or SDAIE to ELs that are not in structured English immersion settings?

Yes, all teachers who provide English learner instructional services to ELs are to be reported on the Language Census, regardless of what setting the ELs are placed in. For example, high school content area teachers may provide SDAIE to EL students who are not in structured English immersion settings. Teachers providing ELD and/or SDAIE are to be reported in **Part 5** section B.

5. When is it appropriate to report teachers as only providing SDAIE?

In settings where students are pulled out for ELD, the home teacher may be providing only SDAIE instruction. In this case the home teacher would be reported as providing SDAIE only in Part 5, section B, row 24.

At the secondary level, ELs may see six teachers for six different subject areas. In this case, some teachers may only provide SDAIE for particular subject areas and other teachers may only provide ELD for other subject areas. In this example, the ELs would be reported as receiving ELD and SDAIE and the teachers would be reported individually as providing SDAIE only and ELD only as appropriate.

6. How do I determine which teachers are providing primary language instruction to ELs?

One way to identify teachers providing primary language instruction is to review the approved parental exception waivers (reported in **Part 4**) authorizing primary language instruction. If the student's teacher is authorized to provide primary language instruction and is doing so, the teacher is reported in **Part 5** Section A.

7. All of our ELs receive ELD. However, ELD is not provided by all teachers. Which teachers should I report on the Language Census?

Only report the authorized teachers who are providing ELD to ELs. If students receive ELD in a pull out program, report ELD instruction by the pull out teacher if they are properly authorized for ELD instruction. Teachers who provide ELD in self contained ELD classes should also be reported on the Language Census. Do not report teachers who are authorized to provide ELD if they are not actually providing ELD services to ELs.

California Department of Education (http://www.cde.ca.gov/sp/el/t3/title3faq.asp)
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Title III FAQs

Frequently asked questions about administrative, programmatic, and accountability features of Title III limited English proficiency and immigrant student programs.

The following frequently asked questions and responses are intended to assist local educational agencies (LEAs) in implementing the Elementary and Secondary Education Act Title III provisions. Applicable legal citations are included.

Introduction

1. **What is the purpose of Title III as reauthorized by the Elementary and Secondary Education Act (ESEA)?**

   Part A of Title III is officially known as the *English Language Acquisition, Language Enhancement, and Academic Achievement Act*. Section 3102 lists nine purposes of the law. The overarching purpose is to ensure that limited-English-proficient (LEP) students (called English learners under California laws), including immigrant children and youths, attain English proficiency and meet the same challenging academic content and achievement standards that other students are expected to meet.

   LEAs must use Title III funds to implement language instruction educational programs designed to help LEP students achieve standards. The state educational agency (SEA), LEAs, and schools are accountable for increasing the English proficiency and core academic content knowledge of LEP students.

2. **What achievement standards apply to LEP students under Title III?**

   SEAs, LEAs, and schools are required to hold LEP students to the same academic content and achievement standards established for all children. Additionally, LEP students must meet annual English language development objectives (Title I, Section 1111(b)(1), and Title III, Section 3122(a)(1)).

3. **Under the former Improving America's Schools Act, our district was awarded a Title VII grant that was funded for three years. What happens to this funding?**

   Title III, Section 3111(c)(2), clarifies that current recipients of Title VII, Part A, Bilingual Education competitive grants will be allowed to complete their funding cycles for the duration of their grant awards. The programs will continue to be funded and administered directly from the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for LEP students at the U.S. Department of Education.

4. **How will the U.S. Department of Education determine the amount of the Title III grant to award to California?**

   The U.S. Department of Education determines the grant award to the states by using a formula based on the number of LEP and immigrant students enrolled in the state. Beginning with fiscal year 2005, the U.S. Department of Education will use American Community Survey data to determine this count, pursuant to the Elementary and Secondary Education Act (ESEA) Section 3111(c). Ninety-five percent of the apportionment will be allocated as subgrants to eligible LEAs serving LEP and immigrant students (Title III, Section 3111(c)(3)).

5. **Must an LEA reapply each year for Title III funds?**

   Yes, eligible LEAs must indicate their acceptance of Title III funds and ensure compliance with Title III statute and regulations each year. LEAs must also submit the results of the annual Language Census (R30-LC) and the Student National Origin Report (SNOR) of all LEP and eligible immigrant students, develop an LEA plan, and meet evaluation and reporting requirements (Title III, sections 3114, 3115, 3116, 3121, and 3123).

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Funding of Subgrants to Local Educational Agencies

1. **Which LEAs are eligible for LEP and/or immigrant student subgrants?**

   LEAs include school districts, county offices of education, and direct-funded charter schools that enrolled one or more LEP

and/or immigrant students during the previous year (Title III, Section 3114(a)(d)). In the case of immigrant education funds, the LEA must also meet the enrollment criteria for eligible immigrant students. (See Section F for details.)

2. **Are private schools eligible to receive Title III funds?**

   No, since private schools are not LEAs, they are not eligible to receive Title III funds. However, LEP and immigrant students enrolled in private schools may receive Title III services provided by public schools in their geographical jurisdiction (Title IX, Section 9501). Please see Section C, Private Schools, and Section F, Immigrant Education Program, for additional details on private school participation.

3. **What is the process for private schools to participate in Title III LEP programs?**

   Title IX, Section 9501, requires LEAs to consult in a timely and meaningful manner with private schools and determine which private schools request participation. Services must be provided on an equitable basis. Additional details are provided in Section C, Private Schools, and Section F, Immigrant Education Program.

4. **How does the California Department of Education allocate Title III funds to eligible LEAs?**

   The Department provides subgrants to LEAs for LEP and eligible immigrant students on the basis of a formula. For the fiscal year, qualifying LEAs will receive an allocation for each LEP student and for each eligible immigrant student enrolled in the LEA.

5. **Which types of subgrants will states make to eligible LEAs?**

   Under Section 3114 of Title III, there are two types of subgrants that the state can give to LEAs:

   Formula subgrants for LEP students: LEAs are eligible for subgrants on the basis of the number of LEP students enrolled in schools served by the LEA. The number of LEP students is annually submitted to the California Department of Education on the Language Census R-30 Report.

   Set-aside subgrants for immigrant students: LEAs that have experienced a significant increase (at least two percent) in the number of immigrant children enrolled in public and nonpublic schools in their jurisdiction are eligible for subgrants. The number of eligible immigrant students is annually submitted to the California Department of Education on the SNOR. For information on immigrant education subgrants, see Section F, Immigrant Education Program.

   See Title III to view the current and future estimated allocations for the LEP student and immigrant education subgrants.

6. **If eligible, may an LEA receive a Title III subgrant for both LEP students and eligible immigrant students?**

   Yes. Because most (but not all) immigrant students are also identified as LEP students, LEAs that are eligible for an immigrant education subgrant will also receive an LEP student subgrant under Title III.

7. **How does an LEA apply for LEP student funds under Title III?**

   To be eligible for a direct-funded LEP student subgrant, LEAs must be scheduled to receive a subgrant of $10,000 or more. LEAs that are scheduled for a subgrant of $10,000 or more will apply though the Consolidated Application, Part I.

   If an LEA is projected to receive an LEP student subgrant of less than $10,000, the LEA must enter into an agreement to form and/or join a consortium in which the total amount of the subgrants of members of the consortium collectively total $10,000 or more. In the case of a consortium of LEAs, only the lead LEA is the grantee. (Title III, Section 3114).

8. **Is an LEA that receives an LEP student subgrant under Title III required to submit a narrative of how it proposes to use the funding?**

   All recipients of the student subgrant must submit a proposed budget.

   As part of the cash management process, each LEA will be required to submit expenditure reports on all Title III expenditures for LEP and Immigrant student programs.

9. **May a county office of education be the lead LEA and/or a member LEA when forming a consortium for Title III funding?**

   If the county office enrolls LEP and/or immigrant students in a county-run school, then the county office may be a member or lead LEA in the consortium. If the county office does not enroll LEP and/or immigrant students, it cannot be considered a member or a lead in the consortium. See below for possible functions of a county office. (Title III, sections 3114 and 3141).

10. **In what ways may county offices of education provide support to a consortium of LEAs?**

    In addition to the conditions described above, county offices may be subcontracted by Title III-funded LEAs to provide required and/or authorized services to Title III direct-funded LEAs and consortia. County offices of education may provide fee-based services to support Title III-funded LEAs and no-cost services in their role as a technical support agency.

11. **Is there a cap on the amount of Title III funds that can be used for the administration of the LEP student program?**

Yes, An LEA may use no more than 2 percent of an LEP student subgrant for administrative costs and indirect costs (Title III, Section 3115[b]). Program administrative costs include such items as salaries of project personnel, clerical support, and other costs directly incurred in the administration of the program. The U.S. Department of Education's 1997 guidance, *Indirect Cost Determinations, Guidance for State and Local Government Agencies* (referred to as the *Blue Book*) states that any "statutory or regulatory limitation applies to the combined claims for indirect costs and direct administration costs."

12. **May LEAs that receive Title III LEP student funds assess the approved indirect cost rate?**

No. Based on recent guidance from OELA, LEAs may not assess the indirect cost rate on funds used to administer the LEP grant. Title III statute specifies a two percent cap on administrative and indirect costs.

13. **Is carryover of Title III LEP student funds allowed?**

Yes. Reasonable carryover of Title III LEP student funds is allowed for an additional 12-month period beyond the original grant period. For example, for funds granted for the 2007-08, school year (July 1, 2007, to June 30, 2008), carryover is allowed until September 30, 2009. Please see Section C, Private Schools, for additional details on carryover funds.

14. **What fiscal procedures should be taken when a direct-funded LEA or consortium-partner LEA discontinues participation in Title III?**

When an LEA submits a Title III application, it agrees to participate in the program for the duration of a particular school year. If, at the end of the school year (June 30th) in question, there are unexpended funds, then carryover of the funds is allowed for another 12-month period. These funds are earmarked for supplementary programs and services to LEP and/or eligible immigrant students in the LEA that originally generated the funds even if the LEA is no longer participating in the Title III program in the current school year. If, at the end of the 12-month carryover period, an unexpended balance remains, these funds must be returned to the California Department of Education. No additional carryover authority may be granted.

15. **What are the Standard Account Codes Structure (SACS) Resource numbers for the Title III LEP student and Immigrant Education programs?**

The SACS Resource number for the LEP student program is 4203. The SACS Resource number for the Immigrant Education program is 4201. The SACS Revenue number for both programs is 8290. This information is available at Standardized Account Code Structure.

16. **What are the responsibilities of the Consortium lead and members?**

The consortium lead LEA will be responsible for acting as the fiscal and programmatic agent for the consortium, and will file the required expenditure reports and maintain fiscal records. The lead provides the member LEAs with programs, services, and products. In the event that the consortium fails to meet the Annual Measurable Achievement Objectives (AMAOs) for one year, the lead LEA will be responsible for ensuring that parents of LEP students in each member LEA are notified if AMAOs are not met. The consortium lead may delegate responsibility to each of the consortium members. In the event that the consortium fails to meet AMAOs for two consecutive years, the consortium will meet to develop a Title III Improvement Plan Addendum. The Lead LEA will be responsible for completing and submitting the Biennial Evaluation and any other evaluation necessary to the CDE.

Member LEAs are required to collectively plan and agree to a common memorandum of understanding (MOU) for the consortium. This MOU outlines the program, services, and products to be provided by the lead LEA. In the case of failing the accountability targets, the MOU identifies the responsibilities of the lead and member LEAs in notifying parents and preparing the LEA Improvement Plan.

Beginning in 2007-08, as a condition of funding, each consortia (lead and members) shall remain as an entity/subgrantee for four consecutive years.

17. **May Title III funds be used to remedy the academic deficits of reclassified fluent-English proficient (RFEP) students, or, is the use of Title III funds limited to LEP students who have not been reclassified?**

The use of Title III funds is limited to providing English learners (also known as LEP) with appropriate language programs and services, so they can attain English proficiency based on the California English Language Development Test (CELDT) and meet academic standards.

When a student is RFEP, that student is no longer LEP and is no longer eligible to receive Title III programs or services. Title I funds can be used to help remedy the academic deficits of RFEP students and ensure that these students reach the proficient level on academic tests.

For more information, visit the CDE Web site at the Title III, LEP Consortia Details Web page.

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Private Schools

1. **Are English learner (EL) students in private schools eligible to receive Title III programs, services, and products?**

Yes, when EL students are identified in an appropriate manner, when the local educational agency (LEA) and private school(s) within its jurisdiction have conducted meaningful and timely consultation, and, when the LEA and private school have developed a memorandum of understanding (MOU), EL students in a private school may participate in programs and receive services and products funded by Title III (Title IX, Part E, Section 9501). Private schools may not receive funds directly.

2. **How can "meaningful consultation" be ensured and what topics need to be addressed by the LEA with the nonprofit private school in the design and development of Title III programs, services, and/or products to be provided?**

   To ensure timely and meaningful consultation, the LEA must consult with appropriate private school officials during the design and development of the Title III program on issues such as:

   - how the EL student needs to be identified
   - what services will be offered
   - how, when, and by whom the services will be provided
   - how the services will be assessed and how the results of the assessment will be used to improve those services
   - what the size and scope of the services to be provided to the private school children and educational personnel will be
   - what the amount of funds available for those services will be
   - how and when the LEA will make decisions about the delivery of services, including a thorough consideration of the views of the private school officials on the provision of contract services through potential third-party providers

   An MOU between the LEA and private school should be developed as a result of initial consultation and address these items. Subsequent meetings should be scheduled between the LEA and private school to assess services and determine areas and plans for improvement.

3. **What resources are available to assist LEAs and private school officials with learning more about Elementary and Secondary Education Act (ESEA), Part A programs, particularly the consultation process and the provision of equitable services?**

   LEAs and private school officials will find a number of useful resources and guidance in Title IX, Part E, Uniform Provisions, Subpart 1, Non-Regulatory Guidance (Outside Source). Section J - Resources includes: links to statutory, regulatory, and guidance documents on the U.S. Department of Education Web site; sample consultation checklists; needs assessment forms; consultation timelines; and, a list of state department of education and local public school district Web sites that host ESEA program pages specific to private schools.

4. **What process should be used to identify eligible EL students in private schools?**

   The California Department of Education (CDE) recommends that private schools make an agreement with the LEA to use procedures similar to those used by public schools to identify private school students eligible for Title III services. The LEA is responsible for the oversight and costs of initial identification.

   The process is as follows: The private school should identify those pupils being considered for participation in the Title III program and administer a Home Language Survey (HLS) that is to be completed by the parent or guardian of selected private school students. Private schools should use the same version of the HLS used by the LEA. If a language other than English is indicated on the HLS, the LEA is required to administer an initial, approved language assessment (the California English Language Development Test is restricted and not allowed for this purpose) to those students. The LEA is responsible for costs and oversight of these assessments, which must have technical data demonstrating their validity and reliability to measure listening, speaking, reading, and writing skills in English for non-native speakers. A list of tests that may be used for assessing the English language proficiency of ELs in private schools may be found on the CDE Web page, List of Tests for English Learners.

   Private schools may wish to further assess identified EL students in their primary language to diagnose needs and determine the best strategies to assist students in furthering their English language proficiency.

   Once identified as EL, a private school may request that a student continue to receive Title III services in subsequent school years until the student attains English proficiency.

5. **Are immigrant students in private school students eligible to receive Title III Immigrant programs, services and products?**

   Yes, when meaningful and timely consultation have occurred, and when an MOU has been developed between the LEA and the eligible private school, immigrant students in the private school may receive Title III immigrant programs and services. Private schools may not receive Title III funds directly.

   For more information and a sample MOU, please visit the Title III Immigrant, Private Schools Web page.

6. **What information should be included in the MOU?**

The MOU should indicate the name of the LEA and private school involved. It should contain the number of EL students identified in the private school; how the students' needs will be identified; what services will be provided; when, where, and by whom the services will be provided; how the services will be assessed and how that information will be used to improve the programs; the size and scope of the equitable services; and, other provisions including timelines for transacting provisions and potential third party contractor information.

7. **How much of an LEA's Title III funds for EL students may be used to support programs, services, and products for ELs in private schools?**

   The Elementary and Secondary Education Act specifies that assistance to EL students in private schools should be equitable to that of EL students in public schools.

   The recommended method to determine equity is to use the per pupil allocation of Title III LEP student funds as the basis for the cost of Title III products and services to be provided to the private school. The private school should receive an equivalent amount of products and services for each of the EL students served as the public school receives for each of its EL students according to the per pupil allocation.

8. **Do LEAs receive Title III funds for EL students served in private schools?**

   Yes. The CDE collects data on the number of EL students enrolled and reported in private schools that receive Title III programs and services. The CDE aggregates these data and adds this number to the number of EL students enrolled in public schools to determine funding amounts.

9. **Do Title III accountability measures apply to EL students in private schools?**

   No, private schools are not responsible for meeting the Title III accountability requirements. Private schools will not be included in the public school calculation to determine if the LEA has met its Annual Measurable Achievement Objectives.

10. **How are LEAs held accountable for meaningful and timely consultation with private schools that request to participate in Title III programs and services?**

    As a part of the Categorical Program Monitoring (CPM) process, LEAs must provide evidence that they have met the legal requirements of ESEA, Part E, Subpart 1, Section 9501 (c) [1-4]. Evidence must demonstrate that personnel representing the LEA have engaged in timely and meaningful consultation with private school officials in their geographic area and have offered to assist the schools with the identification of ELs and the provision of services to eligible students, teachers, and families of ELs. The English Learner Instrument for Categorical Program Monitoring, under the section titled Program Review Instrument and in the document titled English Learner, can be found on the 2010 Cycle D Reviews Web page.

11. **Must private school El students be assessed annually?**

    Yes. English proficiency of private school EL students must be assessed annually to determine their continued eligibility for Title III services. LEAs may use the same instrument that the LEA used for the initial assessment of private school students.

12. **May a public school district request that potential Title III participants enrolled in private schools come to the district's assessment or newcomer center for the administration of the English language proficiency test?**

    Yes, a school district may request that private school students who are being considered for Title III services come to the district's centralized assessment location. In cases where the administration of the English proficiency assessment at the district's center would cause a hardship on the part of the private school students, the school district should make other reasonable arrangements for the assessment of such students.

13. **Must a Title III program design be the same for both public and private schools?**

    No. If the needs of the private school are different from those of the public school, the LEA, in consultation with private school officials, must develop a separate program design that is appropriate for the private school students. Consultation and coordination between LEA and private school officials are essential to ensure a high-quality program that meets the needs of the students being served and assists those students in attaining English proficiency and meeting the same challenging standards as all students.

14. **Does the Title III requirement on language qualifications of teachers also apply to teachers providing services to private school students?**

    Yes. All teachers providing Title III instructional services must be fluent in English and any other language used for instruction, including having written and oral communications skills. (Title III, Section 3116 (c)).

15. **Who maintains control of Title III materials and equipment?**

    The LEA maintains control of the federal funds used to provide services to private schools. It also maintains title to materials, equipment, and property purchased with those funds. LEAs may allow the private schools to keep the items from year to year, in accordance with approved activities specified in the MOU.

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Use of Funds

1. **May an LEA carry over Title III funds from one school year to another?**

   LEAs may carry over Title III funds for one year beyond the original year of funding. For example, in the case of a subgrant allocated for the 2006-07 school year (July 1, 2006, to June 30, 2007), the LEA may carry over funds from this particular allocation until September 30, 2008. Any 2006-07 funds not encumbered or expended by June 30, 2008, must be returned through the California Department of Education to the U.S. Department of Education (Tydings Amendment of General Education Provisions Act, Section 76.709 of Education Department General Administrative Regulations).

2. **Must Title III LEP student funds follow the LEP students?**

   Not necessarily. Although the amount of funds allocated to an LEA is based on a formula subgrant with a specified amount for each LEP student identified and enrolled, the funds do not have to follow the students in a proportional manner. The LEA has the flexibility to determine where and how the funds will be used for allowable activities on the basis of the needs of its LEP student population (Title III, Section 3115).

3. **How may the Title III LEP student funds be used?**

   LEP student funds must be used to increase the English proficiency of LEP students by providing high-quality language instruction educational programs. These programs must be based on scientific research that demonstrates the effectiveness of the programs in increasing English proficiency and student academic achievement in the core academic subjects. These programs must also provide high-quality professional development to teachers, principals, administrators, and other school or community-based organizational personnel (Title III, Section 3115). In addition to these required activities, there are eight additional authorized activities. A full list of required and authorized expenditures may be found in Section 3115(c), (d) of Title III. These services may be provided directly by the LEA, another LEA, institutions of higher education, community-based organizations, or private sector entities in any combination.

4. **How may funds be used to provide professional development?**

   Title III, Section 3115 (c)(2), specifies allowable professional development activities and states specifically that these activities must be of sufficient intensity and duration to have a positive and lasting impact on the teacher's performance in the classroom. Programs must be designed to improve the instruction and assessment of LEP students; designed to enhance the ability of teachers to understand and use curricula, assessment measures, and instructional strategies; and based on scientific research in increasing students' English proficiency. The law also specifies that professional development shall not include activities, such as one-day or short-term workshops and conferences, unless they are a part of a comprehensive professional development plan that is based on an assessment of the needs of the teacher, the supervisor, and the students.

5. **Title III uses the terms "supplement" and "supplant." What do they mean?**

   Title III, Section 3115(g), requires that funds available under a subgrant be used "to supplement the level of federal, state, and local public funds that, in the absence of such availability, would have been expended for programs for LEP students and immigrant students and in no case to supplant such Federal, State, and local public funds." For example, if a particular activity last year was paid with nonfederal funds, the same activity this year cannot be paid with federal funds. State-mandated activities must be paid with state funds first. In this section, "supplement" means "an addition;" "supplant" means "to take the place of."

6. **Can Title III funds be used for alternative bilingual education programs?**

   Yes. In Title III, Section 3301, a language instruction educational program is defined as a program of instruction:

   ". . . that may make instructional use of both English and the native language to enable the child to develop and attain English proficiency, and may include the participation of English proficient children if such course is designed to enable all participating children to become proficient in English and a second language."

   Schools offering bilingual education programs must, of course, adhere to state law regarding the placement of students in these programs.

7. **How can Title III funds be used to provide special education services for LEP students?**

   Special education services, as identified in a student's Individualized Education Plan (IEP), must be provided with eligible non-Title III funds. However, supplementary English learner services may be provided to LEP students who are also identified as special education students (Title III, Section 3115 (g)).

8. **Materials on the state-adopted list, "Reading/Language Arts/English Language Development Reading Intervention Programs for Students in Grades 4-8," may be used as the language arts program for LEP students. May Title III funds be used to purchase these materials?**

   After core curriculum materials as defined by the LEA are provided with eligible non-Title III funds, Title III funds may be used to provide additional supplementary materials (Title III, Section 3115 (d) (g)).

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Parental Involvement

1. **What are the requirements regarding the role of parents of LEP students?**

   Each LEA using funds provided under Title III to provide a language instruction educational program must implement an effective means of outreach to parents of LEP children. LEAs must inform such parents about how they can be active participants in assisting their children to learn English, achieve at high levels in core academic subjects, and meet the same challenging state academic content and student achievement standards that all children are expected to meet (Title III, Section 3302 (1)).

2. **Which parents should receive the notifications required under Title III?**

   Title III requires that the parents of students identified for, or participating in, a Title III program be notified of such participation. Therefore, the parents of all LEP students in any LEA using Title III funds shall receive the required parental notifications. The same requirements regarding parents of LEP students are found in both Title I, Section 1118, and Title III, Section 3302. Additionally, many of the federal parental notification requirements overlap with state requirements. If a student is enrolled in a district that does not receive any federal Title I or Title III funds, then only state requirements for notification of parents apply.

3. **Is parental notification required for LEP students receiving services under Title I? If the student is receiving only state services, does the federal requirement for notification of parents apply?**

   Notification requirements for parents of LEP students are the same for Title I (Section 1118) and Title III (Section 3301). In many cases the federal and state requirements are the same. If a student is enrolled in a district that does not receive Title I or Title III funds, then only the state notification requirements apply.

4. **What is the timeline for LEAs to provide parents with the notifications?**

   Title III, Section 3302, has two timelines for providing parental notifications: one for the student who is new to the LEA and one for a continuing student.

   For LEP students who have been enrolled in the LEA since the previous school year, parental notifications must be provided no later than 30 calendar days after the beginning of the school year. LEAs should use the most current information available regarding each student in these notifications (Title III, Section (a)).

   For new enrollees, LEAs must provide the parental notifications within two weeks of a child being placed in a program. This timeline does not conflict with the state requirement of testing students for English proficiency within 30 calendar days of enrollment and placement in an appropriate program (*Education Code* sections 306(a), 313, 60810-60811, 62002; formerly *Education Code* Section 52164.1 (b)(c); *California Code of Regulations* , Title 5, Education sections 4304, 11511; *Code of Federal Regulations* , Title 34, Education, parts 300, 300.532(a)(c)). The Title III notification is triggered after all the assessments have occurred and a student is officially placed in a program.

   Note: An LEA may issue one parental notification that meets both state and federal requirements for all new LEP enrollees. Sample letters are available at Title III.

5. **What kind of information must an LEA provide to parents regarding their child's participation in a language instruction program?**

   Title III, Section 3302(a), requires that LEAs receiving Title III funds inform parents of the following items:

   The reasons for identifying their child as being limited-English proficient (LEP) and for placing their child in a language instruction educational program for LEP students

   The child's level of English proficiency as measured by the *California English Language Development Test (CELDT)*

   The method of instruction that will be used in the program, including a description of alternative programs

   How the program will meet the educational strengths and needs of the child

   How the program will help the child learn English and meet academic achievement standards for grade promotion and graduation

   The program exit requirement, including the expected rate of transition from the program to an English-language mainstream classroom and the expected rate of graduation from secondary school

   How the program will meet the objectives of an individualized education program for a child with a disability

   The parents' rights in writing, including (A) the right to have their child immediately removed from a language instruction educational program on their request; and (B) the options that parents have in declining enrollment of their child in such a program or in choosing another program or method of instruction, if available; and (C) written guidance assisting parents in selecting among various programs and methods of instruction, if more than one program or method is offered.

6. **After the initial Title III notification, how often must parents be provided with notifications?**

Parental choice and involvement are woven throughout the entire *No Child Left Behind* Act. The intent of Title III, Section 3302, is for parents to be informed of the educational programs offered so that they can make informed decisions regarding their children's placement. To have the most current information and choices available, parents must receive annual notifications.
If LEAs provide separate notifications to parents regarding the various components required in Title III, records about how and when such notifications were issued should be maintained. For example, test results may be mailed to parents under separate cover, the parents' selection of program options may be conducted in another format, and so forth.

7. **Are any other separate notifications required?**

   In addition to providing the parental notification of educational programs, LEAs are required to provide notice to the parents of LEP students who participate in a language instruction educational program funded under Title III of any failure of the program to make progress toward the annual measurable achievement objectives described in Section 3122 of Title III. This notice is to be provided no later than 30 days after the Title III Accountability Reports are released.

8. **Are any parent committees required under Title III?**

   No parent committees are specifically required by Title III, but they are required under other state and federal statutes. For example, both the English Learner Advisory Committee and the District English Learner Advisory Committee are required by state law (*Education Code* Section 62002.5; formerly *Education Code* sections 52168, 52176; *California Code of Regulations* , Title 5, Section 4312).

9. **What format and language are required to be used in the notices to parents?**

   According to *Education Code* Section 48985, when 15 percent or more of the pupils enrolled in the school speak a single primary language other than English, all notices, reports, statements, or records sent by the school or district to the parent/guardian of any such pupil must, in addition to being written in English, be written in such primary language and may be responded to by the parent or guardian in English or in the primary language. In addition, federal law requires that schools and districts effectively communicate with all parents and guardians, regardless of the percentage of students that speak a language other than English (Title III, Section 3122 (c)).

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Immigrant Education

1. **How are immigrant students included in the reauthorization?**

   In addition to the formula subgrants that LEAs may receive for LEP students under Title III, the California Department of Education is also authorized to award subgrants to LEAs that experience a significant growth in the enrollment of eligible immigrant students (Title III, Section 3114 (d) (1)).

2. **Which local educational agencies are eligible for a Title III immigrant education subgrant?**

   Any school district, county office of education, or direct-funded charter school that enrolls one or more eligible immigrant students may participate in the Title III immigrant education program if the LEA meets the criteria for enrollment of eligible immigrant students (Title III, Section 3114 (d)).

3. **What is the definition of "eligible immigrant student" in Title III?**

   The term "eligible immigrant student" is defined in Title III, Section 3301(6) as an individual student who (a) is aged three through twenty-one; (b) is enrolled in any public or private elementary or secondary school in kindergarten through grade twelve; (c) was not born in the United States (or any U.S. Territory); and (d) has not been attending any one or more schools in the United States for more than three full school years (Title III, Section 3114 (d)).

4. **How does the California Department of Education know how many eligible immigrant students are enrolled in an LEA?**

   Annually, each LEA and private school in the state is asked to submit the Student National Origin Report (SNOR). The report provides a vehicle for each LEA and private school to identify the number of eligible immigrant students enrolled and report the data to the Department.

5. **When do LEAs take the annual count of eligible immigrant students for the SNOR?**

   LEAs may take counts of eligible immigrant students October 3, 2007, and/or February 29, 2008. Regardless of the month that the count is taken, LEAs should submit the report to the California Department of Education between March 1 and April 1 of each year. If counts are taken in both October and March, LEAs should report only the results from the month with the largest count when submitting the report in April. Beginning in 2007-08, the SNOR will be submitted electronically during March 2008. LEAs will receive information regarding this new process during January 2008.

6. **How does the California Department of Education determine the eligibility of LEAs to receive an immigrant education subgrant?**

   The Department examines immigrant enrollment data reported annually through the SNOR to determine whether the LEA (any school district, county office of education, or direct-funded charter school) has experienced a significant increase in

eligible immigrant student enrollment in the current year compared with the average of the two preceding fiscal years. If the percentage of growth is two percent or greater, the LEA is eligible to participate in the Title III immigrant education program.

7. **What is the process for private schools to participate in immigrant education?**

   Private schools must submit the SNOR annually to the California Department of Education. Once eligibility for a Title III immigrant education subgrant has been determined for a specific LEA in a specific school year, all the LEAs and all the private schools located within the geographic jurisdiction of each eligible LEA will be notified. Nonpublic schools must then file a "Request to Participate" form with the California Department of Education (Title III, Section 3114 (d)(1)).
   Once the "Request to Participate" forms have been approved, the Department will direct LEAs to contact local private schools and develop a memorandum of understanding for the provision of services and products to eligible immigrant students enrolled in the participating private schools. On the basis of the SNOR, the LEA will receive funds from the Department for each eligible immigrant student enrolled in the LEA and in the local private schools (Title III, Section 3114 (d)).

8. **How does an LEA apply for immigrant education program funds under Title III?**

   LEAs scheduled to receive a subgrant of $5,000 or more may apply directly to the California Department of Education for their immigrant education program subgrant and may operate their program independently. LEAs scheduled to receive a subgrant of less than $5,000 must apply for and operate their immigrant education program in collaboration with one or more consortium partners. The subgrant amounts collectively generated by the consortium partners must equal $5,000 or more (Title III, sections 3114 [b] and 3247[b]).

9. **How does an LEA obtain an immigrant education program application form?**

   The Language Policy and Leadership Office will mail application forms to all eligible LEAs during February 2006.

10. **What is the duration of the immigrant education subgrant?**

    LEAs and local private schools will be funded for a rolling three-year period. For each year that the LEA is eligible (e.g., has an increase in enrollment of eligible immigrant students of five percent or more), the LEA will receive a grant for the subsequent three-year period. For example, if an LEA established eligibility with the 2006 submission of the SNOR, immigrant education funds were approved for 2007-08, 2008-09, and 2009-10. Each year, the level of funding will be recalculated according to the number of eligible immigrant students reported by the LEA for the previous year. For instance, in 2007-08 the per pupil Title III allocation is $95.00. An LEA with a 2006 count of 200 eligible immigrant students according to the report will be scheduled to receive a subgrant of $19,000 in 2007-08.

11. **How may Title III funds for immigrant education programs be used?**

    The purpose of the immigrant education program is to provide enhanced opportunities for immigrant children and youths; these opportunities may include but are not limited to:

    - Family literacy and parent outreach
    - Additional personnel, including teacher aides
    - Provision of tutorials, mentoring, and counseling
    - Identification and acquisition of materials, software, and technologies
    - Basic instructional services needed by immigrant students
    - Other educational services needed by immigrant students
    - Administrative costs of the program

    Programs and services funded under this part are to supplement and not supplant programs and services provided by local and state funds. A full list and description of authorized expenditures under immigrant education may be found in Section 3114(d) of Title III. Services may be provided directly by the LEA, another LEA, and institutions of higher education, community-based organizations, or private-sector entities in any combination.

    LEAs that receive Title III immigrant education funds, in nearly all cases, will also receive a Title III subgrant for LEP students. In most cases, LEAs should use the immigrant education funds for programs and services that are not already provided for eligible immigrant students through local, state, or Title III LEP student funds.

12. **May LEAs assess costs for administration on NCLB, Title III immigrant education funds?**

    Yes. The LEA is authorized to assess costs for administration. The reasonable cost recommended is 2 percent. In addition, the LEA is authorized to assess its approved indirect cost rate for 2007-08 on the remaining portion of the grant after the administration costs have been assessed. A list of approved indirect cost rates is available at Indirect Cost Rates for Local Educational Agencies.

13. **Is the carryover of funds allowed in NCLB, Title III immigrant education?**

    LEAs are authorized to carryover funds for a period of 12 months beyond the original subgrant period. For example, a reasonable amount of funds granted for the 2006-07 school year (July 1, 2006, to June 30, 2007) may be transferred to the 2007-08 school year budget as long as the 2006-07 funds are encumbered or expended on or before June 30, 2008.

14. **Is an LEA that receives an immigrant education grant under Title III required to submit a narrative of how it proposes to use the funding?**

As specified in Title III, Section 3114, in the initial year of receipt of an immigrant education subgrant under Title III, an LEA must submit, as a part of its LEA plan, a specific description of the proposed programs and activities to be implemented and administered under the immigrant education subgrant. Subsequently, if the LEA makes changes in its immigrant education program, the LEA must submit a revised description of its program through an amendment to the LEA plan.

At the conclusion of each school year, each LEA may be required to submit a final annual fiscal report of all Title III immigrant education expenditures. Additional information on this and related fiscal issues will be provided to LEAs later.

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Accountability Requirements

1. **What are the Title III accountability provisions?**

   Title III requires that states hold Title III subgrantees accountable for meeting three annual measurable achievement objectives (AMAOs) for English learners. The first AMAO relates to making annual progress on the CELDT, the second relates to attaining English proficiency on the CELDT, and the third AMAO relates to meeting Adequate Yearly Progress (AYP) by the English Learner subgroup at the LEA level.

2. **When will LEAs be held accountable for reaching these targets?**

   Subgrantees receiving Title III funds were held accountable for meeting the AMAOs beginning with the 2003-04 school year.

3. **When will LEAs receive information on whether they have met the growth targets?**

   Title III subgrantees, including districts, county offices of education, direct-funded charter schools, and consortia will receive preliminary Title III information each spring providing information on their performance on the two English language proficiency AMAOs. The Title III Accountability Report including information on all three AMAOs will be released each fall after the AYP data is released.

4. **How does the CDE determine if a consortium has met the Title III AMAOs?**

   Beginning in 2006-07, the data for the consortium lead and the consortium members are aggregated up to the consortium level to determine if the AMAOs have been met for a consortium as a whole.

5. **How long must consortia remain together?**

   Beginning in 2007-08, as a condition of funding, each consortia (lead and members) shall remain as an entity/subgrantee for four consecutive years.

6. **Do these accountability provisions apply to charter schools that are receiving Title III funds?**

   Charter schools that are direct funded and that receive Title III funds as a separate LEA will be held accountable for meeting the AMAOs and will receive Title III Accountability Reports each fall. Charter schools that receive funds through an LEA will be held accountable as a part of the LEA. Charter schools that are funded as part of a consortium will be accountable as part of the consortium for meeting the AMAOs.

7. **Do these provisions apply to immigrant students and the LEAs with Title III immigrant subgrants?**

   These Title III accountability provisions apply only to the Title III LEP subgrants. Immigrant students who are limited English proficient would be included in these accountability objectives.

8. **Are private schools held accountable for meeting the AMAOs?**

   No, private schools do not receive Title III funds (although they may receive Title III services) and are not subject to these accountability provisions.

9. **What are the consequences if an LEA does not meet the growth targets?**

   If a Title III subgrantee fails to meet the growth targets for two consecutive years, the LEA or consortium lead shall develop an improvement plan that will ensure that the AMAOs are met. The improvement plan shall specifically address the factors that prevented the LEA or consortium from achieving the AMAOs. The plan may apply to targeted schools or districts rather than the entire LEA or consortium if the particular factors that prevented the Title III subgrantee from meeting the AMAOs warrant such an approach. If the LEA or consortium fails to meet the AMAOs for four consecutive years, the state shall require the LEA or consortium to modify its curriculum, program, and method of instruction or determine whether the subgrantee will continue to receive Title III funds (Section 3122 (b)).

10. **How do the Title III accountability provisions affect LEA planning?**

    The Title III AMAOs should become a component in the local evaluation of the effectiveness of services to English learners. LEAs may also use the English Learner Subgroup Self Assessment (ELSSA) tool to help identify areas of strength or weakness in their program for English learners.

11. **Who do I contact for more information on the AMAOs and the Title III Accountability Reports?**

Contact the Language Policy and Leadership Office at (916) 319-0845 for more information on the AMAOs, the Title III Accountability Reports, or additional information about Title III accountability requirements. The Title III Accountability Report Information Guide provides information on the AMAOs and the Title III Accountability Reports.

Questions: Language Policy and Leadership Office | 916-319-0845

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Educating California's Immigrant Children

An Overview of Bilingual Education

By Patricia L. de Cos

JUNE 1999

CRB-99-009

Educating California's Immigrant Children:
An Overview of Bilingual Education

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This report is a follow-up to the author's testimony in an informational hearing regarding the research related to Proposition 227, which was reported to the Senate and Assembly Education Committees on February 18, 1998.

CONTENTS

EXECUTIVE SUMMARY

On June 2, 1998, the people of California passed Proposition 227, a voter imposed statutory amendment that substantially altered the manner by which non-English speaking children learn English in California's public schools. The initiative required that school districts redesign their curriculum so those pupils receive instructional services in a *sheltered or structured English immersion* class for approximately one year.

This paper examines Proposition 227 and the driving forces behind it. It also discusses how school districts have sought waivers to its implementation via the State Board of Education, and how several school districts, along with several advocacy groups have initiated legal challenges against its implementation.

Beyond the initiative itself, and the issues surrounding its implementation, it is important to understand the context of bilingual education in California. To that end, this paper discusses California's diverse population, and the dynamics that public schools face each day as they struggle to educate an increasing number of English language learners.

It is also important to understand the evolution of language policy in public schools. This paper provides a history of language policy, discusses how over time instruction in English became dominant for new immigrants, and presents a summary of why initial bilingual education policies were enacted nationally and in California.

Beyond this history, there exists a limited body of literature on instructional programs for English learners. Several studies directly evaluate outcomes of language immersion efforts and the use of native language instruction. This paper discusses that literature, along with an explanation of the relationship between brain development and second language acquisition and learning, as a possible way to shed light on effective teaching methodologies used for English language learners.

The paper concludes with several policy considerations, beyond Proposition 227, for providing instruction to English language learners.

I. PASSAGE OF PROPOSITION 227: THE "UNZ INITIATIVE"

California's voters passed Proposition 227, known as the "English for the Children in Public Schools" Initiative, on June 2, 1998. Prior to its passage, proponents of the initiative argued that the best path to academic achievement for English learners was to learn English quickly. They contended that many bilingual education programs offered in California public schools placed English learners into slower learning tracks in which they were not learning English adequately, and from which it was difficult to transition into mainstream English language classes.

The initiative requires that all English language learners participate in a *sheltered English immersion* or *structured English immersion* program for a transition period not normally to exceed one year. However, the term *sheltered/structured English immersion* is a new label coined by the initiative's authors. Even though the initiative provides a definition for this new term, it does not provide a prescription for rendering this type of instruction within the one-year time frame. Instead, it allows each school district to interpret and design a one-year curriculum by which to immerse children in English language learning.

The initiative specifies that parents or guardians may request a waiver for their children to attend an alternative language program other than the mandated one-year sheltered/structured English immersion program.[1] In order to obtain an annual waiver, they must personally visit the school to apply and provide a written request. During their visit to the school, schools must provide these parents or guardians with information regarding alternative language programs available. In this way, parents or guardians who are interested in placing their children in an alternative language program (through native language or other recognized educational methodologies) may do so, provided that their children abide by a 30-day waiting period imposed by the law. The initiative requires schools to allow students with waivers to transfer to schools offering an alternative program. If at least 20 pupils at any grade receive waivers in a school, that school must provide an alternative language program.[2]

The initiative appropriates $50 million annually for ten years to provide adult English language services to adults who pledge to tutor school-age children in the English language. The initiative requires the State Board to develop guidelines for this program, the Superintendent of Public Instruction to administer the program funds, and local school boards to allocate the funds at their discretion to schools or community-based organizations that provide adult English language services.

Programmatic Changes and Teacher Training

Although Proposition 227 is clear about its one-year structured/sheltered English immersion requirement, it did not address the issue of how new or existing teachers should be trained in order to offer the new curriculum. In fact, teachers continue to be trained using existing pedagogical techniques. As a new program and

concomitant curriculum are defined, teacher training and professional development programs, for both pre-service and in-service teachers, will need to be realigned with the one-year language immersion requirement.[3]

Implementing Proposition 227 – Complications for School Districts

The passage of Proposition 227 caused consternation among many school districts throughout the State, especially for those with large numbers of non-English speaking students, and particularly for teachers who worked within the bilingual education community who had little knowledge of one-year language immersion programs. Further, absent a clear understanding of the initiative's intent, it was difficult for schools to develop appropriate curricula to meet the spirit of the law, while some schools and teachers were determined to resist. The initiative passed in June 1998, and school districts had only 60 days to rethink how they would implement the law and develop a new curriculum, which also affected the purchasing of appropriate materials to support the new program.

In spite of these difficulties, many school districts began the task of dismantling their previous bilingual education programs. While a large number of school districts began implementing Proposition 227, other school districts had greater difficulty finding solutions or did not want to educate large numbers of English learners within the one-year time frame using the prescribed approach. For many school districts, this will undoubtedly mean that supplemental instructional time in after-school, summer, or Saturday programs will be necessary in order to conform to the one-year time frame.[4] Recognizing their inability to implement a program or curriculum within a short time frame and in the absence of appropriate instructional materials or because they did not want to implement the new program, these school districts have sought waivers from the State Board of Education. They have argued that the new law posed a burden on their school district and was not in the best interest of its pupils.

California State Board of Education's Actions Following Passage of Proposition 227

Immediately following passage of Proposition 227, the State Board of Education conducted a series of meetings which resulted in the passage of temporary emergency regulations aimed to assist school districts in their implementation of the initiative. These temporary emergency regulations remained in force until November 1998, when the Office of Administrative Law approved them as permanent.

During the process of implementing the requirements of Proposition 227, the State Board of Education agreed not to consider any waiver requests by school districts wishing to maintain their bilingual programs. The State Board made its decision after receiving an opinion from the Legislative Counsel that stated that the Board did not have unilateral authority to waive provisions of the initiative. The

Legislative Counsel said that such waivers would be contrary to the intent of the electorate.[5]

The State Board's legal counsel concurred with the Legislative Counsel's opinion. However, the California Department of Education's legal counsel offered a different interpretation of the law. The Department's legal counsel argued that the State Board did have the power to grant waivers.[6]

The Role of the Courts in the Implementation of Proposition 227

Educating California's language minority children in public schools is a complex matter whose controversy is often manifested through legal challenges in our court systems. Leaders in California's K-12 public education system have had a difficult time in accommodating both different values and needs of diverse local communities along with the general needs of the state. This has clearly become the case with interpreting and implementing Proposition 227. This dynamic has caused several legal challenges, which the court system must now sort out, including the following:

- After the State Board decided not to consider school districts' requests for waivers, three school districts filed a joint suit against the State Board for failing to consider their requests for waivers.[7]
- Immediately following the passage of Proposition 227, in June 1998, a coalition of education and civil rights groups sought injunctive relief from the courts arguing that the initiative was unconstitutional.[8]
- Further, in December 1998, a consortium of education interests filed a suit against Governor Wilson, the State Board, and the State Superintendent of Public Instruction alleging the unconstitutionally vague nature of Proposition 227.[9] The plaintiffs in the case claim that many terms are not defined; yet, the initiative holds specified individuals liable for not implementing the initiative, as specified.

The legal challenges brought by the school districts, as well as other cases, are still pending in the courts and the details of each case are further discussed in Technical Appendix A: *Legal Challenges* of this report.

The Need for Data and Evaluation

Implementation of the new law is mixed among California's school districts,[10] and the state gathers limited information on a consistent basis.[11] The California Department of Education recently conducted a mail-in survey to gather information to identify any needs for technical assistance for school districts implementing the new requirements of Proposition 227.[12] The survey intended to report results based on a "snapshot" of what school districts were doing between January and March 1999.

The Department's survey received a 72 percent response rate (654 districts of the 904 districts that enroll English language learners); and data collected from the responding districts represented 88 percent of English language learners in California public schools. All but two of the largest 50 school districts in the state responded. Given the survey design, the responses reflect a district perspective as opposed to the perspective of individual schools.

Results indicate that districts reported a *need* for the following:[13]

- To establish English Language Development standards and benchmarks;
- To establish criteria in order to evaluate the effectiveness of programs;
- To develop model programs and effective curricula for implementing the structured English immersion program; and
- To provide staff development and recruitment of qualified teachers possessing proper credentials.

Results also indicate the following *issues of concern*:

- Districts reported a concern for the mandatory 30-day waiting period for enrolling English language learners under the age of ten in a structured English immersion program prior to transferring them to a bilingual program.
- Only 68 percent of districts reported having notified parents of an opportunity to apply for waivers. In other words, 32 percent of responding districts had not. The Department found differences in district responses based on the number of English language learners enrolled in the district. In districts with low numbers of English language learners only 30 percent had notified parents;[14] in districts with a moderate number of English language learners, 80 percent had notified parents;[15] and in districts with a high number of English language learners, 90 percent had notified parents.[16]
- While districts generally reported that adequate training had been provided to teachers and staff regarding the general requirements of Proposition 227, less than adequate training had been provided for strategies, curriculum, and materials needed for structured English immersion instruction, alternative courses of study, and English language mainstream classrooms.
- About 76 percent of responding districts indicated that Proposition 227 did not have a major impact on the allocation of resources.[17] Conversely, slightly less than 24 percent of responding districts reported that Proposition 227 had a major impact on resources. The Department found differences in district responses based on the number of English language learners enrolled in the district: for districts with low numbers, only five percent indicated a major impact on resources; for moderate and high numbers of English language learners, a quarter of districts responded that Proposition 227 had a major impact on resources.

It should be noted that the survey did not specifically ask how many parents in each district had requested a waiver of the requirements of Proposition 227.

In addition to the information generated from the Department's survey, achievement scores from the Standardized Testing and Reporting (STAR) program were released on June 30, 1999. While Proposition 227 did not require an evaluation of the new program, schools have tested all California school children for the 1999 Stanford 9 and STAR augmentation.[18] While there will be a natural interest in comparing the scores of English language learners with results from last year, we need to be careful about interpreting these results because the population of English language learners is not exactly the same.

Until the State has information such as the number of students enrolled by type of program, how many are mainstreamed annually by type of program, the success of the one-year limitation, and other information, it will be difficult to evaluate the effectiveness of the new program, or any other serving English language learners. Further, absent such information, it will be difficult to determine if any additional legislation may be needed in order to educate language minority children in California.

II. IMMIGRATION TO CALIFORNIA: A MELTING POT OR COEXISTENCE BASED ON TOLERANCE?

California is home to many immigrants who have migrated to this state in search of a better life and economic opportunity. They have sought to realize the American dream by working hard, enjoying political stability, and establishing economic stability for themselves and their families. These immigrants bring with them their cultures, values, and languages.

After immigrants arrive in California, they adapt and conform in varying degrees to the American lifestyle, some by fully assimilating themselves with other Americans, others by selecting communities of people who share their culture and language. The latter group of immigrants has created clusters of ethnic groups which, in many respects, take on the cultural and language characteristics of their native countries.

These ethnic enclaves can be insulated environments where language and culture are reinforced and preserved. Some examples of such communities in California include San Francisco's downtown Chinatown, Hispanic neighborhoods in Los Angeles and San Jose, and Orange County's "Little Vietnam." For some immigrants, learning the English language is not necessary to their economic *survival*. They have managed to get by with minimal English-speaking ability, and by working in industries that do not require English-language fluency. Such industries include agriculture, clothing manufacturing, health care assistance, and food service.

The Importance of Language

Language is a powerful means of communication. Achieving English language proficiency may be viewed as an important skill that immigrants need in order to achieve economic security and social acceptance in America. However, the foreign languages that immigrants bring with them to this country serve other purposes; that is, these languages serve to embody and connect culture and heritage. For some immigrants it is especially important to maintain a connection with their native language, while for others it is not. Whether California may be viewed as a melting pot or simply as coexistence based on tolerance of various diverse ethnic communities may largely be determined through the survival of the various languages spoken here. That is, while language serves to maintain unity among minority ethnic groups, it also exposes the diversity among California's residents.

III. THE DIVERSE DEMOGRAPHY OF CALIFORNIA

In the past thirty years, California has witnessed a tremendous growth in the number of foreign-born, non-English speaking immigrants. During the 1970s, 1.8 million immigrants came to the state-a figure that exceeded all prior decades combined.[19] This number was doubled during the 1980s when 3.5 million new immigrants arrived and established residency in California.[20] The trends from the past decade have continued in the 1990s.

Data from the March 1998 Current Population Survey indicate that immigrants now comprise roughly 25 percent of the state's population. Among first generation immigrants,[21] the largest concentrations come from Latin America[22] and Asia.[23] Smaller immigrant groups come from Europe and elsewhere. According to the California Department of Finance, most immigrants have settled in Southern California, and nearly two-thirds reside in the Los Angeles region.[24]

A study of California's immigrants revealed many interesting trends of their demographic profiles.[25] Based on U.S. Census data, between 1960 and 1990, immigrants had higher high school completion rates than prior to 1960, except those immigrants from Indochina, Mexico, and Central America.[26] The fact that immigrants from these regions of the world complete high school at a lower rate is troubling when one considers that currently about half of California's foreign-born population is from Mexico or Central America, and another one-third is from Asia.[27] Consequently, overall educational levels among recent immigrants have declined.

These demographic indicators are relevant to our discussion for educating immigrant and language minority children in California public schools. If immigrant families arrive without a high school education, then it will be more difficult for them to provide the academic, as well as the English language support, necessary for their children to succeed in school.

Indicators of English Language Learners in California Public Schools

According to a 1997 Language Census Report published by the California Department of Education, there was a 220 percent increase in the number of English language learners between 1982 and 1997 in California's public schools.[28] As of Spring 1998, California public schools reported that there were 1.4 million English language learners, who comprise 24.6 percent of all public school enrollments and who are mainly concentrated in the primary grades (K-3).[29] Geographically, the bulk of English learners are concentrated in Los Angeles and Orange Counties. Eighty-one percent of English learners speak Spanish as their primary language, compared to three percent for Vietnamese as the second highest language concentration.[30]

Enrollments of English Language Learners

Table 1 below indicates the percentages of English learners who received language instruction in California's public schools by type of service in the 1997-1998 school year, prior to the passage of Proposition 227.[31] (Refer to the Glossary of Terms at the end of this report for definitions.)

These enrollment figures indicate that 16 percent of English learners enrolled in California public schools either did not receive assistance in developing their English proficiency or withdrew from such services. That is, despite their English language deficiencies, they attended regular courses. Further, Table 1 shows that slightly less than *one-third* of all English learners was enrolled in pure native language instruction (or bilingual education—called "ELD and Academic Subjects through the Primary Language") during the 1997-1998 school year. The 43.5 percent of pupils enrolled in the ELD and SDAIE[32] (with or without Primary Language Support) were not part of a native language program; however, they could have been in later phases of a bilingual program that was now taught overwhelmingly in English.[33] About 11.4 percent of pupils were enrolled in an ELD program, which promoted English acquisition skills of reading, writing, listening, and speaking. All of these pupils are now required to participate in the one-year sheltered/structured English immersion program pursuant to the requirements of Proposition 227, unless their parents or guardians seek a waiver for them to participate in an alternative program.

Table 1
1998 Enrollment in Language Services for English Learners in Public Schools

	English Language Development (ELD)	ELD and Specially Designed Academic Instruction in English (SDAIE)	ELD and SDAIE with Primary Language Support	ELD and Academic Subjects through the Primary Language	Withdrawn from all services	Not receiving instructional services
State Totals	159,617	307,176	305,764	409,879	21,886	201,844
Percent	11.4	21.8	21.7	29.1	1.6	14.4

Source: California Department of Education, Language Census Statewide Summary, Spring 1998.

Redesignation Rates for English Learners

According to the California Department of Education, seven percent (or 96,545 students) of the total number of English language learners were redesignated as having achieved fluent-English proficient (FEP) status in 1998. Without a broader context, these data do not provide sufficient information regarding their meaning. Specifically, information is not available regarding:

- How long English learners participate in any of these programs;
- The pupil's age and whether this factor influences how long an instructional method should be provided;[34] or

- Whether English learners are mainstreamed after achieving English language fluency.

The latter finding is significant and was recently discussed as part of a national evaluation study.[35] Specifically, that study revealed that early mainstreaming did not occur for students after they were reclassified as having achieved English fluency status (FEP) for both English immersion programs and for Early-Exit bilingual education programs.[36] Table 2 displays these findings.

Table 2
Percentages of English Learners Reclassified to FEP and Mainstreamed during Study, by the Years in the Program[37]

Number of Years in Program	Immersion: Percent Reclassified	Immersion: Percent Mainstreamed	Early-Exit: Percent Reclassified	Early Exit: Percent Mainstreamed	Late-Exit: Percent Reclassified
1 (End of K)	3.9	1.3	12.6	1.6	11.8
2 (End of 1st)	21.2	10.7	25.4	9.1	12.7
3 (End of 2nd)	37.9	19.4	43.8	14	28
4 (End of 3rd)	66.7	25.6	72	16.9	50.8
5 (End of 4th)	*	*	*	*	67
6 (End of 5th)	*	*	*	*	78.6

Source: Ramirez et al. (1991).

A few possible explanations for reclassification without mainstreaming exist. First, school districts retain FEP pupils in English language development or bilingual education classes in order to continue receiving Economic Impact Aid, which currently funds their language development programs.[38] Second, teachers may retain FEP children in English development classes because they believe that these students are not yet academically ready to join students in mainstream courses. Third, teachers may be concerned that there exists little transition assistance for these pupils. However, there are scarce data available to support or refute these arguments.

One may wonder whether teachers themselves have a negative incentive to move English language learners out of their classes if teachers' salaries are connected to the number of English language learners being instructed in their classes. There are some California school districts that provide stipends to bilingual teachers. In some cases, the stipend is offered for teachers merely possessing bilingual certificates. Other school districts offer stipends to teachers who have acquired a bilingual certificate and assign them to English learners to provide specialized services to these pupils. Thus, such stipends are used to recruit and retain teachers with specialized skill, depending on the nature of the service and type of school or assignment. While other school districts offer stipends to teachers who have bilingual certificates and who have a certain number of years of experience (for example, five) or have a minimum number of English learners in their class (for example, six). It is not known exactly how many school districts offer stipends as

part of their collective bargaining agreements with teachers, but it is not a widespread practice.[39] School districts use many measures to assess the progress of their pupils, including language appraisal teams, language assessments, etc. in addition to relying on teacher judgement for deciding to mainstream English language learners. It is not clear what impact the use of stipends has on teachers with bilingual certificates and how it could affect overall redesignation rates in California.

Dropout and Graduation Rates Among English Learners

Dropout and graduation data, collected and reported by the California Department of Education,[40] are only reported by gender and ethnicity and do not provide us with information about whether a dropout or high school graduate student was an immigrant and/or an English learner. Further data on dropouts and high school graduates are not linked to bilingual education programs. This is important to point out since there are assertions that dropout statistics somehow reflect on bilingual education. Since the State does not disaggregate dropout data by subcategories of pupil populations (i.e., English learners), the State has no way to gauge English learner progress through the K-12 educational system.

In early June 1999, the California Department of Education released a report regarding the high school graduation rate. According to this report, nearly 283,000 high school students graduated in 1998, representing a 67.2 percent graduation rate for students over a four-year period from ninth through twelfth grade.[41] The methods for calculating the graduation and dropout rate are problematic, since they do not consider student mobility, enrollment changes, or school district boundary changes. Furthermore, since the current data collection procedures do not allow for an accurate individualized student count for dropouts,[42] the estimated rate does not match the graduation or completion rate. While the dropout rate continues to decline, the Department is reluctant to emphasize this trend because of the difficulties in collecting quality data.

The California Legislature appropriated funds to the Fiscal Crisis and Management Assistance Team (FCMAT) to develop a student information system, through the California School Information Services (CSIS), that will provide much better data about the number of students graduating, completing, and dropping out of high school. The purpose of the CSIS program is to build the capacity of schools to implement and maintain student information systems that will enable accurate and timely exchange of student transcripts between schools and postsecondary institutions, and to assist schools in transmitting electronic data to the state. Through this effort, CSIS will develop a unique student identifier that will assist schools to keep track of students as they transfer and progress through public schools. It is estimated that it will take approximately five to seven years for statewide implementation of CSIS.

IV. SELECTIVE HISTORY OF LANGUAGE LAWS AND POLICY FOR LEARNING ENGLISH

The above data suggest there are current challenges facing the diverse population of students found in California's public schools. However, many of these challenges are not new to American public education. There is a rich history of how America's public schools have accommodated immigrants lacking English language proficiency.

As early as the 1690s, German-speaking immigrants operated schools in their native language in Philadelphia.[43] Until the 1880s, teachers commonly used Dutch, French, Swedish, and German in both public and private schools.

A rising tide of anti-immigrant feeling, accompanied by a strong sense of nationalism during World War I, generated public sentiment against teaching in any language other than English. By 1917, wartime hostility toward Germany caused some states to ban the use of German in public schools. By the end of World War I, 15 states declared English as the official language in schools. This trend continued until the 1960s, as more states passed laws forbidding languages other than English from being used in schools.

About the same time, Latino activists, at the height of the civil rights movement, raised concerns about high dropout rates among Spanish-speaking students, then in excess of 50 percent nationally.[44] Capitalizing on the momentum resulting from that movement, Latino leaders sought to improve the educational attainment of Hispanics, and introduced federal legislation that passed as the Bilingual Education Act of 1968. It prohibited discrimination on the basis of a student's limited-English ability, and aimed at assisting Mexican-American children's efforts to learn English.

Shortly thereafter, in 1974, the U.S. Supreme Court ruled in the *Lau v. Nichols* case that children with limited English proficiency have the right to equal access to public education along with the right to assistance in learning English.[45] In response to this case, Congress quickly moved to pass the Equal Educational Opportunities (EEO) Act of 1974.[46] This federal law requires school districts receiving federal funds to include in their curriculum a program of English language instruction for students of limited English-speaking ability. The EEO Act also required school districts to take appropriate action to overcome language barriers that impede equal participation by those students in instructional programs.

California's Language Policy

In addition to these federal court case and laws, three other major federal cases provided policy direction for California in administering programs to English learners. These cases are *Castañeda v. Pickard*;[47] *Gómez v. Illinois State Board of Education*;[48] and *Keyes v. School District No. 1*.[49]

The *Castañeda* case has been especially important for California in providing a framework for English language learner programs. It specifies three criteria that programs receiving federal funds must meet in serving English language learners:

a) a program must be based on sound educational theory or principles;
b) a program must effectively adopt an educational theory; and
c) a program that fails to produce results after being employed for a sufficient time to give the program legitimate trial, indicating that language barriers confronting students have not been overcome, will no longer constitute appropriate action on behalf of the school.

The *Gómez* case required state and local educational agencies to ensure that they meet the needs of the limited-English proficient students.[50] The *Keyes* case led to the requirement that a teacher have the necessary bilingual skills to communicate effectively and to provide instruction to students who are English learners.[51]

California has enacted several laws directed at instruction of English learners.[52] In addition to Proposition 227, two other laws exist. The first is the Impacted Languages Act of 1984, whose purpose is to provide assistance to districts that are impacted by refugee and English learner pupil populations.[53] The second is the Bilingual Teacher Training Assistance Program of 1981, the purpose of which is to provide training for teachers who have been granted bilingual teacher waivers.[54] It may be necessary to review the compatibility of these laws with the newly enacted Proposition 227.

California had also previously enacted the Chacon-Moscone Bilingual-Bicultural Education Act of 1976, which required school districts to offer bilingual learning opportunities to each pupil who was assessed as an English language learner in public schools. This Act contained a sunset clause, which became effective on June 30, 1987.[55] For eleven years following the Act's sunset, the Legislature was unable to garner necessary consensus for any subsequent legislation regarding bilingual education. However, the Legislature did authorize the State to continue to fund the general purposes of the bilingual law despite its sunset condition.[56]

California State Board Action

As recently as July 14, 1995, the State Board of Education revised a policy statement[57] that directed the California Department of Education to continue administering funds[58] for *eight general purposes* identified in the sunset bilingual law.[59] The State Board policy statement also determined that parent advisory committees continue as part of the sunset program.

The State Board's policy statement established two goals for all school districts providing educational programs and services for English learners, including: 1) rapid development of English language proficiency (literacy), including speaking, reading, and writing; and 2) opportunity to learn, including access to a challenging

core curriculum and access to primary language development. The Board also established five principles that related to educational programs and services for English learners.[60]

In March 1997, the State Board of Education issued a Program Advisory for English Learners. This Advisory clarified school districts' legal responsibilities when providing educational services to English language learners and specified their obligations when applying for and implementing waivers of the then current legal requirements.

In late February 1998, a Sacramento Superior Court Judge ruled that the sunset provision, § 62002 of the Education Code, repealed the substantive provisions of the Bilingual Act, except as discussed for funding of the general purposes of that act. That is, notwithstanding continued state funding of bilingual programs under the inoperative law, instruction in a child's primary language was *not considered a general purpose* of the inoperative Bilingual-Bicultural Act.[61] Instead, the court ruled such funding was only *one means* to obtain the general purpose of the program. The implication of this ruling was that local school districts must provide native language instruction only when it was *deemed necessary*.[62] There was nothing in the ruling that prohibited the offering of native language instruction; however, the ruling did not require it either. Thus, the Court ruled that the State Board of Education, in issuing waivers to school districts that had sought exemption from the mandatory provision of native language instruction, was contrary to law.[63]

The plaintiffs have since appealed the court's decision regarding the judgement that primary language be provided to English language learners "when necessary."

In March 1998, following this ruling, the State Board of Education rescinded its policies and program advisories on bilingual education.[64] At its April 1998 meeting, the State Board of Education issued a new policy statement, which communicated the Board's intent to strongly encourage school districts to take appropriate action to achieve and monitor the development of English learners' proficiency and academic achievement. School districts were no longer required to provide native language instruction to English language learners, thereby granting greater local flexibility to school districts to provide instructional services to English language learners.

The new policy statement for English learners allowed school districts to initially focus instruction on English language development and then provide instruction in the core curriculum courses (mathematics, science, history, language arts, etc.). According to the State Board, federal guidelines authorized this pattern of instruction in which teaching of English language skills would come first, followed by focus on the core curriculum, otherwise known as "sequential" instruction. This legal interpretation clearly contrasted with the Board's previous policies. Earlier, English learners were required to develop English language skills *at the same time* as they received instruction in the core curriculum, otherwise known as

"simultaneous" instruction. In most cases, the former policy was carried out via a bilingual education, or native language, program.

In October 1998, following the passage of Proposition 227, the State Board once again revised and adopted a new policy statement on educational programs and services for English learners, to be in alignment with the new law.

State Board Amends Title 5 Regulations Relating to English Language Learners

In spring of 1998, the State Board commenced a multi-step process for aligning the Title 5 Regulations governing the Consolidated Categorical Aid Programs with existing law. The first step included removing all regulations, which no longer had any statutory authority in the Education Code.[65] The State Board adopted these amendments in April 1998. On June 22, 1999, the Office of Administrative Law approved these regulatory changes.

The second step of the process was to make technical changes in existing Title 5 regulations relating to consolidated categorical aid programs and, given the passage of Proposition 227, included the requirements of this new law.

The third and most controversial step of the process was to review sections of the Title 5 regulations in which substantive regulations were necessary. The State Board acknowledged the difficulty of this work, and therefore adopted a workplan, in December 1998, to broadly discuss and receive input for making regulatory amendments.

The proposed amendments relating to Bilingual Education included:[66]

- Delete § 4301. *Effective Instruction—Bilingual Learning Opportunities* (proposed amendments removed the requirement that districts offer bilingual instruction).[67]
- Substantively amend § 4304. *Census* (proposed amendments removed the requirement that an unassessed English language learner be placed in a bilingual program until a census procedure was complete for that pupil, and other procedures regarding census taking).[68]
- Substantively amend § 4306. *Reclassification* (proposed amendments removed some criteria used for reclassifying pupils from an English language learner category).[69]
- Substantively amend § 4311. *Academic Assessment* (proposed amendments removed the requirement that English language learners be tested in their primary language).[70]
- Technically amend § 4312. *Advisory Committees* (proposed amendments removed references to bilingual instruction or the term "limited-English proficient").[71]

The State Board held a public hearing regarding the proposed technical and substantive amendments at its March 1999 meeting. In response to the comments submitted to the State Board for that hearing, legal staff were directed to review the issues raised. In the broadest terms, assertions were made that the proposed modifications would violate state law and the state's obligation under federal law. Despite the Department's legal counsel's request for further discussion and analysis of issues raised, the State Board voted (7-2) to forward the proposed technical and substantive amendments[72] to the Office of Administrative Law (OAL), at its April 1999 meeting. OAL approved the proposed changes on June 23, 1999; and they will take effect in 30 days, when they are filed with the Secretary of State's Office.

Future modifications of one substantive amendment,§ 4306, as laid out in the adopted workplan, were to be discussed in July 1999. However, the Department submitted a proposed new workplan in May 1999 to the State Board, indicating that draft amendments of § 4306 and § 4311 would not be submitted to the State Board until February 2000.[73] Until further modifications are adopted and approved, school districts do not have state direction or operate with uniform guidelines regarding the procedures for census taking, reclassification, or assessment of English language learners.

V. TESTING PROGRAMS AFFECTING ENGLISH LANGUAGE LEARNERS

The Legislature recently enacted two testing programs that affected California's English language learners. These programs included the Standardized Testing and Reporting (STAR) Program and the English Language Development Assessment Program.

The Effects of the STAR Program on English Language Learners

Governor Pete Wilson signed the STAR program into law on October 8, 1997. The California Department of Education, through local school districts, annually tests all public school pupils in grades 2 through 11 beginning in the spring of 1998, to determine their aptitude in a variety of subject areas.[74] The results of the STAR examination have allowed parents and the public to compare the performance of children in their child's school to children in the same district, county, and the state as a whole, by grade level and subject.

The law enacting the STAR program includes two provisions relevant for English learners. The first provision[75] allows school districts the option to provide a second achievement test in the primary language of English language learners enrolled in grades 2 through 11, inclusive. Thus, in addition to the statewide administration of the STAR examination, English language learners could have the opportunity to be tested in their native language. A recently adopted amendment to this provision requires that the primary language tests produce individual test scores that are valid and reliable.

The second provision[76] requires that English language learners enrolled in grades 2 through 11, inclusive, take an achievement test in their primary language if such a test is available and if they have been enrolled in any California public school for less than 12 months.[77]

The implementation of the STAR program raised concerns for some school districts with high concentrations of English learners. These school districts argued that because many of their pupils lack English language proficiency and that the STAR test is administered in English, test results may not accurately reflect English learners' aptitude in the tested subjects. For these reasons, San Francisco Unified refused to administer the STAR examination to English learners. This prompted the State to file a lawsuit against that district to force compliance.[78] The judge in the case ruled that scores for English learners could be published only on specified conditions. For more details regarding this case, refer to Appendix A: *Legal Challenges*.

Since that ruling, the aggregate scores of the 1998 STAR examination, including the aggregate scores for English learners, have been made available to the public.[79]

On June 30, 1999, the California Department of Education released scores from the 1999 administration of the Stanford 9 STAR examination. And for the first time, California pupils responded to test questions reflecting the state-adopted content standards for reading, writing, and mathematics; this test is referred to as the STAR augmentation. Due to concerns raised regarding errors of grouping of English learners with mainstream pupils' scores, the California Department of Education only released overall statewide results for the Stanford 9 and STAR augmentation. The Department returned the data files to the publisher and expects to publish group scores for English learners by July 15, 1999.

While there will certainly be a natural interest to compare the scores to those released a year ago, some caution should be applied in interpreting any changes in the scores from last year as a way to evaluate the effectiveness of a structured English immersion program. The population of English learners is not exactly the same as it was a year ago and the first year statewide implementation of that program has not been uniform.

English Language Proficiency Assessment Program

California recently enacted a law requiring the State Superintendent of Public Instruction, with the approval of the State Board of Education, to either identify an existing test or a series of tests that are aligned with the state standards for English language development.[80] The purpose of such a test is to provide a benchmark of a pupil's English language skills and to determine a pupil's progress toward achieving English language proficiency. In addition, the law requires the State Board of Education to approve English language development standards for English learners.

In response to this statute, the California Department of Education worked with the San Diego County Office of Education to create an advisory committee comprised of state and national experts in the areas of assessment and second language acquisition to develop appropriate English language development standards. The Department presented draft standards to the State Board of Education at its November 1998 meeting that were grade specific. Since that time, the Department has revised the draft standards to identify standards that were common to all grade levels and which could distinguish English language skills by beginning, intermediate, and advanced skill levels. An Executive Summary, which serves as an abbreviated version of the ELD standards, and an extensive version of the standards were developed and refined, both of which were again presented to the State Board at its April 1999 meeting.[81] It is expected that the State Board at its July 1999 meeting will adopt the revised standards.

VI. RECENT LEGISLATIVE PROPOSALS AFFECTING CALIFORNIA'S ENGLISH LANGUAGE LEARNERS

Since California's major bilingual law sunset, the Legislature has made numerous attempts to extend and/or reform bilingual education. During the 1998 legislative session, the Legislature considered several proposals that would have affected English language learners. Two legislative proposals were nearly successful, including Senate Bill (SB) 6 (Alpert) and Assembly Bill (AB) 2620 (Davis).

SB 6 would have allowed schools to use almost any method they chose to educate students considered to be English learners, within a three-year period, and in exchange for a promise to regularly evaluate student achievement. This bipartisan proposal had been winding its way through the Legislature for more than two years, when just weeks before the electorate enacted Proposition 227, the Legislature finally passed it. Governor Wilson vetoed SB 6, stating that legislative consensus had not only come too late, but that the legislation contained serious flaws.[82]

AB 2620 also passed through the Legislature after Proposition 227's enactment; however, Governor Wilson also vetoed it. This bill would have required the California Department of Education to survey state preschool and child care programs in California that serve English learners to determine the best methods to prepare them to master the English language.[83]

VII. LITERATURE REVIEW OF PROGRAMS SERVING ENGLISH LANGUAGE LEARNERS

Most of the research related to programs serving English language learners in the United States began in the early 1970s, following the passage of the federal Bilingual Education Act of 1968. While formal research in this field is fairly recent, few studies are considered scientific (i.e., are methodologically and statistically sound) and give us information whether or not instructional programs serving English learners are effective.[84]

The National Research Council (NRC), in its 1997 review of the research of language programs serving English learners, acknowledged the limitations of the research conducted in this field.[85] The NRC report said that the research is extremely politicized, which makes it difficult to synthesize program evaluations. In some cases, the researchers themselves appear to be advocates for their ideological positions, even though their research may not support their conclusions.[86]

After enacting federal laws for providing specialized instruction to non-English speaking immigrant children, native language instruction became the "dominant paradigm," even though it was not specifically mandated in federal law. California's original laws reflected this by mandating native language instruction when deemed necessary, which was predominantly in Spanish.[87] Over time, however, some California schools faced a need to educate children who spoke a mix of languages, including Hmong, Vietnamese, Cantonese, Russian, and others. Developing a bilingual program for all of these languages seemed impractical. Gradually, some researchers proposed an "alternative paradigm," namely the immersion approach for educating language minority pupils.

Educational Goals for English Language Learners

According to federal law and state policy, there are two main goals for serving English learners. The first goal is to enable English learners to become English proficient. Instructional methods that address the first goal include English Language Development (ELD) instruction or English as a Second Language (ESL) as is generally used for adults. According to Gersten and Woodward, initial ESL programs focussed on grammar and usage without any context; and over time, these programs began emphasizing the use of natural conversation as a way to learn a second language.[88] Further, many recent ESL programs have joined second-language instruction (ESL) with reading, language arts, and other content area instruction.[89]

The second main goal is to provide pupils with equal access to the core curriculum. There are different instructional methods for providing English learners with access to core subjects. Some researchers and educators believe that providing native language instruction is a more effective and beneficial approach for educating

immigrant children. Others claim that immersing children, with some native language support in subject areas, is more effective. The research related to educating language minority children is consumed with demonstrating definitively that one method or the other is more effective. The research and education community that serves language minority children in schools has become polarized into supporting one instructional approach or the other. This has contributed to situation where constructive dialogue has become virtually nonexistent.

Another method of providing English learners with access to core curriculum is through "Sheltered English," or what is now commonly referred to as "Specially Designed Academic Instruction in English" (SDAIE). It is not designed for developing English language skills, as stated in goal one above. Rather, *in theory*, SDAIE is provided:

- as one component of a native language instruction program;
- for English learners who have achieved an intermediate level of proficiency in English, and thus possess basic literacy skills; and
- as a method to teach the core curriculum (usually for the teaching of grade-level subject matter such as science, mathematics, language arts, etc.).[90]

In practice, this method is carried out differently.[91] About 43.5 percent of English learners in California public schools gained access to the core curriculum using the SDAIE method in 1998, although their instruction was not part of a native language program.[92] These pupils also received ELD instruction; thus, they presumably did not possess basic English literacy skills.

Some school districts with large influxes of English learners with varied language backgrounds began exploring the use of sheltered English and SDAIE in immersion programs as a way for English learners to gain access to content area subjects. Integral to the use of sheltered English/SDAIE was the fact that English instruction was comprehensible; that is, it was sensitive to these pupils' level of English proficiency.[93]

Although there is some descriptive material available regarding "sheltered English" or SDAIE, there has been no evaluation of its effectiveness.

Program Labels are Often Meaningless

Another general limitation in the field of bilingual education is the use of program labels. Program labels are not consistently applied, and therefore render themselves meaningless because there are many assumptions governing these labels. Further, programs serving English learners do not strictly adhere to the theoretical basis on which they are founded; thus, the labels attached to these programs do not provide a full description of their components.

An example of the confusion associated with labeling is with the "immersion" model, which has some important programmatic features. According to F. Genesee, the Canadian French immersion model has the following four goals:

1. *To provide the participating students with functional competence in the second language;*
2. *To promote and maintain normal levels of first language development;*
3. *To ensure achievement in academic subjects commensurate with the students' academic ability and grade level; and*
4. *To instill in the students an understanding and appreciation for the target language group and their language and culture without detracting in any way from the students' identity with and appreciation for the home language and culture.*[94]

It is a modified bilingual education approach. For example, the Canadian French immersion model teaches English-speaking students entirely in French until second grade, at which point English is introduced as an English language arts class for one period. By fourth grade, pupils in these programs receive particular subject matter instruction in English and end up with approximately 60 percent of their instruction through English in fifth and sixth grades.[95] In this environment, students' primary language (i.e., English) is not at risk of being lost because many of these children are from middle class backgrounds,[96] and are not immigrants themselves. It is a voluntary program, in which parents can opt to enroll their children. Many describe the Canadian French immersion model as providing an *additive* feature; that is, students learn French and core subject courses in French at the same time as maintaining their own English language proficiency.

This is contrasted with the English immersion model, which has been described as having a *subtractive* feature. Programs labeled "English immersion" are commonly used to teach immigrant children in the United States. In this model, immigrant children learn a new language, such as English, as a substitute for their native language. As discussed earlier, since language embodies culture, such *subtractive* features of the English immersion model and "short-term" native language instruction programs[97] are disturbing to some researchers, educators, and parents. They have raised the concern that as immigrant children become English language proficient, they will lose their native language and thereby suffer a disconnect from their culture and heritage.[98]

In many communities across the country there is a growing interest in "heritage community language schools." These community language schools provide language instruction and cultural activities for many immigrant communities wishing to pass them down to their children and to be informally connected to other members of their cultural community. Many Jewish/Hebrew, various Asian, Armenian, Ukrainian, Spanish and numerous other language schools operate in local communities across the state and the nation that offer instruction and/or cultural activities after school or on weekends. Unfortunately, there is only limited

information regarding these community efforts and they are not uniformly available in local communities across the state.[99]

A Selective Review of Evaluations

The National Research Council's recent review of the literature related to instructional services for English learners is mixed and inconclusive. Technical Appendix B provides a selective review of studies that directly compares native language and immersion programs. The studies included in this review support the NRC's conclusion that we do not yet have enough information to determine which types of programs are most suitable for educating language minority students. To date, there has been no study supporting the one-year English immersion policy. That does not mean California's schools and pupils cannot meet that challenge, but that an evaluation study is necessary to specifically examine the effectiveness of the one-year English immersion programs currently being implemented in California.

VIII. RELATIONSHIP OF BRAIN RESEARCH AND SECOND LANGUAGE ACQUISITION AND LEARNING

Research into the relationship between brain activity and second language learning and acquisition is still in progress. To date, that research remains mixed with competing hypotheses and contradictory findings. Nevertheless, close examination of this literature reveals some findings that may help to provide a basic understanding of this complex field. In particular, some consensus among researchers exists suggesting that age is an important variable in acquiring or learning a second language. While this literature primarily explains the importance of age as it relates to biological maturation of the brain, it appears that learning from social interactions or motivation (i.e., attitude) may also help explain children's ability to learn and acquire a second language.

Integral to the discussion of the importance of age is a debate among researchers whether a "critical period" for second language acquisition and learning exists. Some evidence suggests that as children and adults age, native-like proficiency in a second language becomes increasingly more difficult. The research suggests that different parts of the brain may be used to process a second language in older children and adults than a young child who learns a native and second language simultaneously.

Researchers are careful to point out that while they may be able to identify areas of the brain that are used for *processing* a second language, this does not directly translate into effective *teaching and learning methods*.[100] Given that caveat, some researchers believe that traditional teaching methods of a second language may not incorporate information emanating from brain research. That is, traditional methods have tended to be rule based, focussing on grammatical structure rather than providing natural context for language development, or providing a combination of both of these methods.[101]

Furthermore, it may be that each child or adult's brain is different, making it easier for some children or adults to acquire or learn a second language in a rule-based environment, whereas other methods may be more effective for other children or adults in acquiring a second language.[102] If this were true, then it would be necessary to structure curriculum that would account for differences in individual learning. The practical limitations in executing such an individualistic approach would be difficult to overcome, given the limited time and resources in public education classrooms.

What we can say is that the younger a child learns a second language, the more native like he/she will become in that second language (particularly if he/she is younger than say about age seven). In contrast, an adult (particularly older than say age 21) may acquire the second language faster than a younger child, but most likely will never lose his/her foreign accent. In any event, more research is needed for better understanding the relationship between brain activities and acquiring/learning a second language. Technical Appendix C provides more detail into the technical considerations of the relationship between brain development and second language acquisition/learning.

IX. POLICY CONSIDERATIONS FOR EDUCATING CALIFORNIA'S ENGLISH LANGUAGE LEARNERS

Lack of consensus in the research literature, mandates imposed by Proposition 227, and current legal challenges to the initiative raise numerous policy issues. Among the more important issues the Legislature and the Governor may face in the coming year include the following:

Issue 1: Existing and Sunset Bilingual Laws

There are a number of sections in Article 3 of the Education Code relating to bilingual education that appear to be inconsistent with the newly passed English for the Children in Public Schools Act of 1998, a.k.a. Proposition 227. For example, the Impacted Languages Act of 1984 and the Bilingual Teacher Training Assistance Program of 1981 still call for bilingual instruction in ways that appear to directly conflict with the newly passed English for the Children in Public Schools Act of 1998. Thus, the Legislature may wish to review such sections to harmonize with existing education laws and regulations relating to English language learners.

Issue 2: Annual Collection of Data

There are a number of sections in Article 3 of the Education Code relating to the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 that sunset as of 1987 that may require new "activating" legislation. For example, the Legislature may wish to provide direction regarding the identification, language census collection, reclassification, and redesignation of English language learners. Furthermore, the Legislature may wish to consider collecting additional data, such as:

1. The number of pupils enrolled by type of instructional program (i.e., structured English immersion, native language instruction, two-way bilingual program, dual immersion program, etc.);
2. The number of hours English learners receive in English language development, Sheltered English or Specially Designed Academic Instruction in English, mainstream core subjects in English, etc.;
3. The number of parents requesting waivers of the structured English immersion program;
4. The number of English learners who are reclassified as fluent English proficient by type of instructional program;
5. The number of fluent English proficient pupils who are redesignated to mainstream classes; and
6. The number of English learners who are mainstreamed, by the number of years in an instructional program.

Issue 3: Teacher Education and Training

Teachers are a critical element in providing a quality K-12 public education to our pupils. Therefore, they need to be properly trained. Specifically,

- Proposition 227 did not address the issues regarding teacher credentialing, thus teachers continue to be trained under current law to provide English language development (ELD) or sheltered English (SDAIE) instruction. As the new program for sheltered/structured English immersion is defined, the Legislature may wish to direct the Commission on Teacher Credentialing (CTC) to align teacher preparation and training programs with the new one-year sheltered/structured English immersion program.
- The Legislature may wish to direct the Commission on Teacher Credentialing to develop programs to provide in-service support and training for teachers who are currently in the classroom with English learners in order to effectively meet the goals of the new one-year sheltered/structured English immersion instructional program.

Issue 4: Clear Definition of English Proficiency

As the English Language Development (ELD) test is developed by the California Department of Education and adopted by the State Board of Education, a clear definition should be provided for a "reasonable level of English proficiency." The Legislature may wish to require CDE to develop and the SBE to approve criteria for English learners to be reclassified to "fluent English proficient" status and specify what level of proficiency is needed for them to join mainstream classes. This is particularly important since the Office of Administrative Law recently approved regulatory amendments including § 4306 (*Reclassification*) and § 4311 (*Academic Assessment*) of Title 5 Regulations. We need to be practical about mainstreaming English language learners in the shortest amount of time after they have acquired the necessary proficiency in English and recaptured any academic deficits. For some English language learners, mainstreaming may occur after approximately one year of sheltered/structured English immersion instruction expires, but for others, it may take a longer period of time. There is a risk that if mainstreaming is prolonged for some English language learners who need more time to acquire a necessary level of English language proficiency to succeed in mainstream classes, they may never "catch up" with academic subjects.

Of course, the same criteria, for determining "reasonable level of English proficiency" and mainstreaming, should apply to English language learners who are enrolled in a sheltered/structured English instruction or alternative instructional programs.

Issue 5: Need for Disaggregated Dropout and Graduation Data

The dropout and graduation data collected by school districts and reported statewide by the California Department of Education appear to be unreliable and have caused considerable recent controversy. Even if these data were credible, they would shed no light on dropout rates for English language learners, because they are unidentified or indistinguishable when the data are collected. As the Fiscal Crisis and Management Assistance Team (FCMAT), and the Legislature work to create a unique student identifier number through the CSIS program, it would be useful if the unique identifier were able to identify pupils as English language learners; determine whether or what type of language instructional program the English learner attended (i.e., sheltered/structured English immersion, native language, two-way immersion, etc.); and apply to the collection of dropout and graduation data.

Issue 6: Transition Plan

The Legislature may also wish to consider instituting a "transition plan" for English learners, given the possible difficulty they may encounter in transitioning into mainstream classes. Once these students are transferred from a sheltered/structured English immersion program to mainstream classes, they may be more at risk for academic or social integration, which could possibly lead to dropping out of school altogether. Such a "transition plan" may include special mentoring support programs, after school programs, and English language and academic support programs. Such support is particularly critical for many English language learners whose family members are not English proficient or who do not have educational attainment levels that are necessary to assist their children in their educational endeavors.

Issue 7: Evaluation of Sheltered English or Structured English Immersion Program

Proposition 227 was silent in terms of evaluating the new one-year sheltered/structured English immersion program enacted by the voters. It is vital to the State that the new program be evaluated, by an independent contractor, to determine the program's effectiveness in comparison with alternative programs provided to English learners. Such an evaluation should examine the following:

- Identify best practices among schools that are implementing sheltered/structured English immersion program or alternative language programs for English language learners.
- Examine reclassification procedures for English language learners to Fluent-English Proficient status for sheltered/structured English immersion program or alternative programs.

- Determine how well English language learners adjust to mainstream classes following their redesignation from a sheltered/structured English immersion program or alternative program.
- Provide specific recommendations to state policymakers regarding ways to enhance programs for English language learners.

Such an evaluation should focus on the following three variables and the relationship between them for the sheltered/structured English immersion program or alternative language program:

1. *Program inputs* (i.e., teaching and paraprofessional staff qualifications and ratios, program curriculum, instructional materials, etc.);
2. *Program processes* (i.e., identification of English learners using *Home Language Survey* and periodic assessment for benchmarking progress toward English language proficiency, processing of parental waivers, how reclassification criteria lead to change in pupil status from English learner to Fluent English Proficient, when mainstreaming for FEP status pupils occur, communication with parents/guardians, etc.); and
3. *Program outcomes* (i.e., redesignation rates for English learners/rate of mainstreaming Fluent-English Proficient (FEP) pupils in regular classes, school participation/dropout rates for English learners, grades/achievement scores for FEP pupils after mainstreaming including the STAR test as well as other measures, etc.).

Based on the results of such an evaluation, state policymakers would have more information to determine ways to modify parameters for existing programs in order to effectively educate language minority children in California.

Issue 8: Community Language Schools

Many California communities offer heritage or community language schools for their children, as a way to teach cultural traditions, maintain language, and acknowledge one's heritage. While there is limited information regarding these community efforts, many Jewish/Hebrew, Asian, Armenian, Ukrainian, Spanish and numerous other language schools operate in local communities across the state that offer instruction after school or on weekends. The Legislature may wish to explore the possibility to provide competitive grants to local communities for such programs as a means to enrich our society and the cultural diversity found within California's communities.

Issue 9: Foreign Language Instruction

Research exists to support the idea that it may be more beneficial to teach younger age pupils a foreign language while their brains are still "flexible" and adaptable, as opposed to doing so later, such as in middle or high school years. Several states, including Arizona, Arkansas, Louisiana, Montana, North Carolina, and Oklahoma have legislative mandates to offer foreign language instruction in elementary schools. The Legislature may wish to consider ways to incorporate foreign language instruction for primary grade pupils.

TECHNICAL APPENDIX A: Legal Challenges

The following section provides a brief description of legal challenges currently pending in the courts regarding English learners. These are grouped into the following themes: constitutionality of Proposition 227; waivers for Proposition 227; and STAR examination results of English language learners.

Legal Challenges Regarding the Constitutionality of Proposition 227

Immediately following the passage of Proposition 227, a coalition of civil rights, education and minority groups challenged the constitutionality of Proposition 227. The suit alleged that the initiative violated several federal laws, including the Equal Educational Opportunities Act of 1974, Title VI of the Civil Rights Act of 1964, the Supremacy Clause of Article VI, Clause 2 of the U.S. Constitution, the equal protection clause of the 14th Amendment of the U.S. Constitution, the due process provisions of the 5th and 14th Amendments of the U.S. Constitution, and a violation of federal rights under color of state law.[103]

The plaintiffs alleged that the one-year structured English immersion program would adversely affect English learners in several ways:

- It would place children prematurely into English-only classrooms without the necessary support they may need to compete with regular mainstreamed children;
- English learners would fall behind in academic subjects;
- Inadequately trained teachers and insufficient subject materials would exist for the new Sheltered English Immersion programs; and
- English learners might end up in low-achieving courses or be held back in grade levels should they be unable to meet academic standards.

In response to these arguments, on July 15, 1998, U.S. District Court Judge Legge denied the plaintiffs' motion for a preliminary injunction against the initiative's implementation and ruled that the initiative did not facially violate any federal laws. Judge Legge concluded that the plaintiffs failed to provide prima facie evidence that Proposition 227 violated the Equal Education and Opportunities Act. He also ruled that the initiative is based on <u>one</u> educational theory to teach English learners, which is supported by some educational experts and has evidence of actual experience. Further, the judge stated that until the state adopts regulations and school districts have an opportunity to implement the initiative's programs, the court is unlikely to have the necessary facts to determine if the programs are effective or not.

The plaintiffs appealed Judge Legge's decision, which they later dismissed. Instead, the plaintiffs amended their original complaint; motions and crossmotions were submitted to the court. At a hearing on January 15, 1999, Judge Legge took these matters under submission and consideration of the court. At a status conference held on June 4, 1999, the Court issued an order to govern resolution of the plaintiffs' two pending claims: 1) equal protection claim, and 2) claims under the Equal Educational Opportunities Act,

Title VI and its implementing regulations, and the Supremacy Clause. Under the first claim, the Court ordered that a hearing be held on June 19, 2000, to hear argument. Under the second series of claims, the Court ordered a scheduling of a hearing for argument on a date convenient to its calendar on or after December 29, 2000. The order from the Court further stated that the schedule provided therein was subject to further refinement or modification by the court.

Another Education and Civil Rights Consortium Files Suit

On December 3, 1998, the California Teachers Association, the Association of California School Administrators, the National Association of Bilingual Educators, the Association of Mexican American Educators, and the California Association for Asian-Pacific Bilingual Education filed suit against Governor Wilson, the members of the State Board of Education, and the Superintendent of Public Instruction on the alleged unconstitutional nature of Proposition 227.[104] The plaintiffs contend that many terms used in Proposition 227 are not defined. For example, they claim that teachers, administrators, and school boards could be personally liable for attorney fees and actual damages for willfully and repeatedly refusing to provide students an "English language educational option" pursuant to § 320 of the Education Code. The term "English language educational option" is not defined, according to the plaintiffs. Thus, the plaintiffs are seeking an order from the court to permanently enjoin the enforcement of the personal liability clause for the specified groups.

The Governor has been dismissed from the case and the California Department of Education has not responded to the suit yet. The Attorney General's Office is representing the State Board of Education in this case, and filed a motion to dismiss the case because there is no case in controversy. Two groups of intervenors have filed motions in the case: Ron Unz as author of Proposition 227 and parents in Salinas, as represented by Pacific Legal Foundation. The plaintiffs are seeking a summary judgement of the case; a hearing date has been scheduled for July 12, 1999, in the federal Central District Court in Los Angeles.

Legal Challenges Regarding the Issue of Waivers

Following the passage of Proposition 227, a number of school districts submitted requests for waiver of the new law's requirements. After the State Board decided it had no authority to consider any of these waiver requests, in July 1998, Berkeley, Oakland, and Hayward Unified School Districts filed suit to compel the State Board of Education to consider waiver requests in order for these districts to continue providing their bilingual education programs.[105] In August 1998, Alameda County Superior Court Judge Needham ruled that the State Board of Education must consider waiver requests filed by school districts. The court did not compel the State Board to grant any or all waiver requests; rather it ruled that the State Board should consider the waivers in accordance with existing education laws and regulations. The Judge denied the petitioners' request for a preliminary injunction, and suggested that these school districts should implement the provisions of Proposition 227 pending a waiver consideration by the State Board. The

plaintiffs have asked the court to hold the State Board in contempt for not taking any action on the waiver requests, but the court disagreed.

The State Board of Education filed an appeal of Judge Needham's decision.[106] The two opponents in the case have submitted position briefs to the court and oral argument is pending. In the meantime, 47 original waiver requests (representing 37 different school districts) have been submitted to the State Board for consideration, and three waiver requests have been resubmitted to the State Board. However, the State Board is unlikely to make any decisions until the court rules on the pending appeal. The plaintiffs have requested an expedited review of the case, but no date has been set yet for oral argument.

Legal Challenges Regarding the Administration of the STAR Examination to English Learners

The implementation of the STAR Program raised concerns for some school districts with high concentrations of English learners. These school districts argued that because many of their pupils lack English language proficiency and that the STAR test is administered in English, test results may not accurately reflect English learners' aptitude in the tested subjects. San Francisco Unified refused to administer the STAR examination to English learners. This prompted the State to file a lawsuit against that district to force compliance.[107] In May 1998, San Francisco Superior Court Judge Garcia ruled that the district was not required to administer the test in English to English learners who have attended public school for less than 30 months.[108]

In reaction to this ruling, Oakland and Berkeley Unified school districts filed a complaint as intervenors in that case,[109] challenging the validity of administering the STAR examination in their districts for English learners with 30 months or less in public schools. In response to this compliant, San Francisco Superior Court issued a temporary restraining order preventing the California Department of Education from releasing test scores of any English language learners. The temporary ruling remained in effect until July 21, 1998, at which time, San Francisco Superior Court Judge Garcia issued a ruling allowing for the release of the 1998 scores only on the following conditions: 1) school districts are not allowed to place test scores in the permanent record of English learners attending California public schools for less than 30 months; 2) school districts are not allowed to report or transmit STAR results for individual English learners to those students' schools and teachers and parents or guardians; and 3) school districts are not allowed to make any academic decision about individual English learners based on their STAR score.

In the interim, litigation is currently "stayed" pursuant to a "tolling agreement" signed on June 16, 1999. The agreement allows all parties to evaluate the results of all pending relevant legislation prior to continuing litigation. The parties agreed to a tolling period from February 16, 1999, until pending action is settled, or otherwise terminated, or until September 30, 1999, whichever comes first. During the tolling period, the State will continue to enforce the provisions of the Education Code and any related regulations.

The tolling agreement is contingent on the issuance of an order by the San Francisco Superior Court to continue the trial date in the early spring of 2000.

The matrix below provides a selective outline of federal laws and court cases, state laws and court cases, and State Board of Education actions to help us follow the history of how these events have worked to shape policy for English language learners in California.

SELECTIVE HISTORY OF ENGLISH LANGUAGE LEARNER POLICY

DATE	FEDERAL LEGISLATION	FEDERAL COURT ACTION	CALIFORNIA LEGISLATION	CALIFORNIA COURT ACTION	CALIFORNIA STATE BOARD OF EDUCATION ACTION
1968	Bilingual Education Act				
1974	Equal Educational Opportunities Act	Lau v. Nichols (414 U.S. 563)			
1976			Chacon-Moscone Bilingual-Bicultural Education Act		
1981		Castaneda v. Pickard (5th cir. 1981) 648 F.2d 989	Bilingual Teacher Training Assistance Program		
1983		Keyes v. School District No. 1 (D.Colo. 1983) 576 F.Supp. 1503			
1984			Impacted Languages Act		
1987		Gomez v. Illinois State Board of Education (7th cir. 1987) 811 F.2d 1030	Sunset of Chacon-Moscone Bilingual-Bicultural Education Act pursuant to Education Code Section 62000.2(d)		
1995					The State Board issued a Policy Statement to continue administering funds for the general purposes of the sunset bilingual law; identified eight general purposes; continued parent advisory committees; established two goals for programs serving English language learners; and established five principles relating to programs and services for English learners.

SELECTIVE HISTORY OF ENGLISH LANGUAGE LEARNER POLICY

DATE	FEDERAL LEGISLATION	FEDERAL COURT ACTION	CALIFORNIA LEGISLATION	CALIFORNIA COURT ACTION	CALIFORNIA STATE BOARD OF EDUCATION ACTION
1997			The Standardized Testing and Reporting (STAR) Program (SB 376, Chapters of 1997), adding Section 60640 et seq. to the Education Code		The State Board issued a Program Advisory for English learners, to clarify school districts' responsibilities.
1997			The English Language Proficiency Assessment Program (AB 748, Chapters of 1997), adding Section 60810 et seq. to the Education Code		
1998				In February, Judge Robie ruled in the Maria Quiroz et al. v. the State Board of Education et al. case (97CS01793) in the Sacramento County Superior Court	In March, the State Board rescinded its previous policies for English learners.
1998					In April, the State Board issued a policy statement for English learners, reflecting the ruling in the Quiroz case.
1998				In May, Judge Garcia ruled in the California Department of Education et al. v. San Francisco Unified School District Governing Board et al. case (994049) in the San Francisco Superior Court	

SELECTIVE HISTORY OF ENGLISH LANGUAGE LEARNER POLICY

DATE	FEDERAL LEGISLATION	FEDERAL COURT ACTION	CALIFORNIA LEGISLATION	CALIFORNIA COURT ACTION	CALIFORNIA STATE BOARD OF EDUCATION ACTION
1998			In June, the electorate passed Proposition 227, "English for the Children in Public Schools Act," adding Section 300 et seq. to the Education Code		
1998		In July, Judge Legge ruled in the Valerie G. et al. v. Wilson et al. case (C98-2252 CAL) in the U.S. District Court for the Northern District of California		In July, Judge Garcia ruled in the San Francisco et al. v. State Board of Education et al. case (994049) in the San Francisco Superior Court	
				In August, Judge Needham ruled in the Berkeley, Oakland, and Hayward Unified School Districts v. the State Board of Education case (8008105) in the Alameda County Superior Court; the appeal Jack McLaughlin et al. v. the State Board of Education (A084730) is in the the 1st Appellate District, Appeals Court, Alameda County	In October, the State Board of Education adopted a policy statement on educational progams and services for English learners based on the passage of Proposition 227.
1998					In November, the Office of Administrative Law approved the State Board's permanent regulations based on the passage of Proposition 227.

SELECTIVE HISTORY OF ENGLISH LANGUAGE LEARNER POLICY

DATE	FEDERAL LEGISLATION	FEDERAL COURT ACTION	CALIFORNIA LEGISLATION	CALIFORNIA COURT ACTION	CALIFORNIA STATE BOARD OF EDUCATION ACTION
1998		In December, the California Teachers Association et al. v. Wilson case (9896ER (CWx)) was filed in U.S. District Court for the Central District of California			

TECHNICAL APPENDIX B: A Review of the Research Literature Comparing Immersion Programs to Native Language[110] Instruction Programs

Ramirez et al. (1991) is the most recent national study that focused on comparing different instructional methods for English learners, including structured English immersion, early-exit bilingual education, and late-exit transitional bilingual education programs. The study design only allowed for a direct comparison of the structured English immersion and the early-exit transitional bilingual models. Thus, after four years in their respective programs, these researchers found that English learners in the immersion and early-exit programs demonstrated comparable skills in mathematics, language, and reading when they were tested in English.[111] This study also uncovered the fact that while many English learners achieved fluency in English, they were not automatically transferred to mainstream classes.

The Ramirez study found more similarities than differences among the three instructional programs studied. For example, all three instructional programs used the same methods for teaching English language learners, regardless of the language used for instruction. Further, Ramirez et al. found that "teachers in all three programs do not teach language or higher order cognitive skills effectively. Teachers in all three programs offer a passive language learning environment limiting student opportunities to produce language and develop more complex language and thinking skills."[112]

Gersten and Woodward (1985, 1995, 1997) conducted a longitudinal study and compared the outcomes of 228 English language learners in El Paso, Texas who had been enrolled in either a bilingual immersion[113] or transitional bilingual program. In the original study, children were followed from the fourth to seventh grades. While initial differences found in reading and language favored the bilingual immersion program, those differences disappeared by the seventh grade. With respect to rates of mainstreaming these pupils, the researchers found nearly all of the children participating in the bilingual immersion program had been mainstreamed to regular classes, while nearly one-third of the children participating in the transitional bilingual program had not been.

Perhaps of greater interest and concern is the fact that the researchers found that many English learners in both program models were failing at the 7th grade, as measured by the Iowa Test of Basic Skills (ITBS), in both reading comprehension and vocabulary. Specifically, the mean scores on ITBS in the seventh grade corresponded to the 24 percentile for bilingual immersion and 21 percentile for transitional bilingual education in reading comprehension, and to the 16 and 15 percentiles, respectively, in vocabulary.[114] Their dismal achievement scores suggested to the researchers that the vocabulary used in junior high school textbooks was much too advanced for these students to comprehend easily.[115]

More recently, the researchers conducted a high school follow-up of the same students,[116] and found that again there were no differences in achievement among these students in

reading, math, or writing when tested in English based on the Texas state exam (TAAS). Again, as in the earlier study, the researchers note that data from TAAS suggest that as many as half of the English language learners in both groups may not have the reading and math skills to meet minimum high school graduation standards.[117]

Rossell and Baker (1996) conducted a meta-analysis of approximately 300 evaluation studies of programs serving English learners, and found only 72 (25 percent) were considered to be methodologically acceptable according to criteria established by the researchers.[118] Based on their comparison of studies, these researchers concluded that structured immersion is more effective in teaching English learners.[119]

One of the greatest criticisms of the Rossell and Baker analysis is that the majority of the so-called "structured immersion" programs included in their analysis were drawn from the Canadian French immersion model, which is different from the English immersion model, for the reasons discussed above. This study highlights the inconsistent use of program labels.

Greene (1998) conducted a similar meta-analysis carried out by Rossell and Baker, by reviewing the same studies, applying the same criteria, and adding one additional criterion. That is, in order to be considered valid, the studies had to measure the effects of bilingual education after a minimum of one academic year. The application of the additional criterion reduced the number of acceptable studies from 75 (what Rossell and Baker reviewed) to 11.[120] Greene found that the review conducted by Rossell and Baker lacked the rigor and consistency in applying their own criteria.

Of the 11 studies in the Greene study, only five used a random assignment of students. Even though there are only a handful of studies to compare and analyze, Greene's meta-analysis concluded that the scholarly literature moderately favors the use of native language in instruction.

Technical Appendix C: The Relationship of Brain Research and Second Language Acquisition and Learning

The review of research into the relationship of brain activity and second language acquisition and learning provides us with some general findings that may serve to broaden our understanding of what researchers now know about this relationship. This technical review discusses the relationship in terms of biological developments in the brain, including a discussion regarding the existence of a "critical period" for second acquisition/learning, and how experience and social settings may contribute to acquiring/learning a second language.

Biological Maturation of the Brain

Most research into second language functioning uses subjects who suffered brain damage (specifically, bilingual asphiatics). Initial discoveries pointed to the left hemisphere of the brain as "dominant" for language processing.[121] The research with most significant implications for second language or foreign language theory and practice came with discoveries revealing the role of the right hemisphere of the brain in initial learning tasks. Specifically, the right hemisphere appears to be a crucial participant in the processing of novel stimuli.[122] (Advances in the use of brain scan technology have recently allowed researchers to confirm findings that older subjects who acquired a second language had increased activity in the right hemisphere.)[123] Subsequently, researchers began to focus more closely on the role of the right hemisphere to second language processing.

Genesee's literature review found general support for the hypothesis that the earlier (or younger) a child learns a second language, the more likely that the same area of the brain (i.e., left hemisphere) is used as in a monolingual person (i.e., learning a first language). As a child matures, cognitive and neurological development in the brain occurs, and second language acquisition/learning is more likely to shift to a different part of the brain (i.e., right hemisphere).[124]

Genesee's literature review also found general support for another hypothesis: there will be relatively more right hemisphere involvement in second language processing if the second language is acquired *informally* and greater left hemisphere involvement if the second language processing is *formal*. It was noted however that while the right hemisphere may be more involved if language processing is informal, the hypothesis recognizes the general predominance of the left hemisphere with respect to language functions. A general weakness of these studies, however, is a lack of a clear definition of what constitutes formal and informal manners of second language processing.[125]

Krashen offered the following distinction between language learning and language acquisition that may conform to different stages of cognitive development:

- *Language learning* emphasizes the structure of language, through, for example, grammar translation or drill practice. Such an approach to learning is thought to

engender in the learner an awareness of language as an abstract, rule-governed system (i.e., using the left hemisphere).

- *Language acquisition* is characterized by natural contexts in which real, meaningful communication takes place (i.e., using the right hemisphere).[126]

Does a Critical Period Exist for Second Language Acquisition/Learning?

Eric Lenneberg is credited with being the first to conclude that there was a neurologically fixed time limit to *acquire a first language*, and that it had to occur prior to the onset of puberty.[127] Lenneberg distinguished between first and second language acquisition, to account for cases in which sexually mature adults could become proficient in a second language. He specified that the cerebral organization for language learning must take place during childhood.[128] Krashen argued later that this process must occur by the time a child reaches five or six years of age. It is vital, therefore, for "a matrix for language skills" to be created as a result of learning the native language, in order for a person to continue to have an opportunity to acquire a second language even after the alleged critical period.[129]

A study by Johnson and Newport is generally recognized as the best evidence in support of the existence of a critical period around puberty for *second language acquisition/learning*. These researchers tested the hypothesis that young children are better second language learners than adults and therefore should reach higher levels of final proficiency in the second language.[130] These researchers found some interesting trends with respect to the data derived from their study:

- A clear and strong relationship existed between age of arrival to America and level of English language performance;
- For example, subjects who were between the ages of three and seven when they arrived in America had indistinguishable scores from native English speakers;
- The older the subjects were when they immigrated to America, the worse they performed.
- Age of arrival in America resulted in being a stronger variable than any variables examined (i.e., initial exposure to English, classroom experience, and attitude).

In Bialystok and Hakuta's review of the literature, they argued that the data derived from the Johnson and Newport study indicated a *progressive decline* in second language learning as the subjects aged. This finding, corroborated with other studies, contradicts the assertion that a "critical period" exists around puberty for second language acquisition/learning. Their interpretation of the Johnson and Newport data showed a more precipitous decline occurring after the age of twenty, leading these researchers to believe that learning abstract linguistic structures (e.g., grammar) becomes increasingly more difficult with age for second language learners.

Bialystok and Hakuta's review also identified studies that indicated that adults have an initial advantage in learning a foreign language; that is, they seem to respond quicker in

learning a foreign language than children. However, children generally outperform the adults over time.[131] These researchers reviewed some studies that identified the tenacity of foreign accent in older learners of a second language.[132] Others studies reviewed exposed the particular difficulty for second language learners to create sounds in a foreign language, which resemble an existing sound in a person's native language.[133]

Bialystok and Hakuta offer the following for consideration: the reason children who are younger than five years of age behave like native speakers of a second language is because they are in fact native speakers. They postulate that "if the impressive acquisition of the second language is accompanied by a deterioration of competence in the first language, then the evidence speaks not to a critical period but to a replacement of one language for another in the child's language acquisition. Put another way, someone who arrives in a new country at a very young age is not really learning a second language but in fact, is continuing the process of first-language acquisition, but in a new language."[134]

The Influence of Other Variables

Pulvermüller and Schumann propose a potential framework for characterizing second language acquisition. These researchers assumed that two conditions must be met in order for a person to acquire full knowledge of a particular language:

1. The learner must be motivated to acquire the language; and
2. The learner must have the ability to acquire grammatical knowledge.

According to these researchers, motivation is always high in early learners to learn one language, and it is also frequently high for learning two languages in a bilingual environment. Motivation is more variable for late learners. These researchers explain motivation in terms of how the language learner evaluates the conditions of the environment. For example, in bilingual families a foreign language may be used by parents in reinforcing and motivating situations with the eldest child, who is very likely to acquire the family language as well as the language of the external environment. For subsequent children in the family, communication among siblings may be in the language of the external environment (i.e., English) and perceive the parents' native language as less reinforcing. For these children, they may be less motivated to develop bilingual language skills.

These researchers argue that only early learners possess the ability to fully acquire grammatical knowledge of a language; this ability progressively decreases until puberty (i.e., they, too, subscribe to the notion of a "critical period" around puberty).[135] These researchers offer two reasons for cases of exceptional second language acquisition in late learners. First, the plasticity of the brain may vary among individuals, allowing some late learners to achieve native-like norms. Second, exceptionally strong motivation (i.e., dopaminergic input) among some late learners may compensate for the limitations caused by the biological maturation of the brain.

Applications to Teaching Methodologies

What does the above discussion tell us about the best manner to teach children (and adults) a second or foreign language? Danesi argues that the research literature on the brain's functions now allows us to characterize language learning as a *bimodal process* in which both of the brain's hemispheres should be used in a complementary and cooperative fashion. This contrasts with the traditional teaching methods for second and foreign languages, which rely on methods which are more closely associated with one hemisphere of the brain or the other, the so-called unimodal approach. Danesi recounts the evolution of second/foreign language teaching methods over time, describing them as fads, with a common feature: they were unimodal in approach.

Beginning in the 1980s, there have been attempts to combine the grammatical (left hemisphere mode) and the communicative (right hemisphere mode) teaching methods into an integrated approach.

Danesi suggests possible directions for further research with implications for teaching second language to children and adults in a classroom setting:

1. What does it mean that the language is organized differently in the bilingual and multilingual brain as compared to a monolingual brain?
2. What specific roles do the right and left hemispheric modes play in classroom learning tasks?
3. How does the structure of the classroom environment and its associated pedagogical modalities facilitate the kind of learning necessary for adults? (According to Danesi, "There is some indication from the literature that for most adults in classroom situations, the Left Mode is the one that is most operative, whereas both modes might be operative in so-called immersion classrooms.")[136]
4. Some researchers have found support for the hypothesis that some learners are left-hemisphere dominant, whereas others are right-hemisphere dominant. Does this automatically mean that the best instructional strategy would be to synchronize to the pattern of hemispheric dominance?[137]

GLOSSARY OF TERMS

According to the California Department of Education's glossary, the following terms are defined as:

- **Academic Subjects through the Primary Language (L1 instruction)**: English Learner *(formerly LEP)* students receiving a program of English Language Development (ELD) and, at a minimum, two academic subjects through the primary language (L1). L1 instruction is (1) for Kindergarten – grade 6, primary language instruction provided, at a minimum, in language arts (including reading and writing) and mathematics, science, or social science; or (2) for grades 7 – 12, primary language instruction provided, at a minimum, in two academic subjects required for grade promotion or graduation. The curriculum is equivalent to that provided to Fluent-English-Proficient (FEP) and English-only students. These students may also be receiving Specially Designed Academic Instruction in English (SDAIE). *See definition for SDAIE.* L1 instruction is provided by teachers with a CTC bilingual authorization in the primary language.

- **English Language Development (ELD)**: A specialized program of English language instruction appropriate for the English learner (EL) student's *(formerly LEP students)* identified level of language proficiency. It is consistently implemented and designed to promote second language acquisition of listening, speaking, reading, and writing.

- **Fluent-English-Proficient (FEP)**: Students whose primary language is other than English and who have met the district criteria for determining proficiency in English (i.e., those students who were identified as FEP on initial identification and students redesignated from Limited-English-Proficient (LEP) or English Learner (EL) to FEP).

- **Language Census (form R30-LC)**: An annual data collection in March which collects the following categories of data, number of English Learner (EL) and Fluent-English-Proficient (FEP) students in California public schools (K-12) by grade and primary language; number of EL students enrolled in instructional settings or receiving services by type; number of students redesignated from EL to FEP from the prior year; and the number of bilingual staff providing instructional services to EL students by primary language of instruction.

  NOTE: English Learner (EL) students were formerly known as Limited-English-Proficient (LEP) students. This change was made in the spring of 1999.

- **Limited-English Proficient (LEP)**: *(See new definition, English Learner students)* LEP students are those students for whom there is a report of a primary language other than English on the state-approved *Home Language Survey* **and** who, on the basis of the state-approved oral language (grades K-12) assessment procedures and including literacy (grades 3-12 only), have been determined to lack the clearly

defined English language skills of listening comprehension, speaking, reading, and writing necessary to succeed in the school's regular instructional programs. This term is being replaced with the term *English Learner* beginning with the 1998-99 data collection.

- **Not Receiving Instructional Services**: English Learner *(formerly LEP)* students not receiving any specialized instructional services related to language learning. This term will not be used on the Language Census beginning in 1999.

- **Primary Language**: A student's primary language is identified by the *Home Language Survey* as the language first learned; most frequently used at home; or most frequently spoken by the parents or adults in the home. Primary language is also referred to as L1.

  The languages listed below represent languages, other than English, reported spoken by English Learner (EL) students (formerly LEP students) in California public schools. Verification of these languages is through the book *Ethnologue – Languages of the World* available on the web.

  Albanian *(new in 1999)*, Arabic, Armenian, Assyrian, Burmese, Cantonese, Cebuano (Visayan), Chaldean, Chamorro (Guamanian), Chaozhou (Chaochow), Croatian, Dutch, Farsi (Persian), French, German, Greek, Gujarati, Hebrew, Hindi, Hmong, Hungarian, Ilocano, Indonesian, Italian, Japanese, Khmer (Cambodian), Khmu, Korean, Kurdish, Lahu, Lao, Mandarian (Putonghua), Marshallese, Mien, Mixteco, Native American, Pashto, Pilipino (Tagalog), Polish, Portuguese, Punjabi, Rumanian, Russian, Samoan, Serbian, Serbo-Croatian, Spanish, Taiwanese, Thai, Tigrinya *(new in 1999)*, Toishanese, Tongan, Turkish, Ukrainian, Urdu, Vietnamese.

  In 1998-99 the languages identified as *Other Chinese, Other Filipino, and Native American* were deleted from the Language Census.

- **Primary Language Support**: Primary Language support is instructional support through the English Learner (EL) student's *(formerly LEP students)* primary language. It does not take the place of academic instruction through the primary language but may be used in order to clarify meaning and facilitate student comprehension of academic content area concepts taught mainly through English. It may also include oral language development in the EL student's primary language. Primary Language support may be provided by credentialed teachers fluent in the EL student's primary language or by bilingual paraprofessionals (aides). The aides are supervised by a credentialed teacher.

- **Redesignated FEP**: English Learner (EL) *(formerly LEP)* students redesignated as FEP (fluent-English proficient) since the prior year census. These students are redesignated according to the multiple criteria, standards, and procedures adopted by the district and demonstrate that students being redesignated have an English language proficiency comparable to that of average native English speakers.

- **Specially Designed Academic Instruction in English (SDAIE)**: SDAIE is an approach utilized to teach academic courses to English Learner (EL) students *(formerly LEP students)* in English. It is designed for nonnative speakers of English and focuses on increasing the comprehensibility of the academic courses normally provided to FEP and English-only students in the district. Students reported in this category received a program of ELD and, at a minimum, two academic subjects required for grade promotion or graduation, taught through Specially Designed Academic Instruction in English (SDAIE).

- **Withdrawn from all Services**: English Learner *(formerly LEP)* students withdrawn from all bilingual services (including ELD) by their parent(s) or guardian(s).

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End Notes

[1] Parents or guardians must request a waiver based on one of three criteria: (1) their child must be over ten years of age; (2) their child must demonstrate proficient English language skills; or (3) their child has special learning needs. Parents must wait 30 days after the start of the school year before requesting a waiver.

[2] While a school is required to offer an alternative language program, it may not be the exact program that is requested by parents in submitting waivers of the sheltered/structured English immersion program.

[3] The Governor's adopted budget for fiscal year 1999-2000 contains a provision to augment professional development for teachers and other personnel who provide instruction and support to English language learners by $10 million ($5 million in the K-12 budget; and $5 million in the higher education budget to establish the English Language Development Professional Institutes) pursuant to AB 1116 (Ducheny).

[4] As part of the Governor's adopted budget for fiscal year 1999-2000, there is a $50 million augmentation to be allocated on a $100 per pupil basis for English language learners in grades 4-8, inclusive, for supplemental services, as specified in AB 1116 (Ducheny).

[5] The Legislative Counsel provided two reasons for opining that the State Board did not have authority to grant waivers to school districts. First, if the State Board granted a school district's waiver, and such a waiver were granted for two consecutive years, then an annual reapplication of such a waiver would not be required according to Education Code § 33051 (c). These actions could effectively repeal the initiative's general intent, by requiring English learners to be in a structured English immersion program for a year, and thereby disregarding the voters' wishes.

Secondly, the California Constitution allows the electorate to vote directly for initiative measures, such as Proposition 227. The Constitution also states that unless an initiative specifically allows the Legislature to amend or repeal a law, only the voters may make changes to the law by amending or repealing it. (In the case of Proposition 227, the initiative specifies that the Legislature may amend it-only to the extent that any proposed amendments further the act's purposes – and such amendments receive two-thirds vote of each house of the Legislature and the Governor's signature.) For this reason, the Legislative Counsel concluded that the State Board does not possess the authority to grant waivers to school districts.

[6] The California Department of Education Legal Counsel argued that the State Board has the authority to grant waivers to school districts for two reasons. First, Education Code § 33051 (a) requires the State Board of Education to approve any and all requests for waiver of any section of the Education Code except for the cases specified therein. Secondly, the Department's legal counsel argued that the initiative did not expressly provide direction of whether the State Board had or did not have the authority to approve requests to waive portions of the new law.

[7] Berkeley, Oakland, and Hayward Unified School Districts v. State Board of Education (8008105) filed in the Alameda Superior Court.

[8] Valerie G. et al. v. Wilson et al. (C98-2252CAL) filed in the U.S. District Court for the Northern District of California.

[9] California Teachers Association et al. v. Wilson et al. (9896ER (CWx)) filed in the U.S. District Court for the Central District of California.

[10] The Assembly Education Committee held an information hearing on November 17, 1998, to obtain information regarding school districts' implementation of the new law. More recently, on March 10, 1999, Assembly Budget Subcommittee No. 2 on Education Finance held an informational hearing regarding implementation issues and corresponding budget implications resulting from passage of Proposition 227.

[11] While the California Department of Education did not publish its annual "Language Census Report" in 1998, which provides information regarding enrollments by program type, grade, etc., for school districts, counties, and statewide, the Department reported selected data regarding English language learners on its website at www.goldmine.cde.ca.gov.

[12] Information resulting from the Department's survey was released in May 1999.

[13] The results from the Department's survey are taken from the Interim Report, dated April 16, 1999.

[14] The Department defined low number of English language learners in a district as being 20 to 100.

[15] The Department defined low number of English language learners in a district as being 1000 to 3000.

[16] The Department defined low number of English language learners in a district as being over 5,000.

[17] The trouble with the survey design is that terms such as "major impact" and "resources" were not defined.

[18] For further discussion regarding the STAR Program, refer to Section V of this report.
[19] K. F. McCarthy and G. Vernez. (1997), xxiv.
[20] Ibid., xxiv.
[21] First generation immigrants are those individuals who are foreign-born.
[22] Principally from Mexico; and to a lesser extent from El Salvador, Guatemala, Nicaragua, Peru, Argentina, Honduras, Colombia, Ecuador, and Chile.
[23] Principally from the Philippines, and to a lesser extent from China, Vietnam, Korea, India, Taiwan, Japan, Laos, Thailand, Pacific Islands.
[24] Ibid., 3.
[25] Ibid., 29-54.
[26] Ibid., 38.
[27] Ibid., xxiv.
[28] This report assumes that the students who are considered English language learners are either immigrants themselves or children of an immigrant parent(s) whose primary language is other than English.
[29] California Department of Education, Language Census Statewide Summary, Spring 1998.
[30] Ibid.
[31] Definitions for each program category are provided in the Glossary at the end of this report**.**
[32] For more discussion of SDAIE, refer to Section VII of this report.
[33] These data provide a "snap shot" of enrollments at the time that the language census was taken; however, they do not indicate how many pupils were ever enrolled in a native language, or bilingual, program.
[34] For more information regarding the effects of age on second language acquisition and learning, refer to Section VIII of this report.
[35] J.D. Ramirez et al. (1991), 18.
[36] According to the authors and for the purposes of their study, the duration of the Immersion and Early-Exit Bilingual programs was four years. The Immersion Program was defined as having all instruction in English, and the use of a child's primary language was limited to use on a case-by-case basis, as a means to clarify the instruction in English. The Early-Exit Program included some initial instruction (30-60 minutes a day) in the child's primary language, and was usually limited to the introduction of initial reading skills. The remainder of instruction was in English, and primary language was only then used as support, to clarify instruction in English.
[37] The authors note that even though LEP students who exited from the study were dropped from calculation, the FEP students who exited the study were included in the reclassified calculation. The implication of this is to slightly bias the data and to increase the percentage of reclassified students as years in the program increase.
[38] The state appropriated a total of $383 million in Economic Impact Aid funds to school districts in fiscal year 1998-1999. In budget year, fiscal year 1999-2000, the Governor's budget increases the appropriation of EIA funds to $394 million. These entitlement funds are allocated to school districts based on the potential impact of bilingual-bicultural pupils with Spanish and Asian surnames; an index of family poverty in each school district, based on the annual Aid to Families with Dependent Children and federal census poverty total; and an index of pupil mobility in each district. There is no requirement that school districts expend these funds on English learners.
[39] The author of this report contacted several districts and found only a small handful of districts offering stipends.
[40] Both dropout and graduation rates are based on self-reported data submitted by California public schools to the California Department of Education annually, for the California Basic Education Data System (CBEDS).
[41] The report indicated that the graduation rate has remained flat in the past decade: the 1988 rate was 68.5 percent.
[42] The 1998 dropout rate is 11.7 percent; it is calculated on the *estimated* percentage of students who will drop out during a four-year period.
[43] J. Crawford (1995), 2.
[44] R. Pedalino Porter, (1998), 28.
[45] § 601 of the Civil Rights Act of 1964.
[46] 20 U.S.C. § 1703(f).

[47] (5th Cir. 1981) 648 F.2d 989.
[48] (7th Cir. 1987) 811 F.2d 1030.
[49] (D.Colo. 1983) 576 F.Supp. 1503.
[50] In the Goméz case, the plaintiffs sought relief from the court because the Board and the Superintendent violated state and federal law by failing to promulgate uniform and consistent guidelines for the identification, placement, and training of LEP children. The plaintiffs claimed that as a result of the defendants actions or omissions, they were deprived of an equal educational opportunity, suffered economic hardship, and undue delays in their educational progress.
[51] In the Keyes case, the plaintiffs brought suit for alleged segregation and discrimination against LEP pupils in the school system. According to the court, the defendant school district in Denver failed to take appropriate action to remove language barriers to equal participation in educational programs, and therefore it failed to establish a unitary public school system.
[52] Two laws have been repealed including the Bilingual Education Act of 1972 and the Bilingual Teacher Grant Program of 1980.
[53] §§ 52130-52136 of the Education Code.
[54] §§ 52180-52186 of the Education Code.
[55] § 62000.2 of the Education Code.
[56] During the 1998 Legislative session, the Legislature successfully passed Senate Bill 6 (Alpert); however, Governor Wilson vetoed the enrolled bill in May 1998.
[57] The original policy statement was adopted in January 1986, amended in August 1987, and then further revised in July 1995.
[58] The policy statement was based on § 62002 of the Education Code, which allowed for the continuation of funds in order to carry out the *general purposes* of the sunset law.
[59] The eight general purposes of the sunset law included: provision of in-service training programs for teachers and administrators in bilingual and cross-cultural skills; a primary goal for all programs is to develop in each child fluency in English; positive reinforcement of the self-image of participating pupils; promotion of cross-cultural understanding; equal opportunity for academic achievement, including, when necessary, academic instruction using the primary language; a requirement that California school districts offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools; a requirement that California school districts provide adequate supplemental financial support; and participation in bilingual programs is voluntary on the part of the parent or guardian.
[60] The five principles, as established by the State Board of Education, were 1) Maximum local flexibility to determine which instructional programs and methodologies best achieve results; 2) Instructional programs based on sound educational theory, emphasizing that the local program may include primary language instruction, English language development through "sheltered" content instruction, and/or other sound instructional methodologies; 3) Adequate resources and personnel to implement local plans and programs; 4) Parent involvement, including parental consent for placement of their children in programs for English learners and the providing of materials to parents to support their children's education actively; and 5) Due process in all compliance matters.
[61] Quiroz et al. v. the State Board of Education et al. (97CS01793) in Sacramento Superior Court.
[62] Judge Robie's ruling refers to § 52161 of the Education Code in which, "The Legislature funds and declares that the primary goal of all programs under this article is…to develop in each child fluency in English. The programs shall also provide positive reinforcement of self-image of participating pupils, promote cross-cultural understanding, and provide equal opportunity for academic achievement, including, when necessary, academic instruction through the primary language."
[63] Judge Robie ruled that the State Board of Education's issuing of waivers to school districts seeking exemption from the mandatory provision of native language instruction was contrary to law for a couple of reasons. First, Judge Robie ruled that the State Board's actions were based on an erroneous interpretation of the sunset statute regarding the mandatory nature of primary language instruction to English learners. Secondly, Judge Robie ruled that the State Board's waiver authority (pursuant to § 33050) did not apply to the funding of programs (pursuant to § 62002) and would be inconsistent with the sunset law. Judge Robie indicated that there is also a provision in the Education Code requiring the California Department of Education to ensure that funds are used for the required purposes of the law. Thus, by allowing the State Board to waive, and since only funding is involved, it would eliminate this provision.

[64] It should be noted that while staff counsel to the State Board recommended that the Board revise existing policy advisories for English learners based on Judge Robie's decision, the Department's legal counsel disagreed with staff counsel's recommendation to the Board. The Department's legal counsel did not understand what Judge Robie meant that there was only one general purpose of the sunset law.

[65] Pursuant to Education Code § 62000.2, the Miller-Unruh Basic Reading program, school improvement program, economic impact aid, and bilingual education sunset on June 30, 1987; since the Legislature had not enacted legislation to continue the programs, authority for these programs no longer existed in the Education Code. The regulations in Title 5 of the California Code of Regulations were amended to delete requirements related to the above programs.

[66] Title 5, California Code of Regulations, Division 1, Chapter 5, Consolidated Categorical Aid Programs, Subchapter 5 pertains to Bilingual Education.

[67] The amendments included removing references to mandating school districts to provide bilingual education to each English learner in public school.

[68] The amendments included removing reference to requiring that each unassessed English learner in grades K-12 be enrolled in a bilingual program until the census procedure is complete for that pupil; and the fact that the census required to take into account all English learners through the determination of each pupil's primary language and use of language proficiency assessment instruments.

[69] The amendments included removing several criteria used for determining whether reclassification of an English learner was warranted. The proposed deleted criteria included multiple criteria with appropriate cut-off scores for assessing the English learner's English skills (i.e., documented teacher evaluation, objective assessment of the pupil's oral English proficiency; parental opinion and consultation; objective assessments in English language arts, reading, writing, and mathematics based on specified criteria; and the recommendation of a language appraisal team using specified criteria). Further, the amendments included removal of language requiring school districts to annually report to the Department the number of English learners reclassified and the district procedures for reclassification.

[70] The amendments included removing references that require English learners to be assessed in their primary language; and that selected school districts conduct and report to the Department the results of an annual assessment of English learners' academic progress in English and appropriate primary language in order to carry out the evaluation required pursuant to Education Code § 52171.6.

[71] The technical amendments included removing references to bilingual programs or limited-English proficient pupils.

[72] These amendments were based on the second and third steps of the overall process.

[73] In the original workplan, proposed amendments to § 4306 (relating to reclassification) were to be submitted to the State Board in July 1999.

[74] For grades 2 through 8, pupils were tested for their reading, writing, and mathematics abilities. For grades 8 through 12, pupils were tested in social science and science in addition to the subjects already named.

[75] § 60640 (f) of the Education Code.

[76] § 60640 (g) of the Education Code.

[77] The State Board approved emergency regulations relative to these provisions, as well as approved the Spanish Assessment of Basic Education (SABE/2) at its November 1998 meeting. The State Board adopted permanent regulations for the primary language achievement test at its March 1999 meeting.

[78] The California Department of Education, State Board of Education and State Superintendent of Public Instruction v. San Francisco Unified School District et al. (994049) in San Francisco Superior Court.

[79] The STAR examination scores and results may be viewed at the California Department of Education Internet site – http://www.goldmine.cde.ca.gov. It should be noted that to protect privacy, no results for any group of less than ten pupils are posted on the Internet.

[80] §§ 60810 and 60811 of the Education Code (AB 748, Escutia, Chapters of 1997).

[81] The Governor's adopted budget for fiscal year 1999-2000 contains a provision to augment the budget by $1 million for development of the English language development test. First administration of the ELD test is expected to occur in the fall of 2000.

[82] In his veto message, Governor Wilson declared that bilingual education had been a serious failure in California and that it had done a disservice to English learners by maintaining their dependency on their native language for too long. In his own words, Governor Wilson stated, "There is great value in having

California's students achieve bilingual or even multi-lingual language proficiency as their ability permits and their interest dictates. California stands to benefit both culturally and commercially to the extent our people gain such skills. But in California's schools, English should *not* be a foreign language. And yet it remains one for too many LEP students—because of the failure of bilingual programs."

[83] Governor Wilson vetoed the bill for the following reasons: "Small children typically learn the language they hear spoken. Children whose primary language is not English will most rapidly and easily learn English by programs consciously seeking to give them maximum exposure to English. This bill requires a survey rather than a program, but impliedly endorses an approach that will continue dependency on a child's primary language. This hardly seems the best preparation for the instruction beginning in kindergarten which is mandated by Proposition 227."

[84] C.H. Rossell and K. Baker (1996), 13; and J.P. Greene (1998).

[85] D. August and K. Hakuta (1997), 139-149.

[86] Ibid., 148-149.

[87] According to California's bilingual law, Education code § 52165 (a) (1), native language instruction was required if there were 10 pupils or more of the same primary language in the same grade level at the same school.

[88] R. Gersten and J. Woodward (1995), 224.

[89] Ibid., 224.

[90] F. Sanchez (1989) and A. Walqui-van Lier (1992).

[91] While some researchers and educators have contributed to a theoretical understanding of sheltered English or SDAIE, there is no copyright of the term.

[92] Enrollment figures from Table 1 above show that about 21.8 percent of English learners receive ELD (from goal one) and SDAIE combined, whereas another 21.7 percent of English learners receive ELD and SDAIE with primary language support.

[93] R. Gersten and J. Woodward (1995), 226.

[94] F. Genesee (1984). "Historical and Theoretical Foundations of Immersion Education," in *Studies on Immersion Education*, Sacramento, California State Department of Education, 32.

[95] W. Lambert. (1984). "An Overview of Issues in Immersion Education," in *Studies on Immersion Education*, Sacramento, California State Department of Education, 11.

[96] According to a telephone interview, on May 27, 1999, with Fred Genesee (Professor of Psychology at McGill University in Montreal, Quebec, who is one of the original researchers of the French Canadian immersion programs) most of the evaluation studies of the Canadian immersion program included students from middle class backgrounds. Professor Genesee acknowledged that a few studies of Canadian French immersion programs were conducted for students from working class backgrounds, which demonstrated positive results.

[97] These short-term bilingual programs include transitional bilingual education or early-exit bilingual education programs.

[98] It is for this reason that many parents, educators, and researchers emphasize and advocate for the *additive* approach to learning a second language. Dual immersion programs, maintenance bilingual programs, and two-way bilingual programs are additive by design. Such programs allow pupils to retain their cultural identity and build upon their primary language knowledge base as well as add a second language.

[99] Community language schools generally suffer from unstable sources of funding for their on-going support.

[100] F. Genesee (1982), 316.

[101] M. Dansei (1988).

[102] J. Schumann (1997), 24.

[103] Valerie G. et al. v. Wilson et al. (C98-2252CAL) in the U.S. District Court for the Northern District of California.

[104] California Teachers Association et al. v. Wilson et al. (9896ER (CWx)) filed in the U.S. District Court for the Central District of California.

[105] Berkeley, Oakland, and Hayward Unified School Districts v. State Board of Education (8008105), in the Alameda Superior Court.

[106] Jack McLaughlin et al. v. State Board of Education, in Court of Appeals, 1st Appellate District of Alameda County (A084730).

[107] The California Department of Education, State Board of Education and State Superintendent of Public Instruction v. San Francisco Unified School District et al. (994049) in San Francisco Superior Court.
[108] California Department of Education v. San Francisco Unified School District (994049) in the San Francisco Superior Court.
[109] San Francisco Unified School District et al. v. State Board of Education et al. (994049) in San Francisco Superior Court.
[110] In other words, bilingual education programs.
[111] Ramirez et al. (1991), 23.
[112] Ibid., 10.
[113] The researchers describe the bilingual immersion approach as accelerating the introduction of English while maintaining some Spanish language instruction and integrating second language instruction with content area materials. Thus, the program retains the predominant focus on English-language instruction from the immersion model but uses a substantive four-year Spanish language program so that students maintain their facility with their native language.
[114] R. Gersten and J. Woodward (1995), 235.
[115] According to Gersten and Woodward, low socio-economic minority students in the United States generally perform at this level, thus implying that these achievement results are not endemic to these particular programs. Further, the researchers comment that the ITBS is a rough gauge of a program's effectiveness and often language minority students experience problems on traditional standardized achievement tests (1995), 236.
[116] In the follow-up evaluation, there were 89 students studied from the bilingual immersion program and 86 students from the transitional bilingual education program, reflecting a 19.8 percent and 26.5 percent attrition rate for these programs, respectively.
[117] R. Gersten, S. Baker, and T. Keating (1997), 23.
[118] That is, they had a treatment and control group and a statistical control for pre-treatment differences where groups were not randomly assigned.
[119] In comparing studies that evaluated transitional bilingual education (TBE) to structured immersion (SI), the researchers found different effects for the following three subject areas examined:

- For *reading*, 12 studies were compared. The researchers found 2 studies that had no difference between TBE and SI , while 10 studies found SI to be better than TBE, and no study found TBE to be better than SI.
- For *language*, one study was examined. The researchers found that there was no difference in TBE and SI.
- For *math*, eight studies were compared. The researchers found that five studies found no difference between SI and TBE, three studies found SI to be better than TBE, and no studies found TBE to be better than SI.

[120] While Rossell and Baker identified 72 acceptable studies, Greene indicated there were 75 citations listed in the Rossell/Baker study as acceptable studies.
[121] K. Kraetschmer (1986), 2-3. According to Kraetschmer, many language functioning centers have been identified on the left side of the brain, including speech production, speech perception, writing, and audition.
[122] M. Danesi (1990), 375.
[123] K. Kim, N. Reklin, K. Lee, and J. Hirsch (1997). Unfortunately, this research does not define terms such as what is meant by "older" subjects.
[124] F. Genesee (1982), 317.
[125] Ibid., 320.
[126] Ibid., 320.
[127] M. Danesi (1990), 373.
[128] E. Bialystok and K. Hakuta (1994), 63.
[129] Bialystok and Hakuta call this an *intact capacity hypothesis*, in which there would be no time limit on learning a second language once the first language is learned. This is in contrast to the *recapitulation hypothesis* in which learning a second language is by retracing the steps for acquiring the first language (64).

[130] Johnson and Newport tested the English language proficiency of 46 native Korean and Chinese speakers who had arrived in the United States between the ages of three and 39, and who had lived in the United States between three and 26 years by the time they were tested. The subjects were tested on a wide variety of structures of English grammar.

[131] Snow and Hoefnagel-Hohle (1978) and Cummins (1981).

[132] S. Oyama (1976).

[133] J. Flege. (1987).

[134] E. Bialystok and K. Hakuta (1994), 79-80.

[135] F. Pulvermüller and J. Schumann (1994), 690.

[136] M. Danesi (1988), 28.

[137] Danesi acknowledges that this approach would directly contradict her argument for a bimodal approach to teaching.