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9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO,
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers,

16 Petitioners,

17 vs.

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. 97CS01793
Sac. County No.

APPENDIX IV: ADDITIONAL
DECLARATIONS AND EXHIBITS
IN SUPPORT OF TEMPORARY
RESTRAINING ORDER

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

APPENDIX IV:

ADDITIONAL DECLARATIONS AND EXHIBITS IN SUPPORT OF
TEMPORARY RESTRAINING ORDER

Item #

- 1 Judge Shubb's September 10, 1997 Memorandum and Order
- 2 Memorandum of Points and Authorities in Support of Petition for Alternative Writ
of Mandate, Peremptory Writ of Mandate and Complaint for Declaratory Relief;
Application for Temporary Restraining Order
- 3 Petitioners' Reply Memorandum in Support of its Motion for a Temporary
Restraining Order
- 4 Delaine Eastin, Brief in *Pro Se*
- 5 Federal Case: *Keyes v. School District #1, Denver* 576 F.Supp. 1503
- 6 Declaration of Carmen Arceo (Parent)
- 7 Declaration of Alicia Carter (September 7, 1997) (Current Teacher in OUSD)
- 8 Declaration of Alicia Carter (September 16, 1997)
- 9 Declaration of Pam de Loetz (September 7, 1997) (Former Administrator of
Special Programs in OUSD)
- 10 Declaration of Marylin Ferrey (Current Teacher at OUSD)
- 11 Declaration of Virginia Gill (Current Teacher at OUSD)
- 12 Declaration of Barbara Hernandez (September 7, 1997)
- 13 Declaration of Barbara Hernandez (September 17, 1997)
- 14 Declaration of Maria S. Quezada (Associate Professor of Educational
Administration at California State
University, Long Beach)
- 15 Declaration of Maria Quiroz (September 16, 1997) (Parent)
- 16 Declaration of Celso Rodriguez (September 7, 1997) (Current Teacher in OUSD)
- 17 Declaration of Santa Rodriguez (Parent)
- 18 Declaration of Elena Stoces (September 7, 1997) (Current Teacher in OUSD)

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CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARIA QUIROZ, et al,
Plaintiffs,

NO. CIV. S-97-1600 WBS\GGH

v.

MEMORANDUM AND ORDER

STATE BOARD OF EDUCATION, et
al,
Defendants.

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I.

BACKGROUND

The Orange Unified School District (the "District") serves more than 28,000 students, approximately 7,000 of which are identified as Limited English Proficient ("LEP"). On May 9, 1997, the District petitioned the California Board of Education ("Board") for a waiver from certain educational requirements to implement a new program for LEP students. The Board was unable to assemble a quorum at two meetings, and by operation of law the waiver was deemed granted for one year. Concerned with the potential impact on such students, plaintiffs - parents with students in affected schools and a number of organized interest

1 groups - filed suit in Sacramento County Superior Court, claiming
2 that the plan violated both state and federal law. Plaintiffs'
3 federal claims were made under Title VI of the Civil Rights Act
4 of 1964, 42 U.S.C. § 2000d et seq., and the Equal Educational
5 Opportunity Act ("EEOA"), 20 U.S.C. § 1703(f). The state court
6 issued a temporary restraining order prohibiting the
7 implementation of the plan. On August 27, 1997, defendant state
8 and local educators then removed the action to this court.
9 Because the state court order expires in ten days under federal
10 law, Fed. R. Civ. Pro. 65(b), and because school has already
11 begun, this matter was placed on an expedited schedule. The
12 court heard arguments and received testimony, both oral and by
13 written declarations, on motions to remand and for a preliminary
14 injunction on September 9, 1997.

15 II.

16 MOTION TO REMAND

17 A. State Law Claims

18 The Eleventh Amendment prohibits federal courts from
19 entertaining suits brought by private citizens against a state
20 absent its consent. Naming state officials as defendants rather
21 than the state itself will not avoid the Eleventh Amendment when
22 the state is the real party in interest; the state is the real
23 party in interest when the judgment would restrain or compel
24 government action. Almond Hill School v. United States Dept. of
25 Agriculture, 768 F.2d 1030, 1033 (9th Cir. 1985). Though for
26 state officials there are narrow exceptions to this general rule
27 when actions are based on *federal* violations, they are
28 inapplicable when the basis for relief is *state* law. Pennhurst

1 State School & Hosp. v. Halderman, 465 U.S. 103, 106 (1984); Air
2 Trans. Ass'n v. P.U.C. of State of Cal., 833 F.2d 200, 204 (9th
3 Cir. 1987). Simply put, the Eleventh Amendment prohibits federal
4 courts from issuing injunctive relief against state agencies or
5 officials on the basis of state law. United Parcel Service v.
6 California Pub. Utilities, 77 F.3d 1178, 1186 (9th Cir. 1996).¹

7 State immunity extends to state agencies and to state
8 officers who act on behalf of the state and who, therefore, can
9 assert the state's Eleventh Amendment immunity. Natural
10 Resources Defense Council v. California Dept. of Transportation,
11 96 F.3d 420, 421 (9th Cir. 1996). The Ninth Circuit has held
12 that California school districts are state agencies for Eleventh
13 Amendment purposes. Belanger v. Madera Unified School Dist., 963
14 F.2d 248 (9th Cir. 1992). States may waive their Eleventh
15 Amendment immunity but that is not the case here.

16 Defendants make a novel argument – analogous to the
17 “fraudulent joinder” doctrine – that the Eleventh Amendment does
18 not bar merit less state law claims against state officials. The
19 doctrine of fraudulent joinder permits a district court to
20 disregard joinder of a nondiverse party and therefore retain
21 jurisdiction when there is no possible cause of action against
22 that party . It is most commonly invoked when a defendant names
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24
25 ¹ “A federal court’s grant of relief against state
26 officials on the basis of state law, whether prospective or
27 retroactive, does not vindicate the supreme authority of federal
28 law. On the contrary, it is difficult to think of a greater
intrusion on state sovereignty than when a federal court
instructs state officials on how to conform their conduct to
state law.” Pennhurst State School & Hosp. v. Halderman, 465 U.S.
103, 106 (1984).

1 co-resident, hoping to eliminate diversity jurisdiction. See
2 generally Lewis v. Time Inc., 83 F.R.D. 455 (E.D. Cal.
3 1979) (Karlton, J.). Defendants argue that the same logic applies
4 to barred claims in federal question removal circumstances.

5 However, the reasoning that supports the fraudulent
6 joinder doctrine are inapplicable here. Defendants cite two
7 district court cases for support. Simmonds v. State of
8 California, 740 F. Supp. 781 (E.D. Cal. 1990) (Karlton, J.);
9 Stephans v. State of Nevada, 685 F. Supp. 215 (D. Nev. 1988).

10 When these cases were decided federal courts lacked jurisdiction
11 over *cases* containing Eleventh Amendment *claims*. Therefore, the
12 fraudulent joinder reasoning seemed to apply: litigants could
13 completely thwart otherwise proper removal to federal court by
14 conjuring up a hopeless case against a state or state agency.
15 These decisions were effectively overruled when the Ninth Circuit
16 held that the Eleventh Amendment precludes removal of only
17 specific barred claims, not the entire action. Kruse v. State of
18 Hawaii, 68 F.3d 331, 334-35 (9th Cir. 1995). Now that Eleventh
19 Amendment analysis of removal is conducted on a claim-by-claim
20 rather than a case-by-case basis the fraudulent joinder analogy
21 is inapt. Unlike a nondiverse party that destroys jurisdiction
22 over the case, a barred claim only implicates that claim.

23 In effect, defendants' argument would have the court
24 consider the merits of a claim against the state before ever
25 reaching the question of Eleventh Amendment immunity. The court
26 will not adopt such an approach; the Eleventh Amendment is a
27 jurisdictional bar considered at the outset. See Cerrato v. San
28 Francisco Community College Dist., 26 F.3d 968, 972 (9th Cir.

1 1994) (Eleventh Amendment bar a "threshold matter"); Mascheroni
2 v. Board of Regents of Univ. of California, 28 F.3d 1554, 1560
3 ("Eleventh Amendment imposes a threshold jurisdictional bar.");
4 (Collins v. State of Alaska, 823 F.2d 329, 331 (9th Cir. 1987)
5 (same).² The Eleventh Amendment protects the states and their
6 agencies from all unconsented suits, the meritless as well as the
7 meritorious. If the barred state claims are frivolous the state
8 court will dismiss them and this court will not be faced with
9 delicate questions of federalism.

10 **B. Federal Law Claims**

11 Congress may abrogate state Eleventh Amendment immunity
12 under section 5 of the Fourteenth Amendment, and the Ninth
13 Circuit has held that the EEOA does just that. L.A. Branch NAACP
14 v. L.A. Unified School Dist., 714 F.2d 946, 951 (9th Cir. 1983).
15 Other circuits have followed suit. United States v. City of
16 Yonkers, 96 F.3d 600, 619-20 (2d Cir. 1996); Gomez v. Illinois

18 ² See also Bouchard Trans v. Florida Dept. of
19 Environmental Protection, 91 F.3d 1445, 1448-49 (11th Cir. 1996)
20 (per curiam) (internal citations omitted):

21 The nature and purposes of Eleventh Amendment immunity
22 suggest that it is a threshold issue. While the
23 Supreme Court has held that the Eleventh Amendment is
24 not jurisdictional in the sense that courts must
25 address the issue *sua sponte*, the Court has held that
26 the Eleventh Amendment is in the nature of a
27 jurisdictional bar. The fact that the Eleventh
28 Amendment immunity, like qualified immunity is a right
to be free from the burdens of litigation also suggests
it should be decided at an early stage. Finally, the
Eleventh Amendment is a recognition that the states
retain certain attributes of sovereignty, and one of
its purposes is to protect states from the indignity of
being haled into federal court by private litigants.
This purpose is not served when a ruling on Eleventh
Amendment immunity is unnecessarily postponed.

1 State Bd. of Educ., 811 F.2d 1030, 1037 (7th Cir. 1987). Thus,
2 the Eleventh Amendment does not bar the federal claims based on
3 the EEOA or Title VI.

4 The court may exercise jurisdiction over the federal
5 claims in a removed action despite jurisdictional bars other
6 claims in the same case. In the Ninth Circuit, Eleventh Amendment
7 bars to some claims in a suit do not divest a federal court of
8 jurisdiction over the claims that are otherwise properly before
9 it. Kruse v. State of Hawaii, 68 F.3d 331, 334 (9th Cir. 1995).
10 Section 1441(c) of Title 28 of the U.S. Code permits district
11 courts, at their discretion, to remand removed matters in which
12 state law predominates. The state law matters – any claims not
13 premised on either the EEOA or Title VI – will therefore be
14 remanded back to the Sacramento Superior Court. 28 U.S.C. §
15 1441(c).

16 III.

17 MOTION FOR PRELIMINARY INJUNCTION

18 Once the state law claims are remanded, the remaining
19 federal issue is whether the court should issue a preliminary
20 injunction prohibiting implementation of the District's program.
21 A party seeking preliminary injunctive relief must meet one of
22 two tests. Stanley v. Univ. of Southern Calif., 13 F.3d 1313,
23 1319 (9th Cir. 1994). Under the first, the moving party must
24 show that: (1) it will suffer irreparable injury if the
25 injunctive relief is not granted; (2) it will probably prevail on
26 the merits, (3) in balancing the equities, the non-moving party
27 will not be harmed more than the moving party will be helped by
28 the injunction, and (4) granting the injunction is in the public

1 interest. Id. (citing Martin v. International Olympic Committee,
2 740 F.2d 670 (9th Cir. 1984)).

3 Alternatively, a preliminary injunction is appropriate
4 if the moving party demonstrates either (1) probable success on
5 the merits and the possibility of irreparable injury, or (2)
6 serious questions going to the merits of the case and the balance
7 of hardships sharply favors the moving party. See Pratt v.
8 Rowland, 65 F.3d 802, 805 (9th Cir. 1995). These, however, are
9 not discrete tests, but are merely extremes of a single
10 continuum. Id. As the probability of success on the merits
11 increases, the requisite showing of irreparable injury decreases
12 and vice versa.

13 A. Success on the Merits

14 Even under the alternative test, the "irreducible
15 minimum" is that there be a fair chance of success on the merits.
16 Martin v. International Olympic Committee, 740 F.2d 670, 675 (9th
17 Cir. 1984). Thus, a preliminary inquiry into the requirements
18 imposed on state and local educators by Title VI and the EEOA is
19 required.

20 1. Title VI

21 Title VI prohibits exclusion based on race, color, or
22 national origin in programs that receive federal financial
23 assistance. To establish a prima facie case under Title VI,
24 plaintiffs must show either discriminatory intent or
25 discriminatory effect. Teresa P. v. Berkeley Unified School
26 Dist., 724 F. Supp. 698, 716 (N.D. Cal. 1989) (holding plaintiffs
27 in a similar LEP case failed to state prima facie case under
28 Title VI). Plaintiffs have made no such claims, making success

1 on the merits of the Title VI claim, to say the least, unlikely.

2 2. The Equal Educational Opportunity Act

3 The EEOA requires that states take "appropriate action
4 to overcome language barriers that impede equal participation by
5 its students in its instructional programs." 20 U.S.C. §
6 1703(f). The EEOA was passed as a floor amendment and has little
7 illuminating legislative history, therefore, analysis should
8 adhere particularly close to the statutory text. Castaneda v.
9 Pickard, 648 F.2d 989, 1001 (5th Cir. 1981); Guadalupe Org., Inc.
10 v. Tempe Elem. School, 587 F.2d 1022, 1026 (9th Cir. 1978). The
11 EEOA does not define the term "appropriate action," but a panel
12 of the Fifth Circuit has set forth a three factor test,
13 Castaneda, 648 F.2d at 1009-10, that has guided other courts.
14 Gomez v. Illinois State Board of Educ., 811 F.2d 1030, 1041 (7th
15 Cir. 1987); Teresa P., 724 F. Supp. at 712-13.

16 The three factors in the Castaneda analysis are: (1)
17 the program be supported by sound educational theory; (2) the
18 programs and practices of the school system are reasonably
19 calculated to effectively implement the educational theory; and
20 (3) the program, after an appropriate period, be evaluated for
21 effectiveness. Castaneda, 648 F.2d 1009-10.

22 It is clear that "appropriate action" does not require
23 bilingual education. Guadalupe Org., Inc. v. Tempe Elem. School,
24 587 F.2d 1022, 1030 (9th Cir. 1978). The EEOA does not "require
25 local educational authorities to adopt any particular type of
26 language remediation program," Id. at 1008. However, a state or
27 locality is required to make affirmative efforts to insure equal
28 participation for LEP students; to satisfy the "appropriate

1 action" provision of the EEOA a state or locality must satisfy a
2 three prong test. Id. at 1009-10.

3 The lack of judicial expertise and the traditionally
4 broad discretion of localities to formulate educational policies
5 counsel caution and restraint in this area.³ "It is with great
6 reluctance that a federal court sits in judgment of a local
7 school board's curriculum choices." Brown v. Woodland Joint
8 Unified School Dist., No. S-91-0032WBS/PAN, 1992 WL 361696 at *5
9 (E.D. Cal. April 2, 1992).

10 Indeed, the Castaneda court emphasized local discretion
11 in education. "That Congress utilized the term 'appropriate
12 education' rather than 'bilingual education,' indicates that
13 Congress intended to leave educational authorities substantial
14 latitude in formulating programs to meet their EEOA obligations."
15 Castaneda, 648 F.2d at 1009. Subsequent courts have echoed this
16 concern. "This Court agrees with, and will heed, the warnings
17 stated by the Castaneda Court itself that courts should not
18 substitute their educational values and theories for the
19 educational and political decisions properly reserved to local
20 school authorities and the expert knowledge of educators, since

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22 ³ In the context of school desegregation, the Supreme
23 Court has emphasized that "local autonomy of school districts is
24 a vital national tradition," Dayton Bd. of Education v.
25 Brinkman, 433 U.S. 406, 410 (1977), and that "[n]o single
26 tradition in public education is more deeply rooted than local
27 control over the operation of schools; local autonomy has long
28 been thought essential both to the maintenance of community
concern and support for public schools and to quality of the
educational process." Milliken v. Bradley, 418 U.S. 717, 741-42
(1974).

1 they are ill-equipped to do so." Teresa P., 724 F. Supp. at 713.⁴

2 The first prong of the Castaneda analysis is whether
3 the program at issue is based on sound educational theory. This
4 inquiry does not mandate an evaluation of the merits of competing
5 theories but consists of a more limited inquiry: "to ascertain
6 that a school system is pursuing a program informed by an
7 educational theory recognized as sound by some experts in the
8 field or, at least, deemed a legitimate experimental strategy."
9 Castaneda, 648 F.2d at 1009.

10 The District's "alternative plan" moves away from
11 bilingual education and toward a predominantly English curriculum
12 with supplemental assistance to students with lower English
13 proficiency. Among these additional programs are: an After
14 School Tutorial Program, a Summer/Intersession Program, a pre-
15 kindergarten program, and a "preview-review" program. Each
16 student will receive daily English Language Development
17 instruction as well. Parental involvement is encouraged by
18 offering programs that promote family education and learning; and
19 adult ESL classes are also offered. The program theory is
20 premised on the notion that language proficiency is best obtained
21 by lingual immersion: the greater the "time on task," in this
22 case learning English, the greater the acquisition rate.

24 ⁴ Plaintiffs make much of the fact that the California
25 Department of Education determined that aspects of the District's
26 plan failed the Castaneda requirements. While the court will
27 often defer to federal agency interpretation federal statutes, a
28 state agency's interpretation of federal law is not entitled to
that same deference. Orthopaedic Hosp. v. Belshe, 103 F.3d 1491,
1495 (9th Cir. 1997). Analysis of federal case law is, of
course, particularly the province of the federal courts.

1 McKinnon Decl. ¶¶ 29-34; Rossell Decl. ¶ 7; Porter Decl. ¶ 14.

2 The District's experts testified that research supports
3 the alternative plan's educational theory. Indeed, both stated
4 that the academic research demonstrated that children taught
5 primarily in comprehensible English demonstrate greater English
6 achievement than students taught in two languages (Rossell Decl.
7 ¶ 5; Porter Decl. ¶ 8) and Dr. Rossell testified that the
8 District's program is based on the very best current practices.⁵
9 In the United States English as a second language programs are
10 far more common than bilingual programs. Of public schools
11 enrolling LEP students 85% provide ESL programs while 36% offer
12 bilingual programs. U.S. Department of Education, Office of
13 Education Research and Improvement, 1993-94 Schools and Staffing
14 Survey: A Profile of Policies and Practices for Limited English
15 Proficient Students: Screening Methods, Program Support, and
16 Teacher Training 11 (1997). This evidence indicates that the
17 District's English language-based instruction is within the
18 mainstream of academic and professional theory and research in
19 the field. See Teresa P. v. Berkeley Unified School Dist., 724
20 F. Supp. 698, 713 (N.D. Cal. 1989) (finding similar ESL program
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22
23 ⁵ In her courtroom testimony Dr. Rossell suggested that
24 because scientific research demonstrates that LEP students simply
25 placed in normal classrooms do no worse than those educated in a
26 bilingual classroom, simply placing such students in a normal
27 classroom might itself be enough to constitute "appropriate
28 action" under the EEOA. If that in fact is what she is
suggesting, the argument goes too far and the court cannot accept
it. It may well be that EEOA is based on the faulty premise that
affirmative efforts are required to avoid excluding LEP students
from a school's educational opportunities. The court, however,
is bound by the acts of Congress, and § 1703(f) clearly
contemplates appropriate affirmative action.

1 in Berkeley "manifestly sound").

2 Expert analysis and the approving actions of the
3 California Board of Education provide strong support for the
4 soundness of the District's alternative plan. Plaintiffs'
5 declarants, even were they competent to evaluate pedagogical
6 theory, do not contradict this. They primarily argue that
7 bilingual education is a better instructional method than the one
8 proposed by the District. That argument must be made to the
9 appropriate educational authorities, as this court will not
10 balance such claims. "So long as the chosen theory is sound, we
11 must defer to the judgment of the educational agencies in
12 adopting that theory, even though other theories may also seem
13 appropriate." Gomez, 811 F.2d at 1041. The alternative plan is
14 within the boundaries of acceptable educational theory and this
15 satisfies the first prong of the Castaneda analysis.

16 The second factor is whether the school authorities
17 have actually committed sufficient resources to the
18 implementation of the educational theory. Castaneda, 648 F.2d at
19 1010. Due to the procedural posture of this action the court
20 must look prospectively rather than retrospectively at this
21 question. Because the program has not been implemented, indeed
22 cannot be implemented under the temporary restraining order, the
23 court must look for assurances that implementation will take
24 place. Substantial and concrete steps, not mere promises or
25 assurances, appropriate to the particular circumstances of the
26 situation must be made. Cf. Castaneda, 648 F.2d at 1010.

27 The district began to implement the plan after the
28 waiver was approved but before the state court enjoined further

1 action. Progress was made in the areas of (1) program design; (2)
2 instructional materials; (3) classroom configuration; (4)
3 principal in service; (5) staff development; (6) support
4 services; and (7) testing and evaluation. McKinnon Decl. ¶¶ 80-
5 116. Significantly, the District is on the verge of completing
6 its long process of selecting English language instructional
7 materials and has already purchased English language arts
8 materials for its LEP students. McKinnon Decl. ¶¶ 87-88.

9 In seeming contradiction to Dr. McKinnon's assertions,
10 several of plaintiff's declarants, all current or former teachers
11 in the District's schools, state that no material steps have been
12 taken to implement the plan. Training has not been provided, new
13 materials have not been ordered, and additional staff have not
14 been hired. See Carter Decl. ¶ 7, Hernandez Decl. ¶ 6, Rennie
15 Decl. ¶ 4, Rodriguez Decl. ¶ 6. Upon closer review, however,
16 these declarations do not necessarily contradict Dr. McKinnon's
17 Declaration or his oral testimony at the hearing. Teachers in
18 individual schools may not be privy to the District's actions,
19 and since the temporary restraining order has prevented
20 additional implementation steps, the teachers would be unaware of
21 the District's plans for implementation of the program.

22 The third prong requires that programs eventually be
23 evaluated, the theory being that plans which fail to eliminate
24 language-based barriers education eventually cease to be
25 "appropriate action" under § 1703(f).⁶ Castaneda provides no
26

27 ⁶ Plaintiffs argue that the absence of an evaluation plan
28 is "particularly egregious" because Castaneda "clearly
envisioned" an evaluation plan in place prior to implementation.

1 guidance in determining what standards a court should use in
2 evaluating an educational plan. Because it "is surely beyond
3 the competence of this court to fashion its own measure of
4 academic achievement" the court approaches this prong with "great
5 trepidation." Teresa P. v. Berkeley Unified School Dist., 724 F.
6 Supp. 698, 715 (N.D. Cal. 1989).⁷ Concerns about evaluation are
7 largely mitigated by the fact that the District's plan is to
8 operate only during the one year allowed by the waiver.
9 Additionally, the District is working with a consultant to
10 develop an evaluation model to gauge the success of the plan, and
11 the District has directed the schools to pretest LEP students to
12 provide a baseline for future evaluation. McKinnon Decl. ¶¶ 111-
13 115. The argument that educational authorities have a federally
14 mandated obligation to adopt certain evaluation techniques finds
15 no support in the EEOA or case law.

16 **B. Irreparable Harm**

17 "Under any formulation of the test [for preliminary
18 injunctive relief], the moving party must demonstrate a
19 significant threat of irreparable injury." Arcamuzi v.

20 _____
21 The Castaneda court actually wrote that the first two prongs do
22 "not necessarily" end the inquiry, implying that the third prong
23 is sometimes optional. Castaneda, 648 F.2d at 1010. The last
24 prong appears to be aimed at prohibiting districts from
25 persisting with programs that are abject failures, not as a
26 hurdle to initial implementation.

27 ⁷ "It is beyond the competence of the courts to determine
28 appropriate measurements of academic achievement and there is
29 damage to the fabric of federalism when national courts dictate
30 the use of any component of the educational process in schools
31 governed by elected officers of local government." Keyes v.
32 School Dist. No. 1, 576 F. Supp. 1503, 1518 (D. Col. 1983). See
33 also Brown v. Woodland Joint Unified School Dist., No. S-91-
34 0032WBS/PAN, 1992 WL 361696 at *5 (E.D. Cal. April 2, 1992).

1 Continental Air Lines, Inc., 819 F. 2d 935, 937 (9th Cir. 1987).

2 This is particularly true if the odds of prevailing on the merits
3 are low.

4 Though under the new plan some students will not
5 receive their preferred instructional program, all students will
6 receive instruction. According to the district's experts, while
7 students will experience an unsettling transition period, this
8 adjustment causes no harm, let alone irreparable injury; indeed
9 because the District's program is superior the children would
10 given a "distinct advantage." Porter Decl. ¶ 14. Dr. Christine
11 Rossell testified that because offering no special programs
12 beyond normal instruction produces results for LEP children no
13 worse than bilingual education, transition to the District's
14 alternative plan would cause no harm to students.

15 The court gives significant weight to this expert
16 opinion. The court is also mindful of and has considered the
17 conflicting declarations of plaintiffs' teachers who state that
18 switching programs would academically and emotionally injure
19 their students. Contreas Decl. ¶ 5, Hernandez Decl. ¶ 8, Yacenda
20 Decl. ¶ 3. However, these declarations are largely anecdotal and
21 not as persuasive to the court as Dr. Rossell's testimony. No
22 students will be excluded from the educational opportunities
23 provided by the District, rather they will merely be moved into
24 another program with the same general objectives. The alleged
25 difference between two sound LEP educational theories - ESL and
26 bilingual instruction - is inadequate to demonstrate irreparable
27 harm sufficient to support the issuance of a preliminary
28 injunction given the low probability of plaintiffs prevailing on

1 the merits.

2 **C. Balancing the Equities/Public Interest**

3 Due to the approval of the District's waiver a number
4 of ESL teachers have resigned. Steps made to implement the new
5 program have effectively made a return to the old a practical
6 impossibility according to the District's Assistant
7 Superintendent for Educational Services. McKinnon Decl. ¶¶ 117-
8 125. Because of these facts an injunction prohibiting the
9 implementation of the new program will leave many students
10 without any effective program. Most LEP students are already in
11 ESL classes so incorporating the smaller number of bilingual
12 students into those classes under the alternative plan would
13 impose less hardship. The balance of equities favors the
14 implementation of the alternative plan.

15 The alternative plan has been approved by the governing
16 bodies of the District and has the approval of the State Board of
17 Education. These bodies are charged with determining and
18 enforcing the public interest. The record indicates open
19 processes and good faith deliberation by these defendants. Under
20 these circumstances the court will not second guess the
21 educational policy choices made by educational authorities.

22 **D. Conclusion**

23 Plaintiffs have failed to meet their burden for a
24 preliminary injunction under either of the alternative tests.
25 The low probability of success on the merits of either of their
26 federal claims, coupled with the weak showing of irreparable
27 harm, precludes the issuance of a preliminary injunction.

28 ///

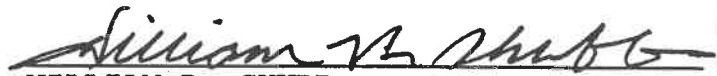
1 IT IS THEREFORE ORDERED that:

2 1. The Temporary Restraining Order issued by the
3 Superior Court on August 20, 1997 is hereby DISSOLVED;

4 2. Plaintiffs' motion for a preliminary injunction is
5 hereby DENIED;

6 3. Plaintiffs' state law claims are hereby REMANDED
7 to the Superior Court of the State of California, in and for the
8 County of Sacramento.

9 DATED: September 10, 1997

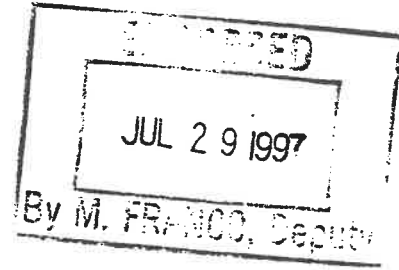
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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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12 Attorneys for Petitioners



13 **SUPERIOR COURT OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SACRAMENTO**

15 MARIA QUIROZ, ALICIA CONSTANTINO,
16 GABRIEL MEDEL, PAUL H. GARCIA, LOS
17 AMIGOS OF ORANGE COUNTY, The
18 ASSOCIATION of MEXICAN AMERICAN
19 EDUCATORS, The CALIFORNIA
20 ASSOCIATION FOR BILINGUAL
21 EDUCATION, and The CALIFORNIA
22 LATINO CIVIL RIGHTS NETWORK as
23 Taxpayers,

24 Petitioners,

25 vs.

26 The STATE BOARD OF EDUCATION and its
27 members, YVONNE W. LARSEN, JERRY
28 HUME, NATALIE J. ARENA, KATHRYN
DRONENBERG, S. WILLIAM
MALAKASIAN, MARION MCDOWELL,
JANET NICHOLAS, SANFORD C.
SIGOLOFF, GERTI B. THOMAS, ROBERT L.
TRIGG, MARINA TSE, THE STATE
SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF,
JIM FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
Superintendent, Does 1-100, inclusive,

Respondents.

CASE No. 97CS01793
Sac. County No.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR ALTERNATIVE
WRIT OF MANDATE,
PEREMPTORY WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF;
APPLICATION FOR TEMPORARY
RESTRAINING ORDER
[C.C.P. 1085; C.C.P. 1060]

DATE: July 30, 1997
TIME: 8:30 a.m.
DEPT: 41

TABLE OF CONTENTS

Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Authorities iii

SUMMARY OF THE CASE 1

THE LEGAL FRAMEWORK 2

 A. Federal Obligations Toward LEP Students. 2

 B. State Law With Respect to LEP Students 4

 C. The State Board's Obligation Under State Law to Assure School District Compliance With the Law 5

 D. State Waiver Law 5

THE FACTUAL BACKDROP 6

ARGUMENT 9

 I. An Alternative Writ of Mandate Should Issue 9

 A. Writ of Mandate is Appropriate In This Matter 9

 II. The Grant of the Waiver Was Arbitrary, Capricious and Totally Lacking in Factual Support and Thus Violates §§ 1085 11

 A. The OUSD Must Meet Its Evidentiary Burden and the State Board Must Have a Record Which Allows It to Conclude that the OUSD Plan Conforms to Law 11

 B. The Uncontroverted Record Before the State Board Was that the OUSD Had Not Achieved Results and Could Not be Trusted to Achieve Results in the Future 11

 C. The Board Acted Capriciously in Not Rejecting an "Alternative Plan" In Which Overwhelming Evidence Before it Established a Violation of *Castañeda* and Thus of Its Own Policy 13

 D. The Waiver Granted Was Additionally Capricious for There is a Lack of Certainty as to What Was "Deemed Approved" 16

 III. The State Board Violated Its Duty Under Federal Law to Enforce the Minimum Standards Necessary For Programs to Meet the Language Needs of the State's LEP Student Population. 17

 IV. The Duty to Provide Primary Language Assistance When Necessary is Not Waivable. 18

 A. The Provision of Primary Language Instruction When Necessary is a General Purpose of the Bilingual Act 19

1 Table of Contents (Cont.)
2 B. Logic and Law Coalesce to Compel a Conclusion that a General Purpose
3 Based on § 52165 and § 52163 Cannot be Waived 21
4 V. OUSD’s Waiver Application Failed to Meet the Standards Articulated in Education
5 Code § 33051. 22
6 VI. A Balancing of Equities Strongly Supports the Issuance of a Temporary
7 Restraining Order 24
8 CONCLUSION 26
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES

PAGE(S)

Ballard v. Anderson,
(1971) 4 Cal.3d 873 10

Butt v. State of California,
(1992) 4 Cal.4th 668 5, 11, 19

Castañeda v. Pickard,
648 F.2d 989 (5th Cir. 1981) Passim

Clean Air Constituency v. California State Air Resources Bd.
(1974) 11 Cal.3d 801 10

Comité de Padres de Familia v. Honig,
(1987) 192 Cal.App.3d 528 10

Common Cause v. Board of Supervisors,
(1989) 49 Cal.3d 432 24

Forrest v. Trustee of Cal. State University and Colleges
(1984) 160 Cal.App.3d 357 9, 10

Gomez v. Illinois State Bd. of Educ.,
811 F.2d 1030 (7th Cir. 1987) 3, 11, 18

Idaho Migrant Council v. Board of Education,
647 F.2d 69 (9th Cir. 1981) 3, 18

Kentfield v. Reclamation Board,
(1934) 137 Cal.App. 675 9

King v. Meese,
(1987) 43 Cal.3d 1217 24

Lau v. Nichols,
(1974) 414 U.S. 563 2

Los Angeles Taxpayers Alliance v. Fair Political Practice Com.
(1993) 14 Cal.App.4th 1214 9

McIntosh v. Aubry,
(1993) 14 Cal.App.4th 1576 10

Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.,
(1996) 44 Cal.App.4th 1391 10

Morris v. Williams,
(1967) 67 Cal.2d 733 9

Omaha Indemnity Company v. Superior Court,
(1989) 209 Cal.App.3d 1266 9

1	<i>Ontario Community Foundations, Inc., v. State Board of Equalization,</i> (1984) 35 Cal.3d 811	19
2		
3	<i>Palos Verdes Faculty Assn. Faculty Assn. v. Palos Verde Peninsula Unified School Dist.,</i> (1978) 21 Cal.3d 650	19
4	<i>Piper v. Big Pine School Dist.,</i> (1924) 193 Cal. 664	5
5		
6	<i>San Francisco Unified School Dist. v. Johnson,</i> (1971) 3 Cal.3d 937	5
7	<i>State Board of Educ. v. Honig,</i> (1993) 13 Cal.App 4 th 720	10, 18
8		
9	<i>Terminal Plaza Corp. v. City and County of San Francisco,</i> (1984) 186 Cal.App.3d 814	10
10	<i>Woods v. Superior Court,</i> (1981) 28 Cal.3d 668	19
11		
12	FEDERAL STATUTES AND REGULATIONS	
13	Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703 (f)	3, 17, 18
14	Title VI of the Civil Rights of 1964, 43 U.S.C. § 2000d	3
15		
16	STATE STATUTES and REGULATIONS	
17	Code of Civil Procedures (C.C.P.)	
18	Section 1085	9, 11
19	Section 1087	9
20	5 California Code of Regulations (C.C.R.) § 4312	6
21	California Education Code	
22	Section 33030	18
23	Section 33031(b)	18
24	Section 33050	5
25	Section 35050(a)(8)	22
26	Section 33051	8, 22, 23
27	Section 33051(a)(1)	8, 11, 16, 23
28	Section 33051(a)(4)	8, 23
	Section 33051(a)(5)	8, 16, 23
	Section 33052	1, 9
25	Part 34 of the Education Code	
26	Section 62000 et seq.	4
27	Section 62002	4, 6, 19, 20
28	Section 62000.2	4
	Section 62000.3	4
	Section 62002.5	6
	Section 62000.8	4

1	Chacon-Moscone Bilingual-Bicultural Act of 1976 (Bilingual Act)	
	Section 52160 et seq.	4
2	Section(s) 52160-52179	4
	Section 52161	1, 6, 19, 20
3	Section 52163	20, 21, 22
	Section 52163(a)	20
4	Section 52163(b)	20
	Section 52163(c)	20
5	Section 52163(d)	21
	Section 52163(m)	1
6	Section 52165	20, 21, 22
	Section 52165(a)(1)	21
7	Section 52165(a)(2)	21
	Section 52165(b)	21
8	Section 52166	22
	Section 52176	6
9	Section 52178	22

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE CONSTITUTION

	Article IV § 1	22
	Article IX § 5	19
	Article IX § 6	11

1
2
3
4
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6
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SUMMARY OF THE CASE

This case concerns the educational future of approximately 7,000 of the state’s most vulnerable children. These children are limited English proficient (LEP)¹ who are enrolled in the Orange Unified School District (OUSD or District). The District is obligated under both state and federal law to provide these children access to appropriate programs and services to address their language needs and to ensure that they will not be denied equal educational opportunities as a result of their lack of English proficiency. Presently, approximately twenty (20) percent of OUSD’s LEP students are enrolled in the district’s bilingual education programs, where they are provided academic instruction in their primary language while they are learning English. They are also required to be taught by certified teachers who speak their language. The OUSD now seeks to dismantle these programs and to deny these children equal access to its curriculum. The District also seeks to deny their parents a meaningful voice in the educational choices available for their children’s future.

The OUSD is aided by the State Board of Education (State Board) in its attempt to thwart the educational rights of these children. Through the State Board’s waiver process, the OUSD submitted an application for a waiver of the state law requirement that LEP students be provided “when necessary, academic instruction using the primary language.”² At its July 10, 1997 meeting, the State Board considered the District’s application and failed to pass any of the motions regarding the matter. As a result of the State Board’s failure to approve, deny or continue the matter, it is the respondents’ position that by operation of law the waiver is “deemed approved for one year.”³

¹A LEP, or limited English proficient, student refers to a student who comes from a home in which a language other than English is spoken, and who needs special assistance in acquiring English and having access to a curriculum that is solely in English. [See e.g. Education Code §§ 52161, 52163(m).] LEP students are sometimes referred to as “English Learners.”

²See Exhibit 1, p. 2, “Program Advisory for Programs for English Learners “ attached to a letter from the State Superintendent of Public Instruction and the State Board President dated March, 1997. (All Exhibits referred to are included in the accompanying “Appendix I: Exhibits in Support of Petition for Alternative Writ of Mandate, and Peremptory Writ of Mandate and Complaint for Declaratory Relief - Application for Temporary Restraining Order.”)

³See California Education Code § 33052. Unless otherwise stated, all code references are to the California Education Code.

1 The waiver will become operative on August 1, 1997 unless halted by this court. The practical
2 effect of this waiver is to permit the dismantling of the District's bilingual programs, and the
3 consequent denial to non-English speaking children of instruction in their primary language when
4 necessary, as has been provided in the past. In place of the dismantled program the OUSD, a district
5 which has recently been found to be in violation of state and federal bilingual education provisions
6 and which has numerous state and federal administrative complaints pending against it, proposes to
7 implement a program which is so lacking in substance that it has been rejected by its statutorily-
8 designated parental advisory group, the District's collective bargaining units, and twice by the
9 California Department of Education (CDE). If the OUSD is allowed to proceed, the educational
10 rights of these children will be placed in the hands of a renegade school district which has refused to
11 assure either its students, their parents, the CDE or the State Board that LEP children will receive
12 an equal opportunity for academic achievement. Furthermore, if this waiver is permitted, there will
13 be no barrier to any other of the state's myriad districts from similarly treating this disfavored group
14 of students. Fortunately for these children, state and federal legal protections are available to halt this
15 wrong.

16 THE LEGAL FRAMEWORK

17 There are three (3) bodies of law that intersect in this action: obligations under federal law
18 to serve LEP students, state legal obligations to serve LEP students, and laws which permit certain
19 state (but not federal) educational laws to be "waived."

20 A. Federal Obligations Toward LEP Students.

21 Both local and state educational agencies have affirmative obligations to certain categories
22 of students under federal law, especially those recognized by statutes and the courts as bearing the
23 brunt of educational inequities. The LEP students enrolled in OUSD fall in this category of protected
24 persons, as do all LEP students in the State of California. *Lau v. Nichols*, 414 U.S. 563 (1974).⁴
25

26 ⁴Pursuant to Sacramento Superior & Municipal Rule No. 3.05(D)(2), a copy of each federal
27 statute and case referred to is included in the accompanying "Appendix II: Federal Authority and
28 Administrative Code Provisions in Support of Petition for Alternative Writ of Mandate, and
Peremptory Writ of Mandate and Complaint for Declaratory Relief - Application for Temporary

1 Local school districts have an affirmative federal obligation to adapt their programs to meet
2 the unique needs of LEP students. This obligation flows from two sources: Title VI of the Civil
3 Rights Act of 1964, 42 U.S.C. § 2000d and the Equal Educational Opportunities Act of 1974
4 (EEOA), 20 U.S.C. § 1703(f). While one could write at length on the nuances of these laws, it is
5 expected that all parties to the litigation accept the principle that § 1703(f) as construed by the Fifth
6 Circuit in *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) sets out a three-pronged standard a
7 school district's LEP programs must meet to comply with federal law.⁵ First, a school district must
8 adopt a sound educational theory for addressing both the English learning needs that a student has
9 and the need to access substantive curricula. *Id.* at 1009. Secondly, it must adopt program practices,
10 allocate sufficient resources, and hire trained personnel "necessary to transfer the theory into reality."
11 *Id.* at 1010. Finally, a district must have in place an evaluation system adequate to provide assurances
12 that its program is achieving results and to provide it with the information needed to change course
13 if results are not forthcoming. *Id.* at 1010.

14 Under the EEOA, state educational agencies must establish minimum standards and guidelines
15 for the implementation of programs to meet the language needs of a state's LEP student population
16 and they must monitor and enforce the implementation of those standards at the school site level.
17 *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981); *Gomez v. Illinois State*
18 *Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987). Federal courts have adopted the reasoning in *Castañe-*
19 *da* to determine whether state educational agencies have taken "appropriate action" to guarantee
20 LEP student rights under the EEOA. *Gomez v. Illinois State Bd. of Educ.*, *supra*, 811 F.2d at 1041-
21 1043.

22 The OUSD is violating federal law protections with respect to its LEP students through its
23 attempt to implement a program that fails to meet the *Castañeda* and state law requirements. The
24

25 Restraining Order.”

26 ⁵The March, 1997 policy memorandum (Exhibit 1) signed by the State Superintendent of
27 Public Instruction and the current President of the State Board, and approved by the Board,
28 acknowledges *Castañeda* as the federal standard that a school program seeking a waiver must meet.
OUSD's expressly claims that its proposed waiver program meets the *Castañeda* standard.

1 State Board has violated its federal obligations to OUSD's LEP students by allowing the District,
2 through its failure to deny the waiver, to implement a program that fails to meet federal and state
3 standards.

4 **B. State Law With Respect to LEP Students.**

5 For approximately eleven years, the guidelines and standards governing California's LEP
6 student programs were set forth in the Chacon-Moscone Bilingual-Bicultural Act of 1976 (Bilingual
7 Act) (§ 52160 et seq.) As enacted, it was an omnibus act which spelled out in great detail the
8 mechanisms for identifying LEP pupils, the specific programs that students were to receive, the
9 qualifications of teachers who were to deliver services, funding of programs, conditions under which
10 children could be removed from a program, the role of instructional assistants or aides, the
11 governance of the program, various reports and evaluations that had to be undertaken, and much,
12 much more. (See generally §§ 52160-52179.)

13 Part 34 of the Education Code, § 62000 et seq., was enacted in 1979. This section provides
14 for the "sunset" of most categorical programs which had been enacted by the legislature unless re-
15 enacted by a certain "sunset date."⁶ The Bilingual Act "sunsetting" on June 30, 1987 by operation of
16 § 62000.⁷

17 While the sunset of an act results in the repeal of most of the specific requirements contained
18 in the act, it continues to be funded, and the recipient of such funding must abide by "the general
19 purposes of that program as specified in the provision relating to the establishment and operation of
20 the program." (Section 62002). Thus, while the specifics of the Bilingual Act were repealed by the
21 1987 sunset, recipients of funding geared to LEP children must continue to adhere to the general
22 purposes of the act. As will be detailed below, the Bilingual Act reflects the clear legislative purpose
23

24
25 ⁶In educational parlance, a categorical program is one, such as the bilingual program, that is
26 targeted at a specific population or which provides funds to service a specifically-defined need.
27 Examples include the Miller-Unruh Basic Reading Program (§ 62000.2), Gifted and Talented
28 Education program (§ 62000.3) and programs designed to assist disabled students (§ 62000.8).

⁷Twice in the mid-1980s the Legislature approved re-enactment of the Bilingual Act but then-
Governor Deukmejian vetoed the legislation.

1 that school districts provide LEP students access to bilingual education programs which utilize
2 primary language instruction and that these programs be staffed by qualified personnel. The State
3 Board's failure to deny the OUSD's waiver application, which seeks relief from the general purposes
4 referred to above, is totally inconsistent with the sunset statute.

5 **C. The State Board's Obligation Under State Law to Assure School District Compliance
6 with the Law.**

7 Under general case law, "[l]ocal districts are the State's agents for local operation of the
8 common school system." *Butt v. State of California* (1992) 4 Cal.4th 668, 681. The State, through
9 the State Board, "bears the ultimate authority and responsibility to ensure that its district-based
10 system of common schools provides basic equality of educational opportunity." *Id.* at 685. Thus the
11 State Board through the CDE is obligated under state law to compel school districts to abide by the
12 law and is legally culpable for continuing violations by school districts. *See also San Francisco
13 Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 951-952; *Piper v. Big Pine School Dist.*
14 (1924) 193 Cal. 664, 669.

15 **D. State Waiver Law.**

16 Section 33050 permits the State Board to waive most provisions of the state Education Code.
17 However, this authority is limited. First, § 33050 explicitly prohibits the State Board from waiving
18 certain Code sections, including a number of provisions in the Bilingual Act. Secondly, the doctrine
19 of non-delegation of authority compels a conclusion that legislative purposes cannot be waived.

20 Furthermore, the process for obtaining a waiver requires a school district to consult with
21 relevant state-mandated parent advisory committees and the district's union, and to take formal action
22 on the request at a public hearing. The failure on the part of a school district to follow the procedures
23 set forth in the statute would compel the State Board to deny a waiver.⁸

24 The State Board and the State Superintendent of Public Instruction have developed their own
25 policy statement which provides further direction. This March 1997 policy statement provides that
26 bilingual waivers will be approved only: 1) "where results are being or will be achieved" and 2)

27
28 ⁸Sections 33050 and 33051.

1 where the waiver request reflects compliance with the *Castañeda* standards.⁹ Pursuant to this policy
2 waiver applications are to be submitted to the CDE, which has trained full-time professionals who
3 are knowledgeable concerning the subject matter of the waiver, to review waiver requests and to
4 make recommendations to the State Board.

5 THE FACTUAL BACKDROP

6 On or about May 7, 1997 the OUSD submitted its "General Waiver" request to the CDE and
7 the State Board.¹⁰ The sections for which the OUSD sought waiver were § 62002¹¹ and § 52161.¹²
8 In the view of the OUSD, these sections were the source of the requirement that children be provided
9 instruction in their primary language by teachers who are trained or in training to provide such
10 instruction.¹³ Approval of the waiver would allow the District to dismantle its present bilingual
11 program and replace it with an "English Only" alternative program.¹⁴

12 The District Bilingual Advisory Committee (DBAC), which is a body elected by the parents
13 of children identified as LEP,¹⁵ strongly objected to the OUSD proposed alternative program.

14
15 ⁹Exhibit 1, p. 3.

16
17 ¹⁰See Exhibit 2, General Waiver Request attached to May 9, 1997 letter from Robert French,
18 OUSD Superintendent, to Ruth Ann McKenna, Chief Deputy Superintendent for Instructional
19 Services for the CDE. See also Exhibit 3, additional "supportive documentation" submitted by the
20 District attached to a letter dated June 6, 1997 from Superintendent French to Yvonne W. Larsen,
21 President, State Board. Counsel for the District submitted additional miscellaneous materials to the
State Board including various articles and monographs of a general nature critical of bilingual
education and state law requirements. Petitioners have only included as exhibits documents which
were more specifically related to actual waiver application before the State Board.

22 ¹¹Section 62002 requires a district to abide by the general purposes of a sunsetted act.

23 ¹²Section 52161 is the section of the Bilingual Act which sets forth the "legislative findings"
24 of that act.

25 ¹³As discussed *infra*, petitioners disagree that general purposes of a sunsetted act can be
26 waived or, if generally waivable, that these particular purposes can be waived.

27 ¹⁴Exhibit 2, see May 9, 1997 letter from Superintendent French.

28 ¹⁵The DBAC was established pursuant to state law provisions found at § 62002.5,
§ 52176 and 5 California Code of Regulations (C.C.R.) § 4312.

1 According to the OUSD's waiver application the DBAC's objection was "on the basis that it is
2 satisfied with the current bilingual program and believes it to be superior to an English-oriented
3 approach" and that the proposed program would have a "detrimental effect on their children's self-
4 esteem and academic success."¹⁶

5 The OUSD's brief summary of the DBAC's objections to the waiver gives short shrift to the
6 breadth and intensity of concern raised by the DBAC and other immigrant and Latino parents within
7 the District concerning the proposed waiver. By letter dated April 29, 1997 the DBAC informed the
8 OUSD of its many objections and concerns regarding the waiver and the District's failure to include
9 the parents in the waiver process.¹⁷ More than 800 parents signed a petition against the waiver, which
10 was lodged with both the OUSD and the State Board.¹⁸ The DBAC was further compelled to file an
11 administrative complaint against the District on the basis that they were excluded from the waiver
12 process and received disparate treatment from the District.¹⁹ This complaint, as well as others, was
13 still pending an investigation by the CDE at the time OUSD submitted its waiver request.

14 The two employee bargaining units each opposed the waiver request and appear to have not
15 participated in the development of the waiver.²⁰

16 The CDE did an in-depth analysis of the OUSD's proposed program. Its conclusions and
17 recommendations were expressed in two separate staff reports to the State Board. The first report,
18

19 ¹⁶Exhibit 2 (supplement without pagination to the form General Waiver Request).

20 ¹⁷See Exhibit 4, Letter dated April 29, 1997 from DBAC officers to Superintendent French,
21 attached to OUSD Board Agenda item, Report No. 10.A. (May 8, 1997).

22 ¹⁸See Exhibit 5, Parents' petition opposing the waiver attached to January 25 letter from
23 DBAC officers to Martin Jacobson, President of the OUSD Board of Education, in Spanish and
24 English.

25 ¹⁹See Exhibit 6, Notice of Official Complaint dated February 25, 1997, OUSD response to
26 complaint dated March 28, 1997 from Assistant Superintendent, Neil McKinnon, and an appeal to
CDE dated April 14, 1997 to Norm Gold from DBAC officers.

27 ²⁰See Exhibit 4, Letter dated April 29, 1997 from Orange Unified Education Association, Inc.
28 to Superintendent French and letter dated April 30, 1997 to Superintendent French from CSEA,
Chapter 67, attached to OUSD Board Agenda Item, Report No. 10.A. (May 8, 1997).

1 dated June 11, 1997, was submitted prior to the Board's June meeting when the waiver application
2 was first considered. In this first report the CDE concluded that the waiver application was legally
3 insufficient under certain subsections of § 33051, specifically: 1) that the educational needs of the
4 pupils were not adequately addressed; 2) that pupil or school personnel protections were jeopardized;
5 and 3) that guarantees of parental involvement were jeopardized. [See § 33051 (a)(1), (4) and (5).]²¹
6 Its analysis, pursuant to the State Board's March policy memorandum, also focused on the federal
7 *Castañeda* standards which all agree cannot be waived and must be met before a waiver can be
8 granted. The CDE found that the OUSD's proposed "alternative program" failed to meet any of the
9 three prongs of *Castañeda*.²² While the CDE did point to numerous specific failings with the
10 application, the basic problem was that the "alternative plan" was heavy in weight but lacking in
11 substance. (See discussion *infra* pp.13-17.)

12 At the June 1997 Board meeting, the State Board had the waiver request on its "action"
13 agenda.²³ The minutes of this meeting reflect that the State Board took formal action on this matter
14 by voting unanimously to postpone consideration of the waiver application until its July, 1997
15 meeting.²⁴

16 On June 26, 1997 the OUSD submitted additional arguments and some supplementary
17 material.²⁵ On July 2, 1997 the CDE replied to OUSD's supplemental materials. The CDE, a second
18 time, found that the material submitted did not meet the factual prerequisites of *Castañeda*.²⁶ At the

19
20 ²¹See Exhibit 7, p. 1, "Staff Report, Orange Unified School District General Waiver
21 Application," (June 11, 1997).

22 ²²*Id.*

23 ²³See Exhibit 8, pp. 17-18, Full Board--Public Session Minutes, Thursday, June 12, 1997.

24 ²⁴See Exhibit 9, pp. 2-3, Full Board--Public Session Minutes, Friday, June 13, 1997.

25 ²⁵See Exhibit 10, "Response to California Department of Education Staff Comments
26 Concerning the Orange Unified School District's General Waiver Application" attached to June 26,
1997 letter from Neil McKinnon, OUSD Assistant Superintendent to Ruth A. McKenna.

27 ²⁶See Exhibit 11, California Department of Education Staff Reply to Orange Unified School
28 District's Response Regarding General Waiver Application (July 2, 1997).

1 July Board meeting the State Board took two votes, one to grant the waiver but to require the
2 submission of a *Castañeda*-sufficient evaluation plan thereafter, and one to postpone approval until
3 such an evaluation plan was submitted. Neither proposal could garner sufficient votes. No other vote
4 was taken on the application. Counsel for the Board advised that in his view the waiver was thus
5 “deemed approved” by default pursuant to § 33052 as no “formal action” had been taken on a request
6 for two consecutive Board meetings.²⁷

7 ARGUMENT

8 I

9 An Alternative Writ of Mandate Should Issue.

10 Petitioners are entitled to an alternative writ of mandate against respondents pursuant to Code
11 of Civil Procedure (C.C.P.) §§ 1085 and 1087 as the petition and accompanying exhibits make a
12 *prima facie* showing of an abuse of discretion by respondents and have demonstrated that in the
13 ordinary course of law petitioners are without an adequate remedy as they have no direct appeal of
14 the matter.²⁸ *Omaha Indemnity Company v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274-
15 1275.

16 A. Writ of Mandate Is Appropriate In This Matter.

17 A writ of mandate is available to force an administrative agency to act in a manner consistent
18 with a statute it is charged to enforce. *Los Angeles Taxpayers Alliance v. Fair Political Practice*
19 *Com.* (1993) 14 Cal.App.4th 1214. See also, *Forrest v. Trustees of Cal. State University and*
20 *Colleges* (1984) 160 Cal.App.3d 357 (court acts properly to compel agency to comply with
21 ministerial duty by issuing writ of mandate to force administrative agency to hold grievance hearing

22
23 ²⁷See Exhibit 12, pp. 17-19, Full Board—Public Session Minutes, Thursday, July 10, 1997. See
24 also Exhibit 13, p. 3, Memorandum dated July 10, 1997 from Allan H. Keown, CDE Deputy General
Counsel to Members, State Board of Education.

25 ²⁸C.C.P. § 1085 invests the Superior Court with the power to compel the performance of an
26 act which the law specifically mandates. The order can be directed to any inferior tribunal,
27 corporation, board, or person. The writ will issue upon a showing that an official or board has
28 refused to exercise, or abused, its discretion in performing an act mandated by statute. *Kentfield v.*
Reclamation Board (1934) 137 Cal.App. 675; *Morris v. Williams* (1967) 67 Cal.2d 733, 737. C.C.P.
§1087 provides that any writ may be issued in the alternative.

1 after refusing to do so because of erroneous interpretation of law); *Terminal Plaza Corp. v. City and*
2 *County of San Francisco* (1986) 186 Cal.App.3d 814, 830; *McIntosh v. Aubry* (1993) 14 Cal.App.
3 4th 1576, 1584. This is true even though agencies are vested with the authority to interpret and apply
4 such statutes. Since the determination of the applicability of statutes or regulations is a matter of law
5 -- not an exercise of discretion -- the ultimate resolution rests with the courts and is reviewable by
6 writ of mandate. *Forrest, supra*, 160 Cal.App.3d at 363, *Terminal Plaza Corp., supra*, 186
7 Cal.App.3d at 830. The agency's application of the statute by policy or action may not exceed the
8 scope of authority granted by the Legislature. *State Board of Educ. v. Honig* (1993) 13 Cal. App.
9 4th 720, 750, *Comité de Padres de Familia v. Honig* (1987) 192 Cal.App.3d 528, 532-533. If an
10 agency has exceeded or failed to exercise its authority under the statute, a writ of mandate will issue
11 to correct that action. *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11
12 Cal.3d 801, 809; *Ballard v. Anderson* (1971) 4 Cal.3d 873, 884-885.

13 The State Board has concurrent duties under state and federal law to ensure that: 1)
14 appropriate services are being provided to LEP students in school districts in California, and 2) that
15 the legislatively mandated requirements for waiver of a state educational program requirement are
16 met, before a waiver is allowed to go into effect. Under traditional mandamus review it is appropriate
17 to examine ". . . the proceedings before the agency to determine whether its actions have been
18 arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow proper
19 procedures or failed to give notice as required by law. [Citations.] (195 Cal.App.3d at 1340)."
20 *Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th
21 1391, 1399. The woefully inadequate nature of the OUSD's waiver application, the State Board's
22 complete disregard of its own internal policy, the CDE's objective evaluation of the proposed plan,
23 and the clear mandates of state and federal law cry out for a mandate to the State Board to deny the
24 waiver on the current record and to enjoin the OUSD from altering its program.

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II

**The Grant of The Waiver Was Arbitrary, Capricious and Totally Lacking
in Factual Support and Thus Violates C.C.P. § 1085.**

A. The OUSD Must Meet its Evidentiary Burden and the State Board Must Have a Record Which Allows it to Conclude that the OUSD Plan Conforms to Law.

The State Board's waiver policy requires that a school district seeking a waiver from State Bilingual Education law submit an alternative plan which is sufficient to meet its obligations under federal law. It, of course, could do no less as a state-approved violation of federal law would constitute a violation of such law and state law by the Board itself. *Gomez v. Illinois State Bd. of Educ., supra*, 811 F.2d 1030. *Butt v. State of California, supra*, 4 Cal.4th at 681. As articulated in the State Board's policy, the burden that this places on a school district is to show that its alternative plan is one which: 1) has achieved or is likely to achieve successful educational results; and 2) meets the showing required under *Castañeda*. As *Castañeda* sets out the conditions by which a school district must show how its plan is likely to meet with success in the future, the State Board's consideration must be focused on *Castañeda* compliance.

There is at least one additional factual determination that the law imposes upon the State Board under certain circumstances relevant to this case. Section 33051(a)(1) implicitly requires a rejection of a plan when the evidence reflects that "[t]he educational needs of the pupils are not adequately addressed." In the instant case the evidence did so reflect and no rebuttal evidence was before the State Board.

B. The Uncontroverted Record Before the State Board Was that the OUSD Had Not Achieved Results and Could Not be Trusted to Achieve Results in the Future.

The purpose of the Education Code and the programs for which the State Board has oversight responsibility is to effectuate the Constitutionally-established goals of promoting intellectual, scientific, moral and agricultural improvement by a general diffusion of knowledge and intelligence. (Cal. Const., Art. IX § 6.) Thus, a starting point for a responsible agency considering whether results had been achieved, or would likely be achieved, with an experimental program containing a significant deviation from the general purposes of education programs would be to determine whether the school district seeking the deviation has a history of concern for the children with which it wishes to

1 experiment. The record here is crystal clear, and the answer is a resounding “no.”

2 Every four years the CDE conducts a “compliance review” of school districts to determine
3 their compliance with essential legal provisions. In their most recent review of the OUSD, in 1995-
4 96, less than one year before its waiver application was submitted, the OUSD was found non-
5 compliant with providing basic access to the curricula for many of its LEP students.²⁹ The record
6 further reflected that currently on file are a broad range of 14 administrative complaints by LEP
7 parents and district staff that still are to be investigated by the CDE.³⁰ These complaints range from
8 alleged *Castañeda* violations to failure to comply with parental participation statutes. But this is not
9 all. On July 8, 1997 the State Board was informed by the U.S. Department of Education, Office for
10 Civil Rights (OCR) that violations of the rights of Special Education LEP students led to a currently
11 operative corrective Action Plan, under federal law. Further, this letter indicated that OCR currently
12 is investigating two separate complaints against the OUSD concerning its LEP program.³¹ In short,
13 the picture presented to the State Board at its July hearing was unambiguous. The OUSD is not an
14 agency which has had a history of concern for LEP students. To the contrary, the clear picture that
15 the Board had to draw was of a renegade district whose past activities had resulted in multiple
16 findings of not meeting the needs of LEP pupils. Assuming that this alone should not have
17 disqualified the OUSD, any responsible Board should have held this district to a high standard to
18 justify its request to deviate from basic state law or held the waiver in abeyance until the outstanding
19 non-compliance issues had been resolved. The grant of the waiver, by default, did neither.

20 No evidence was presented by the OUSD to refute the District’s abysmal record nor to show
21 that its program had worked in the past.

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25 ²⁹Exhibit 11, Attachment 2 to CDE July 2, 1997 Staff Report.

26 ³⁰See Exhibit 5 and Exhibit 13, pp. 2-3.

27 ³¹See Exhibit 14, Letter dated July 8, 1997 from the United States Department of Education,
28 Office for Civil Rights to Yvonne W. Larsen, President, California State Board of Education.

1 C. The Board Acted Capriciously in Not Rejecting an “Alternative Plan” in Which
2 Overwhelming Evidence before it Established a Violation of *Castañeda* and Thus of its
3 Own Policy.

4 The *Castañeda* standard is a mechanism for measuring whether a plan violates federal law.
5 What is important to understand is that it requires a factual evaluation of what a school district is
6 doing or proposes to do. In the instant case the only non-conclusory evaluation, the only objective
7 evaluation, was by the professional staff of the CDE which by State Board policy is charged with
8 conducting such an evaluation. The CDE evaluated the OUSD’s submission before each State Board
9 meeting and concluded each time that the facts showed substantial violations of *Castañeda*.

10 There are, as previously stated, three prongs to the *Castañeda* standard: a theoretically sound
11 approach for accomplishing each of two purposes, teaching English and learning subject matter; an
12 allocation of resources sufficient to make the promise of the theory a reality; and finally, an evaluation
13 system designed to assure that LEP students are acquiring English language and substantive skills and
14 to determine if there are gaps in accomplishing these goals, how they might be remedied. *Castañeda*,
15 *supra*, 648 F.2d at 1009-1011.

16 As to prong one, theory and research, the CDE concluded in its June report that “[a]t no time
17 does the waiver proposal describe or refer to research or other evidence to support the proposed
18 program.”³² The deficiencies with some of the “theory” advanced are illustrated by the CDE response
19 to the OUSD claim that a “natural approach” and “thematic instruction” would be provided. The
20 CDE observes that despite these references “the application fails to set forth a clear set of principles
21 that can be used to design a specific plan of action for the selection and modification of instructional
22 programs for individual students over time.”³³ In short, the rote recitation of concepts fell short of
23 articulating a sound educational plan for specific children who have unique needs that may need
24 different interventions over time.

25 As to prong two, the method by which the theory is applied, the CDE found that the resources
26 mentioned were so general in many instances as to give no assurance that a real program is

27 ³²See Exhibit 7, p. 3.

28 ³³*Id.* at 3.

1 envisioned; that despite the fact that the waiver request was not, at the time, grade limited, it fails to
2 mention material (or any program) for students above grade six; and fails in several areas to provide
3 specific information about how many students will receive which of the proposed services and in what
4 manner. The CDE concludes that the application “fails to meet the second prong of *Castañeda*.”³⁴

5 Prong three, the obligation to have an evaluation system which sets standards and benchmarks
6 to determine whether students and sub-groups of students are overcoming English language barriers
7 and are progressing satisfactorily in their substantive work, is central to *Castañeda*.³⁵ No program
8 can be perfect for everyone but it must have standards by which to determine its failures and suggest
9 alternative approaches. With respect to prong three, the CDE concludes:

10 “The legal guarantees for LEP students require the setting of some specific goals for
11 program effectiveness. All LEP and former LEP students must be addressed. The
12 goals must be specific enough to make it possible to determine whether specific
13 schools and the district as a whole are implementing successful programs. In this
waiver application, the Orange Unified School District has failed to set standards for
students or goals for program effectiveness. It has therefore clearly failed to satisfy
the third prong of *Castañeda*.”

14 (Exhibit 7, p. 6).

15 In its subsequent July staff report, the CDE continued to find violations of all three prongs
16 of *Castañeda*. While indicating that the theoretical prong had been met by clarifications with respect
17 to English language development, the CDE found an inadequate concern for curricular access:
18 “[n]one of the citations provides clear evidence that LEP students will avoid substantive academic
19 deficits or will be successful in overcoming academic deficits as a result of their participation in the
20 District’s alternative instructional program.”³⁶

21 Prong two was again found lacking in the following respects: 1) the questionable use of
22 instructional aides instead of qualified teachers for primary language support; 2) the failure to provide
23 a description of materials to be used; 3) the failure to describe how the core curriculum was to be
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25 ³⁴*Id.* at 5.

26 ³⁵This prong is also central to the State Board’s March 1997 policy statement which
27 emphasizes “educational results.” *See* Exhibit 1, p.1.

28 ³⁶*See* Exhibit 11, p. 2.

1 reviewed in the proposed time allotment; 4) the failure to describe how academic deficits would be
2 made up by LEP students at the beginning levels of English language proficiency who cannot benefit
3 from the proposed "sheltered" instruction; and 5) the failure to explain how LEP student participation
4 would be ensured in after-school or summer school programs offered to overcome academic
5 deficits.³⁷

6 Finally, CDE staff found that the material before it fell "far short" of that which is needed to
7 constitute an adequate evaluation plan. Obviously, cognizant of the State Board's concern for "actual
8 results," the CDE staff provided a chart that compared the evaluation plan proposed by the OUSD
9 with that of the other three school districts that had secured Board approval of their waiver
10 programs.³⁸ The chart showed clearly that OUSD's plan is woefully deficient. The CDE concluded
11 that "[w]ithout such specific student and program goals, it will not be possible for the District, or
12 anyone else, to determine if the program is successful and, if not, how it will be modified."³⁹

13 Arrayed against this in-depth analysis by the CDE were declarations submitted by counsel for
14 the OUSD from two persons from Massachusetts well-known for their unremitting opposition to
15 bilingual education. These declarations were conclusory that the District's plan met *Castañeda*.⁴⁰
16 An additional written opinion was submitted to the State Board from Dr. J. David Ramirez, Director

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18 ³⁷*Id.* at 2.

19 ³⁸*See* Exhibit 15, chart entitled "Districts with Primary Language Instruction Waivers."
20 Additionally, CDE staff gave the Board a packet entitled "General Waiver Application Excerpts"
21 containing excerpts describing the evaluation component from the general waiver applications of
22 previously approved waivers and that of the OUSD. These excerpts further confirm how the OUSD's
evaluation plan failed under federal standards and the Board's own policy statement. *See* Exhibit 16.

23 ³⁹Exhibit 11, p. 3. Pursuant to the State Board's March 1997 policy, evaluation plans are to
24 include "specific student performance objectives and standards of program effectiveness for learning
English and academic achievement." (*See* Exhibit 1, p. 5) With respect to determining whether
25 primary language is necessary, the Board also advises school districts that they "should link this
26 determination to individual student assessed needs." *Id.* at 4. The record indicates that no such
criteria was submitted by OUSD.

27 ⁴⁰*See* Exhibit 17. (*See* also fn. 10. Counsel for the District also submitted several monographs
28 which attacked bilingual education generally while not addressing the merits of the "alternative plan"
before the State Board.)

1 of the Center for Language Minority Education & Research at California State University, Long
2 Beach in which he found a number of factual deviations from the *Castañeda* standard which led him
3 to urge the State Board to disapprove the waiver.⁴¹

4 The record before the State Board was thus one that would compel a responsible body to
5 reject the waiver under both its own policy and its obligation to assure that the school district under
6 its supervision not violate state and federal law. Its legal counsel suggested as much, but his advice
7 was effectively rejected by the failure of the State Board to affirmatively reject the waver.

8 During its presentation to the State Board at its July meeting, the legal office of the CDE
9 informed the Board that fourteen (14) wide-ranging state administrative complaints against the
10 OUSD's LEP program were set for investigation, that the subject matter of these complaints "lie at
11 the core of Title 5's Uniform Complaint Procedures" and that they were directly related to issues
12 raised by the waiver.⁴² The legal office also informed the State Board that the OCR was investigating
13 the program and that CDE staff had twice found the OUSD application to be legally and
14 pedagogically deficient.⁴³ The legal ramifications of approving the waiver under these circumstances
15 were made very clear to the State Board by the legal office:

16 "Obviously, a conclusion, with no factual investigation, that section 33051,
17 subdivisions (a)(1) and (a)(5) have been met despite the fact that the investigations
18 of these complaints by the Department and by OCR have not even begun, would be
19 problematic if not premature. Although the complaints are allegations only, the [State
20 Board] is on notice of their existence."

19 (Exhibit 13, p. 3)

20 Finally, counsel advised that it was legally "risky" for the State Board to approve the program,
21 "either affirmatively or by default." It, of course, did the latter.

22 **D. The Waiver Granted Was Additionally Capricious for There is a Lack of Certainty as
23 to What Was "Deemed Approved."**

24 A final point makes this grant of a waiver even more capricious. The OUSD in its haste to

25
26 ⁴¹See Exhibit 18.

27 ⁴²See Exhibit 13, Memorandum from Allan H. Keown.

28 ⁴³See Exhibits 7 and 11.

1 obtain a waiver essentially modified the scope of the request three times in the course of its pursuit.
2 Its formal waiver request was not on its face limited by grade;⁴⁴ it then suggested at the June State
3 Board meeting that the waiver was limited to grades K-3⁴⁵; finally, by oral "amendment" at the State
4 Board's July meeting, it stated its waiver was for grades K-6⁴⁶. This is not a District with a well
5 thought-out plan for serving LEP students, but one desperate to obtain a waiver at all costs. This
6 behavior is congruent with its history of violation of the rights of these children, and with the general
7 level of the submission to the State Board that led the CDE to find the application unacceptable under
8 *Castañeda*. It also frankly means that it is uncertain which waiver was "deemed approved" by the
9 State Board on July 10, 1997.

10 It is also unclear what was waived with respect to trained teachers. The application sought
11 a waiver of teacher requirements needed to implement a program that utilizes primary language
12 instruction, whenever necessary.⁴⁷ The ambiguity of the scope of the ultimate waiver "deemed
13 granted" reflects on any waiver granted or not granted with respect to teachers.

14 There is an additional legal implication triggered by these *ad hoc* changes by the OUSD, in
15 its odyssey to obtain a waiver. As is discussed *supra* p.5, the entire waiver process legally requires
16 consultation with various interested groups within a school district. Grade level changes clearly
17 constitute significant changes which are subject to consultation with such bodies -- something which
18 was not done by the OUSD.

19 III

20 **The State Board Violated Its Duty Under Federal Law to Enforce the Minimum** 21 **Standards Necessary for Programs to Meet the Language Needs of** 22 **the State's LEP Student Population.**

23 As previously stated, the State Board has an affirmative obligation under the EEOA to ensure
24 that school districts implement educational programs which give LEP children both equal access to

25 ⁴⁴See Exhibit 2.

26 ⁴⁵See Exhibits 8 and 10.

27 ⁴⁶See Exhibit 12.

28 ⁴⁷See Exhibit 2.

1 the curriculum and which teach them English. 20 U.S.C. § 1703(f); *Idaho Migrant Council v. Board*
2 *of Education, supra*, 647 F.2d 69, *Gomez v. Illinois State Bd. of Educ., supra*, 811 F.2d 1030.
3 Furthermore, as confirmed by the 7th Circuit, the state obligation to monitor and enforce minimum
4 state standards governing educational programs for LEP students cannot be waived, delegated or
5 otherwise abdicated by a state's educational agencies under the EEOA:

6 "Although the meaning of "appropriate action" may not be immediately apparent
7 without reference to the facts of the individual case, it must mean something more
8 than 'no action'. State agencies cannot, in the guise of deferring to local condi-
9 tions, completely delegate in practice their obligations under the EEOA...."

10 (*Id.* at 1043, emphasis added).

11 Here, in the guise of "flexibility," the State Board took "no action" with respect to OUSD's
12 waiver application and, in so doing, totally abdicated its federal obligations to OUSD's LEP students.
13 In the face of overwhelming evidence presented by its own staff that OUSD's waiver program did
14 not meet the *Castañeda* standard, the State Board nonetheless allowed the waiver to become effective
15 by default. This failure to act constitutes a gross disregard by the Board of its obligations under the
16 EEOA and of the rights of OUSD's LEP students to equal educational opportunities, and is thus a
17 clear abuse of its discretion.

18 IV

19 **The Duty to Provide Primary Language Assistance When Necessary is Not Waivable.**

20 The State Board of Education has no inherent power. Its authority is limited to that which
21 is granted to it by the Constitution and the State Legislature. *State Board of Educ. v. Honig, supra*,
22 13 Cal.App.4th at 750. Pursuant to § 33030, the Legislature has delegated to the State Board the
23 authority to "determine all questions of policy within its powers." (Emphasis added.) The State
24 Board is further authorized to "adopt rules and regulations not inconsistent with the laws of this
25 state...for the government of the various schools which receive state funds." [§ 33031(b), emphasis
26 added.]

27 In *Honig*, the State Supreme Court rejected the State Board's assertion that it had the
28 authority to "make rules and regulations on any topic reasonably related to its policymaking role so
long as there is no express statute to the contrary." *Id.* at 751. In rejecting this broad assertion, the

1 Court stressed that the Board's rule-making authority could not "exceed the scope of authority
2 conferred by the Legislature." *Id.* at 750. Nor, is there "agency discretion to promulgate a regulation
3 which is inconsistent with the governing statute." *Id.* at 752; citing *Ontario Community Foundations,*
4 *Inc., v. State Board of Equalization* (1984) 35 Cal.3d 811, and *Woods v. Superior Court* (1981) 28
5 Cal.3d 668, 679.

6 The State Board's actions with respect to OUSD's waiver application clearly implicate the
7 principles summarized above. The State Legislature is ultimately responsible for ensuring that all
8 students, including those who are LEP, receive basic equality of educational opportunity. [See Article
9 IX, § 5, California Constitution; *Butt v. State California, supra*, 4 Cal.4th at 685.] The Legislature
10 has enacted specific statutes to effectuate the goal of equal educational opportunities, including
11 specific statutes to address the needs of LEP students. Here, the Board's action in granting a waiver
12 of primary language instruction is inconsistent with state statutes governing the state's obligations
13 to LEP students and with statutes governing the Board's waiver authority. By exceeding its
14 authority, the State Board has undermined the Legislature's efforts to achieve equal educational
15 opportunities for LEP students.

16 **A. The Provision of Primary Language Instruction When Necessary is a General Purpose**
17 **of the Bilingual Act.**

18 In determining the general purposes of any legislation, it is necessary to look at the "statutory
19 framework as a whole." *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist.*
20 (1978) 21 Cal.3d 650, 659. In providing guidance to determine what the general purposes of a
21 sunsetted law are, the Legislature adopted a similar test. Section 62002 requires that the general
22 purposes be determined by reviewing "the provisions relating to the establishment and operation of
23 the program" sunsetted.

24 A starting point, but only the starting point, for determining the general purposes of any
25 legislation would be the legislative intent section. With respect to the Bilingual Act, § 52161 serves
26 that function. It is clear from § 52161 that a central purpose of the Act is to insure that LEP pupils
27 receive instruction in their primary language as a means of learning English and achieving equal
28 educational opportunity. In the intent section the Legislature concludes that "[t]heir lack of English

1 language communication skills presents an obstacle to such [LEP] pupils' right to an equal
2 educational opportunity which can be removed by instruction and training in the pupils' primary
3 languages, while such pupils are learning English." *Id.* Further, § 52161 declares that a central
4 purpose of the Act is to "provide equal opportunity for academic achievement, including, when
5 necessary, academic instruction through the primary language."

6 In considering whether the requirement of primary language instruction as a general purpose
7 can be waived, it is important to look beyond the intent section to the Act as a whole, including the
8 provisions dealing with the "operation" of the program (§ 62002). In doing so, one would have to
9 conclude that the centrality of primary language instruction is founded in a number of provisions. The
10 importance of this is that, as discussed *infra* pp. 21-22, a number of these sections could not be
11 waived before sunset and have been included among the sections that are not waivable post-sunset.⁴⁸

12 Section 52165 is the section which provides the principal service delivery mandate.⁴⁹ This
13 section mandates that:

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

17 Section § 52165 further specifies that at the elementary level a program defined under
18 §52163(a), (b) or (c) must be provided when there is a sufficient core of pupils. A § 52163(a)
19 program is a "basic bilingual education" program; § 52163 (b) is a "bilingual-bicultural education"
20 program. Section 52163(c) is an "experimental bilingual program." While there are variations
21 between these programs, a central feature is the requirement that a child's primary language be
22 provided when necessary. Even when an administratively viable core of LEP pupils cannot be put

23 ⁴⁸The State Board and the CDE have concluded that the provision of primary language when
24 necessary is a general purpose of the Bilingual Act solely by reference to § 52161. While there is no
25 law that expressly states that this section can be waived, neither is it exempt from waiver. As such,
26 the state would allow waiver of primary language if the facts supported it. Petitioners part company
with the State Respondents on this point.

27 ⁴⁹As will be discussed *infra* pp. 21-22, several other sections also concern themselves more
28 peripherally with service delivery and most of these cannot be waived. A number of sections address
matters such as identification of LEP students and parent councils.

1 together, the program mandates instruction by bilingual teachers who can instruct in the child's
2 primary language whenever necessary. [See §§ 52165(a)(1) and (a)(2).] The entire focus of § 52165
3 is to place a bilingual instructor with the child unless that is virtually impossible. This is most
4 graphically reflected in § 52165(a)(2) which provides a progression of access to bilingual teachers
5 depending upon the perceived administrative viability of such an assignment. For example one
6 bilingual resource teacher must be assigned where there are fewer than ten (10) LEP students in any
7 grade but there are twenty (20) of the same language group in the school. When the numbers of the
8 students in the school exceed forty-five (45) "two such teachers" must be assigned. In sum, the
9 legislative intent is to provide maximum access to a native language speaking teacher. This is the
10 clearest manifestation one could find of the legislative intent that primary language be provided to
11 LEP pupils whenever necessary (and possible).

12 While recognizing that there are additional difficulties in providing primary language
13 assistance to pupils at the secondary level, the legislature's resolve remains true. Section 52165(b)
14 reflects that it is the "intent of the Legislature to encourage school districts to offer a language
15 learning program [at the secondary level] pursuant to subdivision (d) of Section § 52163. Certified
16 bilingual-crosscultural teachers or, if no such teachers are available, language development specialists
17 assisted by a bilingual aide shall be qualified to provide instruction for such programs. The section
18 referenced, § 52163(d), while focusing on English language proficiency for secondary pupils, like
19 §52165(b), mandates primary language instructional support "to sustain academic achievement" in
20 core classes.

21 In sum, the key operational sections of the Bilingual Act, like the intent section, reflect an
22 unremitting central purpose of the Act to assure primary language instruction to LEP pupils when
23 necessary. Sections 52165 and 52163 are sections that, even after sunset, have been deemed non-
24 waivable.

25 **B. Logic and Law Coalesce to Compel a Conclusion that a General Purpose Based on**
26 **§ 52165 and § 52163 Cannot be Waived.**

27 The Bilingual Education Act "sunsetted" in 1987. Since that time, the waiver law has been
28 amended three (3) times, the most recently in 1994. Each time that the law has been amended since

1 sunset it has continued to contain the prohibition against the waiver of certain provisions in the
2 sunsetted bilingual education law. These have included § 52163 and § 52165.⁵⁰ [See 33050(a)(8).]

3 There would surely be no reason to prohibit the waiver of these sections if the legislature did
4 not believe that they had some continuing viability. The principle that laws should be harmonized
5 whenever possible can be easily accommodated in the instant case. While the specifics of § 52163 and
6 § 52165 may have sunsetted, the general purposes which flow from them remain viable and are non-
7 waivable. Any other conclusion would do violence to the principle that all laws should be given effect
8 and harmonized whenever possible. Furthermore, it is inconceivable that the legislature would turn
9 over to the State Board the power to waive the legislative intent and substitute its own. Indeed, if so
10 construed, there would be an unconstitutional delegation of authority, pursuant to Art. IV, § 1 of the
11 California Constitution.

12 In conclusion, it is clear that the general purpose of the Bilingual Act to utilize primary
13 language instruction as a vehicle of equal educational opportunity is founded on sections of the Act
14 that continue to be non-waivable. This purpose cannot and should not be waived under any
15 circumstances; it surely could not be waived in the instant case.

16 V

17 **OUSD's Waiver Application Failed to Meet the Standards Articulated**
18 **in Education Code § 33051.**

19 Section 33051 of the waiver provisions articulates a number of standards which a waiver must
20 meet which are designed to ensure that the basic educational principals embraced by state law are
21 preserved, even while school districts are allowed flexibility to implement new programs. CDE found
22 that three (3) of these elements were lacking in the OUSD application: 1) the educational needs of
23 the pupils are not adequately addressed; 2) pupil or school personnel protections are jeopardized; and
24 3) guarantees of parental involvement are jeopardized. Again, the record reflects that CDE was

25
26 ⁵⁰ It has also included § 52166, which mandates that teachers and aides have the skills needed
27 to teach LEP students, including a mandate that even a school which operates the most skeletal
28 program must still certify that it has sufficient teachers "in both English and their [LEP] primary
language to meet the intent of this chapter," and § 52178, which has an internal waiver program for
teachers when fully trained teachers are not available.

1 correct in its assessment and that the waiver should have been denied on these statutory grounds.

2 Clearly the proposed plan does not adequately address the educational needs of the LEP
3 children in the OUSD [§ 33051(a)(1)]. As the discussion of the plan's inadequacy under state and
4 federal law demonstrates, the plan as presented is so vague and amorphous as to be impossible to
5 assess. It fails almost entirely to address the educational needs of LEP children to have access to the
6 core curriculum and, therefore, fails to ensure that students forced to participate in this "alternative
7 program" would avoid academic deficits. As made clear by both CDE staff analyses, the plan
8 certainly fails to meet this requirement and should have been rejected on those grounds alone.

9 The development of the plan and its terms also make clear that the guarantees of school
10 personnel protections are jeopardized [§ 33051(a)(4)]. The collective bargaining agents representing
11 the OUSD staff were not consulted or allowed to participate in the development of the plan. It was
12 presented as a *fait accompli*, despite the fact that it seeks waiver of teacher credential requirements
13 that are designed to assure that the District maintain a high level of teacher quality in areas of
14 bilingual and crosscultural education.⁵¹

15 Similarly, parent involvement was dealt short shrift during the plan development, and parent
16 choice is eliminated in a district where at least some parents of LEP children previously had a number
17 of alternatives to choose from with respect to their education [§ 33051(a)(5)].⁵²

18 One-sided evidence of each of these factors was before the State Board. It was compelled
19 to reject a plan that failed to include requisite consultation or participation. It failed to do so, in
20 violation of its duties under § 33051.

21 //

22 //

23 //

24 //

25
26 ⁵¹See Exhibit 3.

27 ⁵²This also undermines a principle asserted in the State Board's March, 1997 policy
28 memorandum, which states that LEP parent involvement should include "parental consent for
placement of their children in programs for English learners. . . ." (See Exhibit 1, p. 3.)

VI

**A Balancing of Equities Strongly Supports the Issuance of
a Temporary Restraining Order.**

In determining whether temporary injunctive relief should issue, the Court must weigh two “interrelated factors:” 1) the likelihood that the moving party will ultimately prevail on the merits, and 2) the relative harm to the parties from issuance or non-issuance of the injunction. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441- 442. In making this determination, the courts have applied a sliding scale such that the stronger the showing of harm to the petitioners, a lesser showing of likelihood of success will be required. *King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228.

The District can demonstrate no harm. They have a program in place which can be maintained pending a hearing on the merits. The persons who would be harmed if a temporary restraining order is not issued will be those LEP children currently enrolled in the District’s bilingual programs.⁵³ These students, on the basis of diagnosed educational need, are currently provided equal access to the District’s core curriculum through the use of primary language instruction. The District’s LEP parent advisory committee, as well as several hundred other LEP parents, teachers and administrators, have voiced their strong preference for the District’s current bilingual program. They do not want the bilingual programs dismantled, nor do they want their children enrolled in the District’s “alternative program.”

The State Legislature has decreed that primary language instruction must be provided when necessary. The waiver would allow children to be placed in an English-only program even when primary language instruction is necessary. This surely constitutes irreparable harm. Dr. Eugene Garcia’s declaration further supports the need to maintain the status quo. Dr. Garcia, Dean of the Graduate School of Education, U.C. Berkeley, envisions severe harm to these young children

⁵³District census documents reveal that the vast majority (69% or 3260) of the District’s total elementary LEP students (4724) are enrolled in “English-only” programs. According to District documents, those students receive English language development instruction and/or “sheltered instruction.” Only 465 of these students receive some type of “assistance” in their primary language. Only 1460 of the District’s total LEP enrollment have access to the core curriculum through primary language instruction. *See* Exhibit 19.

1 (kindergarten - grade 6) who will be torn from a program in midstream and placed in programs
2 profoundly different from that which they have been provided.⁵⁴ In addition, implementation of this
3 plan would further contribute to the severe morale problems of the LEP student teaching staff, and
4 hasten the resignations of those teachers who remain. In the opinion of Celso Rodriguez, a resource
5 teacher in the OUSD and a teacher for twenty-two years, it could be years before the District would
6 reassemble an adequate staff even if the bilingual program were later reconstructed. In the meantime,
7 LEP students attending the OUSD would suffer irreparable harm.⁵⁵

8 If the District is not enjoined these children will be summarily ejected from a program which
9 provides them understandable instruction and materials as well as exposure to teaching methodologies
10 and instructional strategies with which these children are accustomed. In its place, and contrary to
11 the express wishes of their parents, the OUSD will impose its "alternative program." This "alternative
12 program" is a program which the CDE has determined fails to meet the State Board's own policy
13 guidelines and federal law standards and thus, according to the CDE, would fail to adequately address
14 the language needs of these students.

15 The CDE has equally recognized the harms resulting from the imposition of such a failed
16 program when it concluded that there was no clear evidence that LEP students participating in the
17 OUSD's "alternative program" would "avoid substantive academic deficits or [would] be successful
18 in overcoming academic deficits."

19 The issuance of a temporary restraining order is further compelled by the fact that the District
20 seeking to experiment on these children has a pronounced track record of violating both federal and
21 state statutory rights of LEP students and currently has sixteen (16) state and federal administrative
22 complaints pending against it. No one wants their children to be treated as "guinea pigs," especially
23

24 ⁵⁴See Declaration of Eugene E. Garcia, filed in Support of Petition for Alternative Writ of
25 Mandate, and Peremptory Writ of Mandate and Complaint for Declaratory Relief - Application for
26 Temporary Restraining Order.

27 ⁵⁵See Declaration of Celso Rodriguez, filed in Support of Petition for Alternative Writ of
28 Mandate and Peremptory Writ of Mandate and Complaint for Declaratory Relief - Application for
Temporary Restraining Order.

1 when those conducting the experiment have demonstrated little regard for the children's well-being.

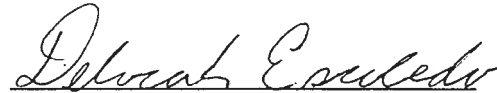
2
3
4 **CONCLUSION**

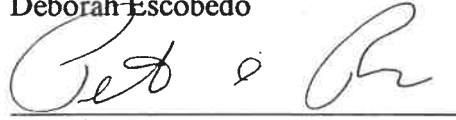
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6 Unless enjoined by this court, OUSD's language minority children, who compel special
7 protections under both state and federal law, will be subject to a program that the Department of
8 Education has determined does not meet minimal federal standards and the State Board's own policy
9 guidelines. The State Board and the OUSD have totally abdicated its responsibility to ensure equal
10 educational opportunities for these children. These children and their parents have no recourse but
11 to seek protection from the court. Petitioners have made a prima facie case of abuse of discretion
12 and an alternative writ and temporary restraining order should issue.

13
14 Dated: July 29, 1997

15 Respectfully submitted,

16
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ENDORSED
AUG 11 1997
By M. FRANCO, Deputy

8
9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12 MARIA QUIROZ, ALICIA CONSTANTINO,
13 GABRIEL MEDEL, PAUL H. GARCIA, LOS
14 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
15 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
16 EDUCATION, and The CALIFORNIA
LATINO CIVIL RIGHTS NETWORK as
Taxpayers,

17 Petitioners,

18 vs.

19 The STATE BOARD OF EDUCATION and its
members, YVONNE W. LARSEN, JERRY
20 HUME, NATALIE J. ARENA, KATHRYN
DRONENBERG, S. WILLIAM
21 MALAKASIAN, MARION MCDOWELL,
JANET NICHOLAS, SANFORD C.
22 SIGOLOFF, GERTI B. THOMAS, ROBERT L.
TRIGG, MARINA TSE, THE STATE
23 SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
24 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
25 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
26 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF,
27 JIM FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
28 Superintendent, Does 1-100, inclusive,

Respondents.

CASE No. 97CS01793
Sac. County No.

PETITIONERS' REPLY
MEMORANDUM IN SUPPORT OF
ITS MOTION FOR A TEMPORARY
RESTRAINING ORDER
[C.C.P. 1085; C.C.P. 1060]

DATE: July 30, 1997
TIME: 8:30 a.m.
DEPT: 41

TABLE OF CONTENTS

Page

1

2 *Table of Authorities* ii

3 INTRODUCTION 1

4 I. The Petitioners are Likely to Prevail on the Legal Merits of this Claim 2

5 A. The state mandate that school districts provide primary language instruction when

6 necessary is not waivable 2

7 1. The provision of primary language instruction is a general purpose of the

8 Bilingual Act.. 2

9 2. The General Purpose of Providing Primary Language Instruction in not

10 Waivable 4

11 a) The Waiver Law, § 33050, Specifically Prohibits Waiver of this

12 General Purpose 4

13 b) It Would Constitute an Unconstitutional Delegation of Power for the

14 Legislature to Grant the State Board the Authority to Override the

15 General Purposes if its Laws 5

16 B. It was Arbitrary, Capricious, and an Abuse of Discretion for the State Board to Fail

17 to Deny the Waiver on the Record Before It 7

18 II. The Claim that the Status Quo for K-3 Children in No Longer Native Language

19 Instruction is False; Petitioners Will Suffer Irreparable Harm

20 if the Program is Dismantled 9

21 A. The OUSD’s Assertions 9

22 B. The Petitioners Will Suffer Irreparable Harm if the

23 Alternative Plan is Implemented 13

24 Conclusion 13

25

26

27

28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES

PAGE(S)

Castañeda v. Pickard,
648 F.2d 989 (5th Cir. 1981) 7, 9

Clean Air Constituency v. California State Air Resources Bd.
(1974) 11 Cal.3d 801 5, 6

Comité de Padres de Familia v. Honig,
(1987) 192 Cal.App.3d 528 5

Davies v. Supreme Court,
(1984) 36 Cal.3d. 291 5

Fuentes v. Workers Compensation Appeal Bd.,
(1976) 16 Cal.3d. 1 5

IBM v. State Board of Equalization,
(1980) 26 Cal.3d 923 8

Kugler v. Yocum,
(1968) 69 Cal.2d 371 5

Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.,
(1996) 44 Cal.App.4th 1391 7

Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.,
(1981) 29 Cal.3d 101 7

San Francisco Unified School Dist. v. Johnson,
(1971) 3 Cal.3d 937 6

Schmidt v. Southern Cal. Rapid Transit Dist.,
(1993) 14 Cal.App.4th 23 5

STATE STATUTES and REGULATIONS

California Education Code
Section 33050 4, 6
Section 35050(a)(8) 4

Part 34 of the Education Code
Section 62002 2, 3, 4, 5

Chacon-Moscone Bilingual-Bicultural Act of 1976 (Bilingual Act)
Section 52160 et seq. 2
Section 52161 3
Section 52163 4, 6
Section 52165 4, 6

STATE CONSTITUTION

Article IV § 1 4, 5

1
2
3
4
5
6
7
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Introduction

This Court has a difficult task, but one which can be resolved in a principled manner. The Respondents have submitted a declaration from a Deputy Superintendent of Orange Unified School District (OUSD) which suggests a virtual Armageddon if the District is forced to continue its program which uses native language instruction at certain designated K-3 school sites. Surely neither the Court nor the Petitioners wish such a day of reckoning. Balanced against this bleak picture are declarations from (a) the person who was charged with directing all state and federal programs, including the language programs, in the OUSD for the past five years, until she resigned in protest over this ideologically motivated change; (b) four current teachers in the OUSD who are putting their careers on the line; (c) a number of former OUSD teachers who are willing to be labeled as “troublemakers” for their declarations and thus see their career opportunities limited; (d) five parents of children in the OUSD who are fearful of retaliation against their children but who have chosen to speak out nonetheless; and (e) several experts.¹ These people, many of whom have worked at the school and/or administrative level into the summer, contradict most of the details and all of the conclusions of this Deputy Superintendent. The question is who to believe, as we do not have the benefit of cross-examination.

We would suggest that in addition to evaluating the motivation of each declarant and the exhibits which many bring to the Court in support of statements in their declarations, the Court should look to the discussion of the legal merits of the claims before the Court. We would suggest that the Court will find that the Respondents have absolutely misrepresented the legal position of the Petitioners, and that the Respondents generally have not addressed the legal questions posed but rather ones that they would prefer to discuss. If the Respondent, OUSD, is willing to do this in its legal analysis we would suggest that their assertions of irreparable harm are similarly stretched beyond credibility. With this framework we believe that the Court should find that because the Petitioners are virtually certain to prevail on the law, and because the Petitioners are virtually certain to suffer

¹All Exhibits and Declarations referred to are included in the accompanying “Appendix III: Declarations and Exhibits in Support of Temporary Restraining Order.

1 irreparable harm in a program that is far from ready to deliver a credible education and which can and
2 has delivered a bilingual program through the summer, a Temporary Restraining Order should issue.
3 The Petitioners submit herewith a measured order which conforms with our Ex Parte Application for
4 an Alternative Writ and Temporary Restraining Order, and which is designed to maintain the primary
5 language program for those many parents who feel it is crucial for their young children. At the same
6 time, the law allows those who wish an alternative program to have such a program.

7
8 **I**
9 **The Petitioners are Likely to Prevail on the Legal Merits of this Claim**

10 **A. The state mandate that school districts provide primary language instruction when**
11 **necessary is not waivable.²**

12 **1. The provision of primary language instruction is a general purpose of the**
13 **Bilingual Act.**

14 In 1987 the Chacon-Moscone Bilingual Bicultural Act of 1976, § 52160 et seq., “sunset.”
15 However, by the specific provisions of the law that effectuated the sunset, the general purposes of
16 the Bilingual Act continued to bind school districts.

17 The California Department of Education (CDE) obligated to provide legal guidance to schools
18 districts and to enforce the law, issued an advisory concerning the effect of the sunset on bilingual
19 programs.³ That advisory concluded that one of eight general purposes of the sunsetted law was that
20 school districts provide primary language instruction to non-English speakers. That has been the
21 consistent position of the CDE for more than ten years, and has guided its enforcement efforts
22 throughout that time. During this time the State Board of Education (State Board) supported the
23 CDE interpretation and as recently as March, 1997 the Board issued an update of its own which
24

25 ²See argument at pages 18-21 of Petitioners’ opening Memorandum; see also Petitioners’
26 Second Basis for Relief.

27 ³A number of other laws also sunsetted at the time, and the policy guidance addressed these
28 as well. See the State Board’s 1987 Policy Guideline, p. 2, attached as Exhibit A to the Declaration
of Peter D. Roos, Appendix III, Declaration number 15.

1 reaffirmed that primary language instruction, when necessary, was required of school districts
2 pursuant to the general purposes requirement of § 62002.⁴ Never in the past ten years did the
3 Legislature amend or condition the language of § 62002, which was applied thousands of times to
4 hundreds of school districts across the state.

5 What do we have from the OUSD in refutation? A starting point would be to look at the
6 point headings of their Argument. There are two. The first is entitled “An injunction will not issue
7 to enforce expired law;” the second is “The sunset statute’s ‘general purposes’ language does not
8 revive its specific requirements.”⁵ As is readily apparent from these headings, the OUSD’s approach
9 is to address irrelevant issues in hope of diverting the Court’s attention from the Petitioners’
10 argument. The Petitioners argue that specific legal authority § 62002, as consistently construed for
11 ten years and not refuted by the Legislature, requires not the specifics but the general purposes of the
12 expired Bilingual Act to continue. Petitioners would not and could not argue the points that are
13 raised by Respondents. These are not worthy of addressing, for they are irrelevant.

14 Under the above headings, the Respondents continue the diversionary practice. There is the
15 argument, found in abundance throughout the Orange Memorandum, that federal law has never
16 required bilingual education — a point neither at issue nor contested. The closest that the
17 Respondents come to joining issue is to state that § 52161 of the sunsetted law has as a “primary
18 goal” the achievement of English fluency in each child. Again, the Petitioners would argue that this
19 was and is one of the general purposes of the Bilingual Act. That is not to say it is the only general
20 purpose. Indeed, the March, 1987 advisory by CDE and the March 1997 memorandum by the State
21 Board list this along with the provision of primary language instruction, as being a primary purpose
22 of the sunsetted Bilingual Act.

23 In short, there is no credible refutation of this point.
24

25
26 ⁴See Appendix I, Exhibit 1.

27 ⁵See pages 11 and 13 respectively of the Memorandum of Points and Authorities in Support
28 of Orange Respondent’s Opposition to Petition for Alternative Writ of Mandate and Complaint for
Declaratory Relief, Application for Temporary Restraining Order (henceforth Orange Memorandum).

1 **2. The General Purpose of Providing Primary Language Instruction in not**
2 **Waivable.**

3 There are two interrelated but distinct reasons why the general purpose of providing primary
4 language instruction cannot be waived by the State Board. First, the Legislature clearly does not
5 intend that this be waivable; secondly, it could not (and thus, is presumed, did not) intend to allow
6 a waiver of general purposes which would run afoul of Article 4, § 1 of the California Constitution,
7 the non-delegation of authority law.

8 **a) The Waiver Law, § 33050, Specifically Prohibits Waiver of this General Purpose.**

9 As stated in our opening Memorandum, the general purposes of a law are determined by
10 looking to the “provisions relating to the establishment and operation” of the program sunsetted
11 §62002. It is clear that the general purpose to provide primary language instruction when necessary
12 flows from, *inter alia*, §§ 52163 and 52165 of the Act. Indeed, such a determination flows in part
13 from the elevated status accorded these sections by including them among the sections not waivable
14 under §33050.

15 The additional inclusion of §52165 as a non-waivable provision was accomplished by SB 968
16 (1982) which amended §33050. As the Department of Finance analysis states, this provision was
17 added to the non-waivable list because it is an “important aspect of the Bilingual program.”⁶
18 Correspondence from Peter Shilla, chief lobbyist for this provision, states that § 52165 is added to
19 the list of non-waivable sections because it lies “at the heart of the Bilingual law”⁷ and because it is
20 the “most basic requirement of AB 507 (Chacon).”⁸ SB 968 with this amendment became Stats
21 1982, ch 1298. Section 52165, along with §52163 and several other sections, remains as a non-
22 waivable provision of law by reason of §33050(a)(8).

23 _____
24 ⁶Enrolled Bill Memorandum to Governor, September 9, 1982 (Appendix III, item 21). The
25 documents referred to in notes 6-8 are found in the Archives of the Secretary of State.

26 ⁷Correspondence from Peter Shilla to Senator David Roberti, March 23, 1982 (Appendix III,
27 item 22).

28 ⁸Correspondence from Peter Shilla to Honorable Edmund G. Brown, Jr., August 31, 1982
(Appendix III, item 23).

1 Section 33050 has been amended six (6) times since the Bilingual law sunsetted in 1987.
2 There has been one constant throughout this amendment process; §§52163 and 52165 have remained
3 non-waivable.⁹ It is assumed that the Legislature, in enacting or amending laws, was familiar with
4 the actions of previous Legislatures. *Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14
5 Cal.App.4th 23, 27. It is further the law in this state that “[w]henever possible, we must reconcile
6 statutes and seek to avoid interpretations which would require us to ignore one statute or the other.”
7 *Fuentes v. Workers Compensation Appeal Bd.* (1976) 16 Cal.3d. 1, 7. See also *Davies v. Supreme*
8 *Court* (1984) 36 Cal.3d. 291 (all words in legislation to be given effect whenever possible). If we
9 were to conclude that the 1987 sunset vitiated any effect of these latter enacted provisions, we would
10 violate virtually every rule of statutory construction adopted in the state. That is not what should be
11 done.

12 It is entirely possible to harmonize § 62002 and these later-enacted statutes without bringing
13 them back in all of their specifics. The way to do this is to conclude that the general purposes that
14 flow from them remain in full force. This is indeed the most logical construction. Though one could
15 go further and argue that the specifics have been re-enacted, that is probably not correct, nor
16 important for the resolution of this case. The general purpose of providing primary language
17 instruction when necessary flows from these sections and remains non-waivable. This conclusion is
18 also compelled, for a contrary conclusion would lead the Court to conclude that the Legislature was
19 guilty of violating Art. 4, § 1 of the California Constitution. When there is one interpretation of law
20 that would lead to a determination that an act of the Legislature is unconstitutional, and another
21 which would lead to a finding of constitutionality, the alternative construction should be used to save
22 the statute. *San Francisco Unified School Dist v. Johnson* (1971) 3 Cal.3d 937, 942.

23 (a) **It Would Constitute an Unconstitutional Delegation of Power for the Legislature**
24 **to Grant the State Board the Authority to Override the General Purposes if its**
25 **Laws.**

26 In *Comité de Padres de Familia v. Honig* (1987) 192 Cal.App.3d 528, 532-33 the Court
27 observed that “an unconstitutional delegation of legislative power occurs when the Legislature

28 ⁹Stats 1988, ch 1461; stats 1990, ch 1263; stats 1994, ch 126; stats 1994, ch 1186; stats 1995
ch 275; stats 1996, ch 163.

1 confers upon an administrative agency unrestrained authority to make fundamental policy decisions.”
2 See also *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816;
3 *Kugler v. Yocum* (1968) 69 Cal.2d 371. “To avoid such delegation the legislature must provide an
4 adequate yardstick for the guidance of the administrative body empowered by law to execute the
5 law.” *Clean Air Constituency, supra*, at 817 (citation omitted). “Underlying these rules is the belief
6 that the Legislature as the most representative organ of government should settle insofar as possible
7 controverted issues of policy and that it must determine crucial issues whenever it has the time,
8 information and competence to deal with them.”

9 One cannot envision a more basic violation of these principles than the Legislature allowing
10 an administrative agency the power to override its general purposes — effectively substituting its
11 judgement for that of the Legislature. If one thing cannot be delegated it must be the ability of an
12 agency to override the intent of the Legislature.

13 While the general purposes above-stated allow, indeed require, this Court to avoid this
14 interpretation, the waiver law is also supportive. While it contains the listing of non-waivable
15 provisions as discussed, it further limits waivers to those laws which “may be waived.” Section
16 33050. Clearly these general purposes cannot be waived.

17 What is the rebuttal of the Respondents to this argument? It is found in the same argument
18 previously discussed. Without analysis, the OUSD beats the dead horse that sunset means sunset and
19 nothing remains. This may be their hope but, as above discussed, it is not wholly correct — and it
20 is certainly not correct as respects the central issue in this case. In keeping with their favorite
21 approach, the OUSD further mischaracterizes the Petitioners’ arguments to enable them to argue
22 what they can win, however irrelevant. It is stated that “Petitioners’ argument that the Legislature
23 implicitly revived the Bilingual Education Act by amending unrelated provisions of the waiver statute
24 surely would come as a great surprise to members of that body who twice tried — and failed — to
25 do so expressly.”¹⁰ Petitioners have never argued, nor do we argue, that the entire Act or even any
26 specifics were revived. What is argued, and what must be concluded to avoid the result that the

27
28 ¹⁰OUSD Memorandum, pp. 12-13, n. 9.

1 inclusion of §§ 52163 and 52165 in the waiver law is without any force and effect, is that this
2 inclusion makes non-waivable the general purposes which flows from such sections.

3 In sum, the Petitioners are virtually certain of prevailing on their second cause of action. This
4 cause of action raises purely legal questions which are uniquely addressed by writ. *See e.g. Clear Air*
5 *Constituency, supra*, 11 Cal.3d 801, 820. Neither the OUSD nor the State Respondents have
6 provided any credible refutation to the Petitioners' position.

7 **B. It was Arbitrary, Capricious, and an Abuse of Discretion for the State Board to Fail to**
8 **Deny the Waiver on the Record Before It.¹¹**

9 The Petitioners' opening Memorandum on this basis for relief was fairly complete, and thus
10 we will focus on "refutation" by the OUSD. That refutation is contained at pages 15-19 of the
11 OUSD Memorandum.

12 The OUSD opens with the argument that "mandamus will not lie to compel a discretionary
13 act." While as a general principle this is correct, the abuse of the discretionary authority granted to
14 an administrative agency is certainly reachable by mandate. *Monterey Mechanical Co. V. Sacramento*
15 *Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1399. The record before the State
16 Board established a *prima facie* case that its own standards and federal legal standards would be
17 violated by the grant of the waiver. This record further contained irrefutable evidence that the school
18 district standing before it was one which through its actions deserved a critical review of its waiver
19 request. Yet, despite these facts, the State Board effectively approved the waiver by default. This
20 constitutes capricious and arbitrary action, which amounts to an abuse of discretion.

21 Credible, non-capricious exercise of discretion by the State Board must be predicated on
22 having credible, substantive evidence that the multiple findings by its own agent, the CDE, were in
23 doubt. The CDE staff that found twice that the alternative plan submitted by the OUSD failed to
24 meet *Castañeda* standards is one that has unparalleled experience in assessing school district
25 programs under *Castañeda*. That staff reviews on average 200-300 school districts a year to evaluate
26 their programs under *Castañeda*. They visit upwards of 500 schools a year to determine whether

27
28 ¹¹See pp. 11-17 of Petitioners' opening Memorandum. See also First Basis for Relief.

1 *Castañeda* standards are met. They have been doing this for at least ten years.¹² This is an agency
2 whose determination deserves great deference on this point. It is well-settled that “Because of (an)
3 agency’s expertise, its views of a statute or regulation that it enforces is entitled to great weight
4 unless clearly erroneous or unauthorized.” *Pacific Legal Foundation v. Unemployment Ins. Appeals*
5 *Bd.* (1981) 29 Cal.3d 101, 111; *see also IBM v. State Board of Equalization* (1980) 26 Cal.3d 923.

6 While totally ignoring these findings by the CDE, the OUSD would argue that because the
7 State Board heard from eleven speakers in favor of the waiver and fifteen against it that the Board
8 exercised its discretion in a non-abusive manner. Indeed, what is absolutely missing from the
9 OUSD’s discussion of this activity is whether there was any substantive refutation of the CDE’s staff
10 findings. There was not. Also missing is the acknowledgment that the vast number of speakers in
11 favor of the proposed waiver were OUSD School Board members and senior staff of the OUSD, who
12 had no claimed expertise in this area; in contrast, the Director of State and Federal Programs in the
13 OUSD, who until June, 1997 was charged with developing programs for LEP students, supported
14 the CDE’s findings and urged rejection of the waiver.

15 It is noted that the State Board “considered the published research of Dr. Christine Rossell.”¹³
16 Whether or not this was “considered,” it is a useful point to discuss the general strategy of the OUSD
17 before the State Board and in its brief. Dr. Rossell has made a career arguing against bilingual
18 education and desegregation. Her “research” generally favors “ESL” programs and opposes bilingual
19 programs. Throughout this section of the brief, the OUSD tries to draw this dichotomy between
20 “bilingual programs” (bad and sought by Petitioners) and “ESL programs” (good and sought by
21 Respondents); the dichotomy is both false and irrelevant to this claim and every claim before the
22 Court. The claim alleging an abuse of discretion alleges that, as the CDE found, the alternative plan
23 failed to pass muster as an adequate ESL plan. The CDE did not, nor do Petitioners, argue that the
24 State Board abused its discretion by not approving a bilingual plan. That was not and is not an issue.

26 ¹²See Declaration of Peter D. Roos, Appendix III, number 15. *See also* Declaration of Lydia
27 Stack, Appendix III, number 18.

28 ¹³See OUSD Memorandum in Opposition to TRO, p. 16.

1 Secondly, and highly relevant, there is no such thing as “an ESL program” or even “a bilingual
2 program.” These terms can hide a multitude of sins or conversely may include positive programs.¹⁴
3 Thus when Dr. Rossell says ESL is good she is not saying the OUSD program is good; when, as the
4 OUSD argues, many districts in this country have ESL programs, they are not telling us whether
5 these programs are good or bad. The only substantive evidence before the State Board about the
6 “ESL program” advanced by the OUSD was that it was a failure as a response to the needs of the
7 LEP students in that District, and as such violated *Castañeda*. This continued after an in-depth
8 analysis by an agency that does this analysis on a daily basis. That conclusion was not substantively
9 refuted, and the OUSD in its papers has not shown that it was refuted. Not refuted, the Board’s
10 action in approving the plan constituted an abuse of discretion. Yes, they exercised their discretion,
11 but they abused it.

12
13 **II**
14 **The Claim that the Status Quo for K-3 Children in No Longer Native Language**
15 **Instruction is False; Petitioners Will Suffer Irreparable Harm if the Program is Dismantled**

16 **A. The OUSD’s Assertions.**

17 The OUSD’s irreparable harm claims are based exclusively on the declaration of Dr. Neil
18 McKinnon. That declaration is fully discredited by those who have working knowledge of the
19 program: teachers, parents, and the person charged with the development and oversight of the
20 program for the past five years.

21 Dr. McKinnon makes a number of claims of irreparable harm. We address those claims in this
22 section.

23 1. The OUSD asserts that six year round schools began on July 1, 1997 and have already
24 dismantled their programs.

25 Ms. Pam de Loetz, the former Administrator of Special Programs, is intimately familiar with
26 the specific programs at the schools. Only five of the schools have bilingual programs. As to those

27
28

¹⁴See generally the Declaration of Lydia Stack (Appendix III, number 18), the immediate past
President of the international Teachers of English as a Second Language organization.

1 five, Ms. de Loetz states:¹⁵

- 2 a) Lampson Elementary. “Lampson’s bilingual program was totally in effect up to the
3 last day of the last session, July 29, 1997.” (de Loetz, p. 3.)¹⁶
- 4 b) Sycamore Elementary (a K-2 program). The daughter of Ms. de Loetz taught there
5 this summer. “According to my daughter, all three teachers instructed their respective
6 classes in Spanish My daughter’s classroom as well as the other two bilingual
7 classrooms were fully stocked with all the Spanish language materials necessary to
8 teach the core curriculum, as they have been in the past. Thus Dr. McKinnon’s
9 statement that, ‘after July 10, 1997, these schools immediately began transitioning to
10 English instruction’ is simply false.” (de Loetz, p. 3.)
- 11 c) Fairhaven Elementary. While there were problems and resignations, “All of these
12 classrooms functioned as bilingual classrooms and utilized the Spanish language core
13 curriculum materials they utilized in the past. . . . Again, Dr. McKinnon’s statement
14 considering Fairhaven is simply not true.” (de Loetz, p. 4.)
- 15 d) Cambridge Elementary. This was always a small program — one classroom which
16 “can easily be staffed.” (de Loetz, p. 4.)
- 17 e) West Orange Elementary. “West Orange retains one BLCAD teacher and would also
18 be staffed with bilingual staff transferred from non-bilingual schools.” (de Loetz, p.
19 4.)

20 2. The OUSD asserts that the schools scheduled to begin on September 2, 1997 will have
21 problems due to teacher attrition.

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23
24
25

26 ¹⁵All references are to the Declaration of Pam de Loetz, Appendix III, item 3.

27 ¹⁶See also Declaration of Barbara Hernandez, current bilingual teacher at Lampson Elementary
28 (Appendix III, item 8).

1 Ms. de Loetz states that the other bilingual schools, Jordan,¹⁷ Prospect,¹⁸ Esplanade and
2 California, will also be able to “continue their bilingual programs in September.” (de Loetz, p. 7.)
3 She builds upon this conclusion explaining in detail, with names of teachers, how these programs can
4 be maintained. Indeed, despite the general loss of both ESL and bilingual teachers trained to teach
5 LEP students she notes that some schools are on the cusp of implementing “a better program than
6 they had before.” (de Loetz, p. 8.)

7 Ms. de Loetz, who was responsible for maintaining teacher data, puts the loss of bilingual
8 teachers in perspective (de Loetz, p. 8). The OUSD, like many other districts, has a plan to remedy
9 the chronic shortage of teachers. What would be lost by the denial of a TRO would be the incentive
10 to fulfill such a plan. Further, the absence of a program would make impossible the recruitment of
11 new teachers, which would make the implementation of a Peremptory Writ just that much more
12 difficult.¹⁹

13 3. The OUSD asserts that there will be a loss of a summer-school and tutorial program.

14 This program existed before the waiver and would be unaffected by the grant of a TRO. As
15 stated by Ms. de Loetz,

16 I find it absolutely astounding that Dr. McKinnon would imply that summer sessions
17 and tutorial programs would somehow cease to exist if the district’s “English-only”
18 program was not implemented. This is nonsense. During my entire tenure with the
19 district, it has always had after school tutorial programs and summer sessions. These
20 programs have always been open to LEP students, enrolled in both bilingual and non-
21 bilingual programs and to non-LEP children.” (de Loetz, p. 4.)

22 Ms. de Loetz concludes, “Title I mandates that school districts receiving such funds
23 implement these types of supplemental programs and that LEP students be given meaningful access
24 to them. To suggest that either an after-school tutorial or a summer session program is dependent

24 ¹⁷See Declaration of Celso Rodriguez, current Bilingual Resources Teacher at Jordan
25 Elementary (Appendix III, item 14).

26 ¹⁸See Declarations of Alicia Carter and Cherie Rennie, current Bilingual Resource Teacher
27 and CLAD Teacher at Prospect Elementary.

28 ¹⁹See Declarations of Linda Contreras, Eddie Espinosa, Elsie Espinosa, Mary J. Murray, Maria
Luisa Sanchez, Vanessa Torres, Rebecca Yacenda in Appendix III, items 2, 5, 6, 7, 17, 19 and 20.

1 upon the implementation of the district's waiver program is simply not true." (de Loetz, p. 5.)

2 4. The OUSD asserts that the Districts's LEP student's will suffer from lack of appropriate
3 materials if the K-3 bilingual program is continued.

4 Ms. de Loetz states,

5 The only waste that would occur with respect to instructional materials should the
6 district be allowed to dismantle its bilingual program would be the thousands and
7 thousands of dollars that I personally budgeted and expended as the district's Special
8 Programs Administrator for the last five years. It would be a conservative estimate
9 that each bilingual classroom in the district currently had at a minimum \$5,000 worth
10 of Spanish language materials for our children. Ensuring that these children had
11 access to the full complement of all core curriculum materials in their own language
12 was one of my personal goals. I also maintained a centralized library for our bilingual
13 teachers so that they could have access to many additional Spanish language materials
14 for their children, including a film library with Spanish language videos, a core
15 literature library, centralized "big books" and guided readers. I also took great steps
16 to ensure that our bilingual classrooms had take-home libraries for parental
17 reinforcement of our students' literacy skills. This list can go on and on. But most
18 importantly, there are substantial and appropriate Spanish language materials in the
19 core curriculum areas for each of the district's 1,460 students enrolled in the district's
20 bilingual classroom when school begins on September 2, 1997. (de Loetz, pp. 6-7.)

13 5. The OUSD asserts that it will lose \$123,000 which it has already expended on language arts
14 materials if the K-3 bilingual program is continued.

15 Ms. de Loetz concludes that of this sum only \$36,000 was for the children affected by this
16 litigation. She continues,

17 Furthermore, these materials were ordered months before the waiver application was
18 ever heard by the State Board of Education. At that time I specifically inquired about
19 why the district would make this extra expenditure if it was not sure the waiver would
20 be approved. I was informed by Tom Shrodi, the district's Director of Instructional
21 Services, that we would be able to use the extra language arts materials even if the
22 waiver was not approved because of the growth in enrollment that the district had
23 been experiencing and was projected to experience." (de Loetz, p. 5.)

24 As stated at the outset, the general assertions by the OUSD must be measured against the
25 multiple and specific declarations which refute them. The general assertions of the OUSD should be
26 evaluated in light of the courage of many of the declarants in refuting them; and the general assertions
27 of the OUSD should be considered against the propensity of the OUSD in this filing to make general
28 arguments where specific ones are needed. Properly evaluated, these assertions by the OUSD
deserve little weight. The Petitioners will not be harmed if the bilingual program is continued. They
will be harmed if it is not continued.

1 **B. The Petitioners Will Suffer Irreparable Harm if the Alternative Plan is**
2 **Implemented.**

3 In evaluating the claims of harm it is important to consider who is and is not affected by the
4 closure of the bilingual program, and to consider what has been said about the alternative plan. The
5 program at issue is for children at grades K-3. These are not older children who might be better able
6 to cope in a program that did not use their primary language. This is a program for children who are
7 extremely limited in their English skills. Those children who are well on their way to acquiring
8 English are by definition not entitled to the program; finally, this is not a program that forces children,
9 against their will, to receive instruction in Spanish. In accordance with law, the OUSD has always
10 permitted a parent to remove his or her child from a bilingual program.

11 In evaluating harm, it is also important to weigh what children may receive in the alternative
12 program. The conclusion by the CDE that the alternative program fails to meet *Castañeda* standards
13 is more than a technical objection to the program. The conclusion was that the alternative program
14 did not have a sound basis for enabling LEP children to learn the subject matter available to others;
15 the conclusion (contrary to the broad assertions in the OUSD Memorandum) was that there was
16 inadequate allocation of resources to the proposed program; and finally, the CDE concluded that
17 there was an inadequate evaluation plan in effect to allow the OUSD to shape a program to the needs
18 of the children. If any of these conclusions are true, these children are in jeopardy of irreparable
19 harm. They should be spared that harm.

20 There are a number of declarations submitted that spell out the concerns of the parents,²⁰ and
21 which point to innumerable harms that are likely to confront these children pulled out of a program
22 in mid-stream. We would urge the Court to review these. Irreparable harm is a virtual certainty if
23 the Respondents are permitted to go forward with a plan that must ultimately be determined to violate
24 the law. The Petitioners should not have to suffer this.

25 **Conclusion**

26 The Petitioners merely seek at this juncture an order running to the OUSD compelling them

27 ²⁰See Declarations of Del Val, Osorio, Ponce, Quiroz, and Ruiz, parents of LEP students in
28 the OUSD, in Appendix III, items 4, 10, 11, 12 and 16.

1 to maintain the program that was in effect at the end of the last school year, and which could not
2 legally be altered before August 1, 1997.

3 As respects the State Respondents, the Temporary Restraining Order that has been submitted
4 merely orders them to inform the OUSD not to proceed with the alternative program. It further
5 orders them not to take further steps to consider the waiver request that has already been submitted
6 to the State Board and which is the subject of this litigation. We seek no relief beyond this at the
7 current time.²¹

8

9 Dated: August 8, 1997

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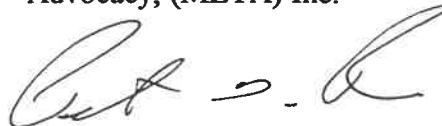
Respectfully submitted,

11

Multicultural Education, Training and
Advocacy, (META) Inc.

12

13



14

Peter D. Roos

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Deborah Escobedo

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California Rural Legal Assistance

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Cynthia L. Rice

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Attorneys for Petitioners

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²¹A copy of the Temporary Restraining Order is resubmitted for the convenience of the Court.

CALIFORNIA
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OF
EDUCATION

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DELAINE EASTIN

State Superintendent of Public Instruction

ORIGINAL
FILED

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U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
37

September 8, 1997

The Honorable William B. Shubb
Presiding Judge, U.S. District Court
Eastern District of California
650 Capitol Mall, Room 2042
Sacramento, CA 95814-4707

Re: *Maria Quiroz, Plaintiffs, et al. v. State Board of Education,
State Superintendent of Public Instruction, Orange Unified School
District, et al., Defendants*
Case No. CIV-S-97-1600 WBS GGH

Dear Judge Shubb:

As the defendant State Superintendent of Public Instruction in this case, please accept this letter as the required brief in pro se for the hearing on September 9, 1997 on the issues of preliminary injunction and remand to the State Superior Court. Whether the State Department of Education Legal Office may represent me will not be resolved until the State Board of Education (SBE) meets on September 11, 1997.

I fully support, and join in, the Plaintiffs' motion for a preliminary injunction filed in your court on September 2, 1997. My staff analyzed the plan submitted by Orange Unified School District (Orange) in the context of an application to the State Board of Education to waive certain Education Code sections asserted to be an obstacle to implementation of Orange's alternative plan for the education of Limited English Proficient (LEP) children. The Department staff, with whom I totally agree, determined that the Orange alternative plan (plan) LEP children fails to comply with the second and third prong of the requirements in Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) as incorporated into the department's Program Advisory for English Learners (March 1997) and the Program Advisory relating to sunset of statutory education provisions, including bilingual programs (August 1987).

With respect to the Castaneda second prong, Department staff found that no rationale is given in the plan for the use of instructional aides instead of qualified teachers, no description of instructional materials is provided or how the core curriculum can be covered in the proposed class periods of only 30-60 minutes. Such elements are educationally critical in determining whether a waiver should be granted to Orange.

Also distressing to me is the failure of Orange's plan to comply with the third prong of the Castaneda test. The plan contains virtually no evaluation component. The plan does not reveal, for example, a definition of program success, the annual rate of expected pupil achievement, the time frame for students to reach Orange's standard for fluency, the mechanism

The Honorable William B. Shubb

September 8, 1997

Page 2

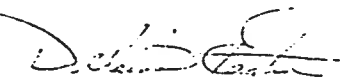
by which English proficiency is to be measured initially, what assessment instruments will be used, the schedule of assessments during the year and generally, the goals of the program by which it is determined to be successful. For purposes of approving a waiver to implement the plan, it is vital to know what the evaluation process will be. It would be irresponsible to allow Orange to develop that component later, with the possibility that it would not be developed at all.

Attached for your further edification is a copy of each of Department of Education staff reports dated June 11 and July 2, 1997.

For these reasons, the plan should not be allowed to be implemented until its validity is finally decided by the court. Therefore, a preliminary injunction should be granted.

With respect to the issue of remanding the case back to the Superior Court, either in whole or in part, I take no position. I believe that the issues will be fairly and competently judged in either court.

Respectfully submitted,



Delaine Eastin
State Superintendent of Public Instruction
and Director of Education

Attachments

cc: The Honorable Ronald B. Robie
Deborah Escobedo
Peter R. Roos
Multicultural Education, Training
and Advocacy (META)
Cynthia L. Rice
California Rural Legal Assistance
Janice L. Sperow
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Orange Unified School District
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Office of the Attorney General



Cite as 576 F.Supp. 1503 (1983)

pleading to determine the character of an alleged threatened action. For example, in reaching an alternative holding in *La Chemise Lacoste*, the Court of Appeals declined to find jurisdiction under *Wycoff* even though the defendant might very likely have brought a federal trademark infringement suit. *La Chemise Lacoste*, 506 F.2d at 345. The defendant could have brought three types of actions, the court stated: "a state common law trademark infringement suit, an unfair competition suit under state law, or an infringement suit based on its federally registered trademarks." *Id.* at 345-46. Lacoste's complaint, however, did not "specifically assert that Alligator would bring an action based on its federal rights." *Id.* at 345. See also *Care Corp. v. Kiddie Care Corp.*, 344 F.Supp. 12 (D.Del.1972) (remanding to state court where plaintiff's state declaratory judgment action alleged only a threatened state claim, even though plaintiff could have alleged a threatened federal claim).

Likewise, in this case, Northwest nowhere alleges that defendants threatened a suit under federal law, nor did they disguise what was an obvious and imminent threat of a federal lawsuit.¹¹ Defendants' Western District of Oklahoma claims and counterclaims here arose only after plaintiff drafted and filed its complaint in Delaware Chancery Court. Although this Court cannot ignore the fact that defendants filed their Western District of Oklahoma action only one day after plaintiff's action was filed, the threat of a federal lawsuit was far from imminent when Northwest brought suit in Chancery Court. Indeed, the Western District of Oklahoma has dismissed defendants' "federal" claims for lack of jurisdiction. See note 8, *supra*. The Court cannot hold, as defendants would like it to, that plaintiff's suit necessarily anticipated the "federal" causes of

tion that Northwest is bound by the *Ashland Oil* case merely anticipated a defense to Northwest's position regarding "the validity of certain provisions of the contract." *Id.* at 12. Because of this Court's holding that plaintiff's complaint did not allege a threatened federal action by defendants, it need not address the merits of the Western District of Oklahoma decision nor plaintiff's argument that the Western District of

action raised in defendants' counterclaims and in their separate Oklahoma litigation.

For the reasons stated above, plaintiff's motion to remand will be granted. An appropriate order will issue.



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.

United States District Court,
D. Colorado.

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

Oklahoma case has preclusive effect in this Court. See C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4436 (1981).

11. See *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) (plaintiff cannot avoid removal jurisdiction by artfully drafting federal claims as state law claims).

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.

1. Federal Civil Procedure \S 187.5

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 \S 148

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, \S 204, 204(f), 20 U.S.C.A. \S 1703, 1703(f).

Peter D. Roos, Irma Herrera, Mexican American Legal Defense and Educational

Fund, San Francisco, Cal., Roger L. Rice, Camilo Perez-Bustillo, Cambridge, Mass., for plaintiff-intervenors.

Michael H. Jackson, Denver, Colo., John S. Pfeiffer, Denver, Colo., for defendants.

MEMORANDUM OPINION AND ORDER ON LANGUAGE ISSUES

MATSCH, District Judge.

The delay in dealing with the particular issues discussed in this memorandum opinion is a result of the difficulties involved in using the adversary process to assess the efforts made by a public school district to obey a mandate to replace a segregated dual school system with a unitary system in which race and ethnicity are not limitations on access to the educational benefits provided. Among those difficulties are: (1) the polarization of positions through pleadings and proof, (2) the necessity to make a retrospective inquiry into a very fluid problem focusing on a static set of operative facts, (3) 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

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

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 Opportuni-

ties 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

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 Intervenor.

In determining the awards on applications for attorneys fees, Judge Finesilver commented on the role of the plaintiff-intervenor 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

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 inter-

ests 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

Cite as 576 F.Supp. 1503 (1983)

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

schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

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

20 U.S.C. § 1703.

The present focus of attention is on subsection (f) of Section 1703. That subsection was analyzed carefully by the United States Court of Appeals for the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir.1981), a case which is very instructive in the present controversy. There, the Court made the following pertinent observations:

We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy

the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

Congress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district's language remediation efforts are "appropriate." Thus we find ourselves confronted with a type of task which federal courts are ill-equipped to perform and which we are often criticized for undertaking—prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government (i.e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly, with this type of task in this case, we have attempted to devise a mode of analysis which will permit ourselves and the lower courts to fulfill the responsibility Congress has assigned to us without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators. *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir.1981).

The suggested analysis is to ask three questions. First, is the school system pursuing a program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Second, is the program reasonably calculated to implement that theory? Third, after being used for enough time to be a legitimate trial, has the program produced satisfactory results? *United States v. State of Texas*, 680 F.2d 356, 371 (5th Cir.1982).

THE EVIDENCE

Limited-English proficiency children in the district.

School District No. 1 has a duty to identify, assess and record those students who come within the provisions of the English

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

district enrollment. An additional 700 Spanish language students were identified as Lau category C.

The school district's curriculum.

At the elementary level, a transitional bilingual program exists at twelve elementary schools: Boulevard, Bryant-Webster, Crofton, Del Pueblo, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Mitchell, Swansea and Valdez. At all those schools except Valdez, the program is for grades K-3; at Valdez it is provided for grades K-6. Not all classrooms in these schools are designated bilingual classrooms; most have one designated bilingual classroom for each grade level in the program. At Fairmont there are two designated bilingual classrooms for each grade level K-3. While only 13.4% of the total number of limited-English proficiency children enrolled in the district (Lau A, B and C children, including all 42 language groups) were receiving instruction in bilingual classrooms during 1981-82, 31.03% of the total number of Spanish speaking, elementary level limited-English speaking children were in bilingual classrooms.

No speakers of languages other than Spanish, and no Spanish speaking Lau C children receive instruction in designated bilingual classrooms. The bilingual classrooms are intended to have about 40% limited-English proficiency children, and 60% English proficient children, but the actual figures deviate from this goal. Students who are placed in bilingual classrooms merge with the rest of the student body for classes in art, music and physical education, and for lunch and recess.

There are differences in the teaching staff in the desegregated bilingual schools. Each bilingual classroom is taught by a certified teacher, but many of those teachers are monolingual English. Most teachers, including all of the monolingual English teachers, have a bilingual aide to assist in communicating with those children who do not speak English. It is a fair inference that any instruction in Spanish, in classrooms led by monolingual English teachers, occurs through these bilingual aides. In several designated bilingual classrooms,

there are full or part-time ESL (English as a Second Language) tutors to assist in English language instruction. In other classrooms ESL is taught by the teachers and aides.

In addition, each bilingual school, except for Mitchell, has a bilingual resource teacher who serves in an administrative and supportive role. (Del Pueblo and Valdez have two bilingual resource teachers, while Bryant-Webster and Greenlee have half-time bilingual resource teachers.) The resource teacher's duties are extensive, including: coordinate between the classroom teacher and the aide in establishing an instructional program; provide technical and other assistance to bilingual classrooms; coordinate the total bilingual effort within the school; meet weekly with the teachers and aides to discuss student progress and other program concerns; provide at least two hours of in-service training to the aides weekly; develop curriculum and materials; involve parents and the community in the program; assess and evaluate limited-English speaking children; diagnose their needs and prescribe specialized curricula; demonstrate techniques and methodologies involved in bilingual instruction, second language acquisition, ESL, and Spanish oral language development; read to children in Spanish; and work with children on conceptual development using the child's native language. All the bilingual resource teachers are bilingual.

For those Lau A and B elementary level children who are not in designated bilingual classrooms—about 1,200 in all languages and about 500 Spanish-speaking children—the district provides two modes of ESL instruction. Four elementary schools—Brown, Cheltenham, Goldrick and Mitchell—have a full-time ESL teacher. The remaining elementary schools (and the non-Spanish speaking Lau A and B children in the twelve bilingual schools) are served by full or part-time tutors who instruct in ESL. All ESL instruction, whether it is by a teacher or tutor, occurs on a "pull-out" basis: the children are taken from their regular classrooms to receive from 30 to 60 minutes of ESL instruction each day. The

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

not limited-English speaking, the district determines him to be ineligible for the bilingual/ESL program. It is common for parents to overstate the language abilities of their children, and the teacher's involvement in the questionnaire is intended to safeguard against that. Most of the district's teachers are not trained in linguistics, bilingual education, other languages, or in detecting language problems. At the secondary level those students who are identified as LEP are given an ESL test to place them in ESL level I, II, III or IV.

To measure the progress of elementary children receiving ESL instruction, the school district uses the IDEA Test, which is a part of the IDEA Kit. In addition to the IDEA Test, the district relies on the opinions of its teachers and staff to determine whether and how much the child has progressed. If the student achieves "mastery" of the IDEA Test, he leaves the ESL program, unless his tutor or teacher determines that it would not be appropriate to "mainstream" him at that point. The IDEA Test is also used for those students receiving instruction in designated bilingual classrooms, because part of the transitional bilingual program is ESL instruction through the IDEA Kit. If the child achieves mastery in the test, he will be released from the bilingual program. Of course, if a child becomes proficient in English during the school year he can remain in the bilingual classroom and simply do without the ESL instruction, effectively joining the English speaking children already in the classroom.

At the secondary level, the school district measures progress in the ESL program through the Structure Test of English Language, or STEL. That test is administered twice a year, on a pre/post basis.

The school district does not keep records of the progress of children who have left either the bilingual or ESL program. There is no continuing support provided to students who have exited from either program, and the district does not compare their performance against that of non-limited-English speaking children. None of the tests used by the district measures the capabilities of limited-English speaking

children in their native languages in either language skills or content areas.

Staffing.

Teachers in designated bilingual classrooms are placed by the school district's personnel office, rather than by the bilingual program administrator, Mr. Moses Martinez. These placement decisions do not depend upon the teacher's proficiency in a second language or in bilingual instruction skills. For example, the personnel office often will assign tenured teachers or teachers already working within a particular school, to fill vacancies in bilingual classrooms, even though those teachers are not bilingual and have no training for bilingual teaching, and even though a non-tenured bilingual teacher is available. There is no state endorsement for bilingual classroom teachers. Selection is based on an oral interview. The district does not administer a written test to evaluate either language skills or bilingual instruction skills.

No special training is required for ESL teachers and there is no state endorsement for ESL teachers. There is no formal district procedure to assess them for language proficiency or ESL teaching skills. ESL teachers are not required to be bilingual.

During the 1980-81 school year, over 200 of the district's teachers—predominantly teachers who did not lead designated bilingual classrooms or teach ESL—received an 18-hour in-service training course which covered the basics of linguistics, ESL (including the IDEA Kit curriculum), and multicultural awareness. The school district did not follow up on whether those teachers actually used such training in their classrooms; nor did the school district know whether those teachers taught in classrooms or schools with large numbers of limited-English speaking children.

There are regular classroom teachers in the district who are bilingual, generally in English and Spanish. The evidence did not show the number of bilingual teachers who were working in the district during the 1981-82 school year.

Cite as 576 F.Supp. 1503 (1983)

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

Lau C child as that term is used in the Act. In addition, the Act prohibits funding of a particular student's educational program for longer than two years. *Id.* § 22-24-104(3).

HAS DENVER DESIGNED A PROGRAM BASED ON A SOUND EDUCATIONAL THEORY?

The defendant district has a freedom of choice among several educational theories which experts have recognized as valid strategies for language remediation in public schools. It is, of course, subject to the requirements of Colorado statutes. While the Colorado English Language Proficiency Act is essentially a funding program, it does establish an affirmative duty on Colorado school districts in § 22-24-105 which reads as follows:

(1) It is the duty of each district to:

(a) Identify, through the observations and recommendations of parents, teachers, or other persons, students whose dominant language may not be English;

(b) Assess such students, using instruments and techniques approved by the department, to determine if their dominant language is not English;

(c) Certify to the department those students in the district whose dominant language is not English;

(d) Administer and provide programs for students whose dominant language is not English.

The state has not, however, directed the use of any particular type of language program.

Denver has elected to use what is called a "transitional bilingual approach" which is well described in the following language from the Denver Public Schools' Bilingual Program Model for the 1981-82 School Year:

The intent of bilingual education is to facilitate the integration of the child into the regular school curriculum. English is not sacrificed, in fact it is emphasized; the native language is used as a medium of instruction to ensure academic success in content areas such as math, social

studies, etc., while the child at the same time is acquiring proficiency of the English language.

(Intervenors' Exhibit 26).

The parties are in agreement and the testifying experts have all said that this is a recognized and satisfactory approach to the problem of educating LEP children. Mr. Martinez testified that this is a two-pronged approach. One is to provide the student with an opportunity to develop English language skills and the other is to provide content area to him in a language he understands while he is learning English. The experts agree that this approach not only should enable LEP students to enter the mainstream of instruction, it also helps to overcome the emotional barriers of fear, frustration, discouragement and anger by providing understandable content instruction in their native language during the transitional phase.

HAS DENVER PURSUED ITS PROGRAM WITH ADEQUATE RESOURCES, PERSONNEL AND PRACTICES?

The elementary bilingual classroom program is the best which Denver has to offer LEP children. Accordingly, the analysis should begin with a focus on the deficiencies in that program.

The key to an effective elementary bilingual 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 class-

rooms with bilingual teachers in the twelve elementary schools having that program.

Given the district's declaration of a transitional bilingual policy and the obvious need for the services of competent bilingual teachers, it would be reasonable to expect that the placement of teachers with those skills would be matched with the programs in the designated schools. That is not the case in Denver.

The assignment of teachers to bilingual schools in the defendant district is accomplished by the same procedure used for the assignment of teachers to all other schools. Teachers with tenure have preferential rights for assignment to vacancies according to their seniority. Accordingly, a monolingual English teacher may fill a vacancy in a bilingual classroom at a bilingual school even though a qualified bilingual teacher with less seniority is available for placement there. Likewise, tenured monolingual teachers cannot be removed from a bilingual classroom to create a vacancy for a competent bilingual teacher. The justification for this contradiction of common sense is that the movement and placement of teachers is restricted by personnel regulations and contractual commitments.

The ESL component of the program is being delivered by ESL designated instructors who have not been subjected to any standardized testing for their language skills and they receive very little training in ESL theory and methodology. The record shows that in the secondary schools there are designated ESL teachers who have no second language capability. There is no basis for assuming that the policy objectives of the program are being met in such schools. The tutorial program relies on paraprofessionals who may have second language skills but who are not required to show any competence or experience with content area knowledge, or teaching techniques, and who receive scant in-service training.

It should be noted that the inadequacy of the delivery system for the bilingual education program in Raymondville, Texas was one of the specific defects which the court required to be remedied in the *Castaneda*

v. Pickard, supra, case from which opinion the following comment is taken:

The record in this case thus raises serious doubts about the actual language competency of the teachers employed in bilingual classrooms by RISD and about the degree to which the district is making a genuine effort to assess and improve the qualifications of its bilingual teachers. As in any educational program, qualified teachers are a critical component of the success of a language remediation program. A bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children, if the teachers charged with day-to-day responsibility for educating these children are termed "qualified" despite the fact that they operate in the classroom under their own unremedied language disability. The use of Spanish speaking aides may be an appropriate interim measure, but such aides cannot, RISD acknowledges, take the place of qualified bilingual teachers Nor can there be any question that deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students.

648 F.2d at 1013.

The Spanish speakers in the elementary bilingual classrooms are the most fortunate of the limited-English proficient children. Most LEP students are not in those classrooms. Accordingly, it follows that for those students there is less commitment and effort to achieve implementation of the transitional bilingual policy. Significant numbers of limited-English proficient children attend schools which are not bilingual. Some of the secondary students from certain schools are brought together for extended ESL services at the Fred Thomas Center. That type of "clustering" has not

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. More-

Cite as 576 F.Supp. 1503 (1983)

over, 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

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

1975 did not include any consideration of the claims under that statute. Indeed, the enactment of the EEOA in 1974 is one of the legal developments which occurred during the pendency of this case. Consideration of the claims concerning language remediation is a new facet in this old problem.

During the course of this litigation, this court has repeatedly stressed the importance of recognizing that disestablishing a dual school system and creating a unitary system with equal educational opportunity requires attention to all aspects of public education. Unfortunately, the record of this case shows that those who have governed the district during the past decade have consistently centered their attention on the shibboleth of "forced busing." The requirement that some students must be transported from their residential areas to achieve a mix of racial and ethnic groups in individual schools has never been intended to be more than a lever to try to energize other efforts to ameliorate the historical disadvantages of race and national origin in a society which has long been dominated by a single group. Limited-English proficiency is one of those disadvantages.

The Congress had justification when, in § 1702 of the EEOA, they criticized the failure of the courts to articulate adequate guidance for local public officials in desegregation cases. The Denver Board of Education has expressed the same frustration. Yet, it is noted that the legislative mandate to take "appropriate action to overcome language barriers" appearing in § 1703(f) is not a particularly helpful contribution. As observed in the quotations from the *Castaneda* opinion, the lack of precision in that phraseology has resulted in a return to the courts to litigate these issues.

Perhaps what Congress did achieve is to give added emphasis to the importance of the *educational opportunities* which should be provided and to remind those who govern school districts that removing the vestiges of a dual school system requires more than maintaining ratios in pupil assignments.

Consideration of the deficiencies in Denver's efforts to remove the barriers to participation by limited-English proficiency students demonstrates, again, the interrelationship 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

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.

**CAPITAL BANK AND TRUST
COMPANY**

v.

**ASSOCIATED INTERNATIONAL
INSURANCE COMPANY.**

Civ. A. No. 83-1152-B.

United States District Court,
M.D. Louisiana.

Jan. 3, 1984.

Insured brought action against insurer in state court. The action was removed from the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana. On motion of the insured to remand, the District Court, Polozola, J., held that: (1) under general rule in Louisiana that if doubt is to be resolved in favor of insured and against insurer, insurer which could have inserted clause stating "reserving the insurer's right to remove to Federal court" but did not do so waived right of removal of suit to federal court by reason of agreement to submit to personal jurisdiction in any state of the insured's choosing, and (2) such waiver by insurer was not void and unenforceable as illegal attempt to "oust" jurisdiction of the federal court, since the federal court, by declining to exercise jurisdiction, was not "ousted" of jurisdiction but decided to enforce term of agreement allowing insured to litigate in forum of its own choosing.

Motion to remand granted.

1. Removal of Cases ⇐17

Waiver of right of removal to federal court must be clear and unequivocal. 28 U.S.C.A. §§ 1332, 1441(a).

2. Contracts ⇐206

Purpose of service-of-suit clause is to allow dissatisfied policyholder to compel insurer to submit to forum of insured's choice to recover proceeds under policy, and by agreeing to "submit" to state forum, defendant insurer waives right to de-

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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

CASE No. Civ-S-97-1600 WBS GGH

DECLARATION OF CARMEN
ARCEO IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER

16 Petitioners,
17 vs.

Date: September 18, 1997
Time: 1:30 p.m.
Dept: 41

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNs, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

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Declaration of Carmen Arceo

I, Carmen Arceo, declare and depose as follows:

1. My daughter, Crystal, is presently enrolled at Lampson Elementary School in the Orange Unified School District. Crystal is my youngest child and she has been enrolled in Lampson's bilingual program since kindergarten. She is now enrolled at the third grade level. I have been very pleased with the bilingual program at Lampson. My daughter is fluent in both Spanish and English. Her favorite subject is Math. Her school year started on July 1, 1997 and the second cycle began on September 2, 1997.

2. My daughter has been very happy with the bilingual program. Although I speak English, my husband does not and therefore my daughter's first language was Spanish. As a result she has learned English and can still speak with her father and our other family members in Spanish. Because she has been enrolled in a bilingual program my husband has been able to help my daughter with her homework. I have also helped her with both her Spanish and English.

3. I am very concerned because I have been informed that the District now wants to destroy the bilingual program with no notice to the parents and no concern about what this will do to the children. I am very worried about my daughter and what will happen to her now.

5. I am especially concerned because I have personally witnessed how an English-only program can harm children who do not speak English. My two older children, Jose Luis, age 16, and Monica, age 12, also did not speak English when they started school in the District. They were placed in English only and have had problems in school ever since.

6. I will be very upset if my daughter will not be allowed to finish her full program. She should not be denied the benefits of a program that has been a part of her life since kindergarten. Latino parents should have a meaningful choice in deciding what program their child should receive. The District should not be allowed to harm the children and to ignore their parents.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 14, 1997, Orange, California.

Carmen Arceo

Carmen Arceo

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12 Attorneys for Petitioners

13 **SUPERIOR COURT OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF SACRAMENTO**

15 MARIA QUIROZ, ALICIA CONSTANTINO,
16 GABRIEL MEDEL, PAUL H. GARCIA, LOS
17 AMIGOS OF ORANGE COUNTY, The
18 ASSOCIATION of MEXICAN AMERICAN
19 EDUCATORS, The CALIFORNIA
20 ASSOCIATION FOR BILINGUAL
21 EDUCATION, and The CALIFORNIA LATINO
22 CIVIL RIGHTS NETWORK as Taxpayers,

23 Petitioners,

24 vs.

25 The STATE BOARD OF EDUCATION and its
26 members, YVONNE W. LARSEN, JERRY
27 HUME, NATALIE J. ARENA, KATHRYN
28 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
FEARNS, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
Superintendent, Does 1-100, inclusive,

Respondents.

CASE No. 97CS01793
Sac. County No.

SUPPLEMENTAL DECLARATION
OF ALICIA CARTER IN SUPPORT
OF TEMPORARY RESTRAINING
ORDER

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 SUPPLEMENTAL DECLARATION OF ALICIA CARTER

2

3 I, Alicia Carter, declare and depose as follows:

4 1. I am currently employed as a Bilingual Resource Teacher with the Orange Unified
5 School District at Prospect Elementary School. I have a Standard Lifetime Teaching Credential and
6 a Bilingual Crosscultural certificate. I have worked for the District for twenty-two years. I have
7 previously provided a declaration in this matter.

8 2. As the Bilingual Resource Teacher I am responsible for overseeing Prospect's
9 bilingual education program and all other services provided to Prospect's LEP students. Prior to the
10 start of this school year, as I have done in previous years, I worked with my principal to make every
11 effort to ensure that Prospect's bilingual education program would be properly implemented for the
12 1997-98 school year, which began on September 2, 1997. Based on assessed need, we assigned LEP
13 students to bilingual classrooms and made appropriate teacher assignments to these classrooms based
14 on teacher Spanish language skills, CLAD and BCLAD training, and other related qualifications. To
15 compensate for the loss of CLAD and BCLAD teachers who left our site as a result of the District's
16 proposed waver, we will utilize team teaching strategies and our five (5) bilingual instructional
17 assistants to facilitate primary language instruction. I will also spend more of my time working
18 directly with our third grade LEP students to ensure that they have access to the core curriculum.

19 3. To my knowledge, since the Superior Court's order was issued no one from the
20 District's administration has told our site not to implement our bilingual program; in fact, my principal
21 informed me that we would implement the bilingual program to the best of our ability for this 1997-98
22 school year. Prospect has implemented a bilingual education program for at least fourteen years.
23 Therefore, as I explained in my previous declaration, our bilingual program already had the full
24 complement of educational materials necessary to provide our LEP students access to the full core
25 curriculum (language arts, math, science, and social studies) in Spanish along with the requisite
26 English language development materials. There is no need to purchase additional materials to ensure
27 implementation of our bilingual program. I have also been made aware that the District has
28 purchased a new English as a Second Language (ESL) series to be used for the English language

1 development component of both our bilingual and non-bilingual LEP programs, since this was the
2 scheduled year to adopt a new ESL series anyway. All of our bilingual programs have always had an
3 English language development component. This ESL series is published by Hampton-Brown and
4 trainings are now scheduled for teachers to review this new series. These materials will replace the
5 current ESL series we are using in our bilingual and non-bilingual LEP programs.

6 4. During this first week of school we have made every effort to ensure that our
7 bilingual program was implemented. However, it would be in the best interest of all of our LEP
8 students, those in both the District's bilingual and non-bilingual programs, if the District would take
9 the steps necessary, as it has done in the past, to recruit and hire teachers with the appropriate
10 bilingual and/or ESL credentials, or similar qualifications, to replace the teachers who left the District
11 as a result of the proposed waiver. This District has experienced teacher shortages in the past for
12 its LEP programs. As a former CLAD/BCLAD Mentor teacher, I am aware that this District has in
13 previous years implemented teacher in-service programs so that teachers could obtain appropriate
14 LEP-related credentials to address its shortage needs. This also should be re-instituted. I am also
15 aware that in the past there have been bilingual teachers teaching "out of assignment" at various
16 school sites within the District that do not implement bilingual programs. These teachers could also
17 be utilized to staff our bilingual programs. There are a number of steps the District can and should
18 take now so that our LEP students have access to teachers who are best qualified to meet their
19 language needs.

20 5. Based on my most recent observation of our school site, it would be extremely
21 difficult for Prospect to implement the District's waiver program now that the 1997-98 school year
22 has started. As I stated in my previous declaration, neither I nor other staff at our site have received
23 any training concerning the waiver program. Nor have I as a bilingual teacher been re-trained. No
24 curriculum has been developed or planned to replace the curriculum in place in our bilingual program,
25 nor do we have English language core curriculum materials for the core areas of math, science or
26 social studies for our LEP students. Once ordered, it takes months to receive these materials, and
27 teachers would have to take time to review them and would need to be trained in their use in the
28 classroom. Many of our present classroom assignments would have to be reconfigured. In other

1 words, such a drastic change at this point in the school year would wreak havoc on our students. In
2 my view, based on my thirty years as a teacher working with LEP students, it would be in the best
3 interest of our LEP students if their present programs remained intact and that they be allowed to
4 have some stability in their educational program. It would, in my view, be extremely harmful to our
5 LEP students if they were now suddenly removed from their present bilingual programs and exposed
6 to the District's un-tested waiver program without materials, curriculum or a trained staff with which
7 to implement it.

8

9 I declare under penalty of perjury that the foregoing is true and correct.

10

11 Dated: September ____, 1997 in Orange, California.

12

13

[See attached faxed signature page (over)]

Alicia Carter

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1 words, such a drastic change at this point in the school year would wreak havoc on our students. In
2 my view, based on my thirty years as a teacher working with LEP students, it would be in the best
3 interest of our LEP students if their present programs remained intact and that they be allowed to
4 have some stability in their educational program. It would, in my view, be extremely harmful to our
5 LEP students if they were now suddenly removed from their present bilingual programs and exposed
6 to the District's un-tested waiver program without materials, curriculum or a trained staff with which
7 to implement it.

8

9 I declare under penalty of perjury that the foregoing is true and correct.

10

11 Dated: September 7, 1997 in Orange, California.

12

Alicia Carter
Alicia Carter

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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

CASE No. Civ-S-97-1600 WBS GGH

SUPPLEMENTAL DECLARATION
OF ALICIA CARTER IN SUPPORT
OF TEMPORARY RESTRAINING
ORDER

16 Petitioners,
17 vs.

Date: September 18, 1997
Time: 1:30 p.m.
Dept: 41

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNS, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

1 SUPPLEMENTAL DECLARATION OF ALICIA CARTER

2
3 I, Alicia Carter, declare and depose as follows:

4 1. I am currently employed as a bilingual resource teacher at Prospect Elementary
5 School within the Orange Unified School District. I have been employed with the District for twenty-
6 two years and have taught at Prospect for the past twelve years. I have given two previous
7 declarations in this matter

8 2. As Prospect's Bilingual Resource teacher I am charged with overseeing its
9 bilingual education program and all other services to Prospect's LEP students. As I explained in my
10 previous declaration, prior to the start of the 1997-98 school year I worked with my principal to
11 ensure that our bilingual education program would be properly implemented. Although my principal
12 specifically directed me to implement the bilingual program at our site for this school year, this task
13 has been difficult because we had received no support from the District's Administration in this
14 regard. Nevertheless, our site did the best we could and we utilized various strategies to compensate
15 for the BCLAD and CLAD teachers we lost as a result of the District's proposed waiver. (See
16 Supplemental Declaration of Alicia Carter dated September 7, 1997).

17 3. On September 11, 1997 I received a contrary directive. My principal informed me
18 that I was to teach in English-only and she had me sign a form acknowledging that I had been so
19 informed. (See Attachment A attached to this declaration.) Other than this directive, no further
20 clarification has been provided by the District's Administration to my site regarding the
21 implementation of its waiver program. I would know if there had been such clarification for as the
22 Bilingual Resource Teacher requires that I oversee all LEP programs at Prospect.

23 4. As a result of this directive we have done the following: Our classroom
24 configurations have remained the same. No effort has been made to disperse our LEP students
25 throughout the school to the various classrooms nor has the Administration directed us to do so. It
26 is our view that if these LEP students were dispersed throughout the school they would be placed in
27 classrooms with teachers who have no experience managing a mixed classroom with non-English,
28 LEP and English only students.

1 5. We were told to expunge some, but not all, references to Spanish from our
2 bilingual classroom bulletin boards. We have maintained all bulletin board displays that contain dual
3 language (Spanish/English) labeling (i.e. calendars, Spanish/English poems.) However, we have
4 removed bulletin board displays related solely to Spanish language reading.

5 6. With respect to materials, I was personally required to ensure that each bilingual
6 classroom had sufficient copies of the District's new English Language Arts texts and materials.
7 However, I believe, based on my 30 years of teaching LEP students, that these materials are totally
8 inappropriate for our LEP students who have been enrolled in our bilingual program. These materials
9 and its curriculum are designed for fully English proficient or native English speakers not for our LEP
10 student who are at the lowest levels (A and B) of English language proficiency. These materials will
11 be totally useless for our teachers who continue to be assigned to our LEP students who remain in
12 self-contained classroom. I was also directed last Friday to inform the District administration
13 regarding how many books we would need in the other core curriculum areas of science, math and
14 social studies to replace our Spanish core materials in these areas. I gave that information to the
15 District on Monday, September 15, 1997. I have been ordering materials for Prospect for the past
16 twelve years. Based on my experience it takes a minimum of six weeks for texts to arrive once
17 ordered and orders not used can be returned. A case in point, is the new Hampton-Brown ESL series
18 recently ordered by the District. The last day to submit the site orders for those materials was August
19 15, 1997, which I was responsible for at Prospect. It has now been one month since that order was
20 submitted and we have still not received these new materials at our site. Spanish language literature
21 books remain in our classrooms.

22 7. Other than the "no Spanish" language instruction directive, the District's
23 administration has provided no guidance with respect to the implementation of its waiver program.
24 Neither our teachers nor our instructional assistants have received any training regarding the
25 implementation of the waiver program (i.e. preview-review methodology) nor have we been informed
26 of any scheduled training. To my knowledge no curriculum exists for the program. With respect to
27 our LEP students who were in self-contained bilingual classroom there is essentially no replacement
28 program in place for them at this time. Our teachers have been placed in the untenable position of

1 not being allowed to instruct in Spanish to children who simply do not understand English. This has
2 created a tense environment for our teachers and will result in harmful repercussions for our LEP
3 students if this “no-Spanish” directive is not reversed.

4 8. In my previous Supplemental Declaration dated September 7, 1997 submitted in this
5 matter, I explained that the District had ordered a new ESL series published by Hampton-Brown (see
6 paragraph 6 above). Although we have not received these new materials, I did attend a training for
7 the purpose of reviewing these new materials and this training occurred on Monday, September 15,
8 1997. During the training a consultant from the publisher reviewed the new ELD series with us.
9 These materials would be appropriate to use in both a bilingual and non-bilingual program for LEP
10 students.

11 9. To date the District has done very little to reconfigure classrooms and no such
12 reconfiguration is to take place at Prospect. Since the “no Spanish” directive, level A and B LEP
13 students remain in self-contained classroom at the following sites: Prospect, Fairhaven, California,
14 Lampson and Jordan.

15 10. Very little has been done at my site this past week that cannot be undone to
16 resume bilingual instruction for our students who were benefitting from our program. Our
17 classrooms retain the same student make-up, the same teachers are assigned to these classrooms.
18 These teachers just need to be allowed to teach as they have been trained. We have our bilingual
19 curriculum and no additional materials have to be ordered. All this was in place prior to the “no-
20 Spanish” directive.

21

22 I declare under penalty of perjury that the foregoing is true and correct.

23

24 Dated: September____, 1997 in Orange, California.

25

26

[See attached faxed signature page (over)]
Alicia Carter

27

28

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2 created a tense environment for our teachers and will result in harmful repercussions for our LEP
3 students if this "no-Spanish" directive is not reversed.

4 8. In my previous Supplemental Declaration dated September 7, 1997 submitted in this
5 matter, I explained that the District had ordered a new ESL series published by Hampton-Brown (see
6 paragraph 6 above). Although we have not received these new materials, I did attend a training for
7 the purpose of reviewing these new materials and this training occurred on Monday, September 15,
8 1997. During the training a consultant from the publisher reviewed the new ELD series with us.
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10 students.

11 9. To date the District has done very little to reconfigure classrooms and no such
12 reconfiguration is to take place at Prospect. Since the "no Spanish" directive, level A and B LEP
13 students remain in self-contained classroom at the following sites: Prospect, Fairhaven, California,
14 Lampson and Jordan.

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16 resume bilingual instruction for our students who were benefiting from our program. Our
17 classrooms retain the same student make-up, the same teachers are assigned to these classrooms.
18 These teachers just need to be allowed to teach as they have been trained. We have our bilingual
19 curriculum and no additional materials have to be ordered. All this was in place prior to the "no-
20 Spanish" directive.

21

22 I declare under penalty of perjury that the foregoing is true and correct.

23

24 Dated: September 16, 1997 in Orange, California.

25

26

Alicia Carter
Alicia Carter

27

28

Attachment A

P R O S P E C T M E M O R A N D U M

DATE: September 11, 1997
TO: STAFF
FROM: Vicki James
RE: Lifting of Temporary Restraining Order

Please note that *effective immediately* your instruction to students is *in English*.
The use of Spanish materials to preview and review lessons is acceptable.
Please be aware that I have been asked to supervise your instruction on a regular
basis to insure that we are in compliance of current court orders.

Sign and return this memo ASAP. Thank you.

Alicia Carter
Name

9/11/97
Date

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2 PETER D. ROOS (State Bar No. 41228)
3 MULTICULTURAL EDUCATION, TRAINING and ADVOCACY (META), Inc.
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10 Santa Rosa, California 95404
11 Telephone: (707) 528-9941

12 Attorneys for Petitioners

13 **SUPERIOR COURT OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF SACRAMENTO**

15 MARIA QUIROZ, ALICIA CONSTANTINO,
16 GABRIEL MEDEL, PAUL H. GARCIA, LOS
17 AMIGOS OF ORANGE COUNTY, The
18 ASSOCIATION of MEXICAN AMERICAN
19 EDUCATORS, The CALIFORNIA
20 ASSOCIATION FOR BILINGUAL
21 EDUCATION, and The CALIFORNIA LATINO
22 CIVIL RIGHTS NETWORK as Taxpayers,

23 Petitioners,

24 vs.

25 The STATE BOARD OF EDUCATION and its
26 members, YVONNE W. LARSEN, JERRY
27 HUME, NATALIE J. ARENA, KATHRYN
28 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
FEARNS, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
Superintendent, Does 1-100, inclusive,

Respondents.

CASE No. 97CS01793
Sac. County No.

SUPPLEMENTAL DECLARATION
OF PAM DE LOETZ IN SUPPORT
OF TEMPORARY RESTRAINING
ORDER

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 SUPPLEMENTAL DECLARATION OF PAM DE LOETZ

2

3 I, Pam de Loetz, declare and depose as follows:

4

5 1. I have been an educator for thirty years. I possess an Elementary-Secondary
6 Standard Teaching Credential and an Administrative Credential. I also possess a Bilingual-Bicultural
7 Certificate of Competence. Throughout my entire thirty years of teaching I have worked in programs
8 that have addressed the needs of limited English proficient (LEP) students as a classroom, a resource
9 teacher, and an administrator. I have served on task forces at the County and State levels, as well
10 as serving as a field colleague for the State Coordinated Compliance Review process.

11 2. In October of 1992, I was hired by the Orange Unified School District to serve as
12 its Special Programs Administrator. It was my responsibility to oversee most of the State and federal
13 categorical programs including the District's LEP programs. It was my responsibility to ensure that
14 these programs met all state and federal programmatic and funding requirements. In this capacity I
15 worked closely with site principals, resource teachers, classroom teachers and parents. Because of
16 the scope and size to the district's LEP program a majority of my time was spent in this area.

17 3. As a result of my years with the District, I am thoroughly familiar with the
18 District's bilingual education program as well as the other programs specially designed for the
19 District's LEP students. Of those, approximately 1400 LEP students were enrolled in the District's
20 bilingual education program during the 1996-978 school year. In order to best utilize our resources,
21 the bilingual program was limited to grades kindergarten through third grade and was implemented
22 in approximately eleven of the District's thirty-nine school sites. These sites include Jordan,
23 Lampson, Prospect, Fairhaven, Cambridge, Sycamore, West Orange, Esplanade, California, Palmyra,
24 and Handy elementary schools.

25 4. I resigned from the District in June of this year. My last day of work was June 30,
26 1997. My resignation was based on the grave concerns, outlined below, that I had, and continue to
27 have, regarding the alternative program proposed to take the place of the District's current bilingual
28 program — an ESL (English as Second Language) based approach to instruction. Following is a

1 summary of the main elements of each component of the proposed plan compared to the current
2 bilingual program, along with my comments.:

3 5. Component: English Language Development (ELD)

4 Waiver Program Current Bilingual Program

5 -Goal is achieving English fluency -Same

6 as effectively and efficiency as possible. (p.23)

7

8 -Daily ELD instruction using natural approach -Same

9 and state approved materials and curriculum. (p. 23)

10

11 -ELD lessons are tied to core curriculum. (p.23) -Same

12

13 -"The ELD program uses English as the language -The ELD program, in any class-
14 of instruction and utilizes instructional strategies to room including bilingual class-
15 make input comprehensible." (p. 23) rooms, has always utilized English as
16 the language of instruction.

17

18 -Students needing even more ELD may receive -After school programs are currently
19 after school tutoring. (p. 28) available at Title I schools, and are
20 open to all students assessed as
21 needing academic tutoring. They do
22 not exclusively focus on LEP students
23 and ELD.

24 **Comments:** I believe that there is no qualitative difference between the English language
25 development aspect of the current bilingual program versus the alternative program proposed. It is
26 a common misconception that students in bilingual classrooms never learn English. This is clearly
27 not the case. It was my experience during the almost five years in Orange, that students entering as
28 non-English proficient (at an A or B level of English Language proficiency on the oral language

1 proficiency test) made an average growth of one English oral language level per year, regardless of
2 whether they were enrolled in an bilingual or non-bilingual classroom. Also, the District’s rate of
3 redesignation of students from limited to fluent was at, or above, the state yearly rate. There was no
4 difference between bilingual schools and non-bilingual schools.

5 6. Component: Language Arts (Literacy Skills)

6 Waiver Program

7 -Goal of ELD instruction is to develop
8 English literacy in all students. (p. 23)

9
10
11
12 -Through daily lessons; listening, speaking,
13 and writing skills are emphasized. (p. 23)

6 Current Bilingual Program

7 Goal of bilingual language arts is that every
8 student with three or more years of continuous
9 enrollment will transition to English reading
10 by, or during 3rd grade, and will perform at
11 grade level or better in reading.

12 -Bilingual classrooms have a balanced
13 literacy reading program including; state-
14 approved language arts series, sequential
15 phonics program, core literature, specialized
16 curriculum resource guides, home reading
17 materials, poetry enrichment program.

18
19 **Comments:** One of my greatest concerns is that, although the goal of the alternative program is “to
20 provide students with the English language skills necessary to enjoy equal educational opportunities
21 and to succeed in school and beyond” (p. 13), there is absolutely no mention in the waiver plan about
22 how the non-English students, currently diagnosed as needing primary language instruction and in
23 a bilingual program, would become literate in English. It is true there are LEP students that do not
24 need a bilingual program to achieve literacy. They come to school already prepared and literate, or
25 at grade level, in their native languages. All they need is daily English — listening, speaking, reading
26 and writing. What the plan doesn’t address is the needs of more than one-sixth of the LEP students
27 entering school unprepared and illiterate, or below grade level, in their primary language. My
28 personal experience has been that this type of student, placed in an ESL-only program learns to speak

1 English at the expense of never becoming fully literate, in any language. Currently, those students
2 in bilingual programs are achieving literacy and transitioning to English language arts by, or during,
3 the third grade. This is supported by standardized reading scores and by teacher observations and
4 assessment.

5 7. Component: Core Content Instruction

6 Waiver Program

Current Bilingual Program

7 -Goal is to provide equal opportunity for mastery
8 of challenging core curriculum. (p. 3)

-Same

9 -Promotes access to district's challenging
10 core curriculum through use of SDAIE.
11 (Specially Designed Academic Instruction
12 in English) (p.3)

13
14 -SDAIE instructional strategies are implemented
15 to meet individual student needs, and include
16 materials and curriculum designed to foster and
17 simplify vocabulary development, comprehension
18 and concept attainment. (p. 16)

-Same challenging core curriculum
content, standards and textbooks
(in Spanish) as English only peers

19
20 -Instruction emphasizes comprehensible input,
21 including the use of visuals, realia, and hands-on
22 learning, which makes concepts accessible. (p. 17)

-Utilizes wide array of print and
auditory media, along with visuals
and hands-on materials to develop
concepts.

23
24
25 -Instructional support in the primary language,
26 for at least 30 to 60 minutes daily, provided by
27 bilingual instructional aides, where deemed appro-
28 priate to assist student at the lower levels of English

-All core concept development
instruction is provided by the
classroom teacher.

1 language proficiency in mastering the core-curricula
2 through “preview-review” methods. (p. 17)

3

4 **Comments:** Again, this is another area of the proposed plan which holds grave concerns for me as
5 an educator. In order for the content area lessons to be comprehensible in English for non-English
6 students, the curriculum has to be “simplified” and therefore is not as rigorous and challenging as the
7 curriculum of their English-speaking peers. For non-English students, who come to school
8 conceptually prepared in their primary languages, they are quickly able to “fill in the blanks” between
9 simplified instruction and grade level instruction. SDAIE or sheltered instruction was never originally
10 designed for non-English level students. It was designed to be used for intermediate level students.

11 Although “preview-review” instruction from bilingual para-professionals, for those less
12 prepared non-English students, may be helpful, it is not the best instructional method for these
13 students. It tends to be very cumbersome and segmented. The aides go from classroom to classroom
14 in 30 to 60 minute blocks of time. They often do not have full comprehension or training in the
15 subject matter they are previewing/reviewing. They also don’t know what came before or what will
16 follow their lesson. There is often not enough time to communicate and plan with teachers about
17 their lesson. This method is similar to a “Readers’ Digest” version of the core curriculum. For
18 students less prepared, it is not as rigorous and challenging as primary language instruction using the
19 same curriculum and standards as the English mainstream curriculum and taught by a credentialed
20 teacher.

21 8. Component: Parent Education

22 Waiver Program

23 -Goal is to provide parents opportunities
24 to support their children’s academic progress.
25 (P. 17).

26

27 -Variety of parent education programs each
28 year through which parents learn how to

Current Bilingual Program

-Same

-Variety of programs, activities to
develop and involve parents as

1 work with their children to encourage academic
2 success. (p. 20)

partners in the education of their
children.

3

4 **Comments:** As the Administrator of Special Programs, I was the District's representative and a
5 member of the District's Bilingual Advisory Committee (DBAC). The DBAC raised many concerns
6 about the qualitative difference between the role of the non-English parent in an ESL-based
7 alternative program and in a bilingual program. These concerns have been documented in
8 correspondence to the Board of Education, the State Department of Education, in the minutes of
9 meetings, and in this lawsuit. During a child's most formative years, when literacy and conceptual
10 foundations are being developed, the current bilingual program has done much more than just teach
11 parents how to encourage academic success, the parent has been actively involved in the academic
12 success of their child. This has been achieved through such things as a home reading program, home-
13 school compacts, bilingual newsletters, and classroom volunteer programs. The bilingual program
14 has fostered an atmosphere of equal access for non-English parents in the role as a teaching partner
15 with the school. Our parents embrace this role wholeheartedly. Parents are regularly asked to
16 review homework, participate in home-learning activities, listen to their children read, listen to what
17 their children write. Gone are the days when they only attended in-services on how to be a better
18 parent, making sure their child finishes his/her homework. During the last State Compliance Review,
19 the two bilingual schools reviewed received commendations on their excellent parent involvement
20 programs. This same partnership cannot be developed for non-English speaking parents in an
21 English-only program.

22 9. Component: Pre-K Program

23 Waiver Program

24 -The District will establish a Pre-K program
25 at the two school-sites. (p. 27)

26

27

28

Current Bilingual Program

-One elementary school, Lampson,
houses Head Start classes open to all
qualifying pre-schoolers, regardless
of language proficiency.

1 **Comments:** There is no parent or educator alive who would say no to a pre-school program; but they
2 are extremely expensive and require additional classroom and playground space. Current categorical
3 programs and state ADA are for K-12 educational programs. State or federal pre-school funds are
4 limited and highly competitive. Most of the bilingual schools, where these pre-school classes might
5 be housed, are on or will be on a year-round schedule due to overcrowding and 20-1 classroom
6 configurations. There are not enough portable classrooms produced to meet the demands of the
7 district's regular K-12 programs. Also, I wonder how long a district supported pre-kindergarten can
8 be maintained for only LEP students without other parents and taxpayers complaining about equal
9 access.

10 10. Cross-Cultural Understanding and Acceptance

11 Waiver Program	Current Bilingual Program
12 -Goal is to increase student's self-confidence	-Same
13 and increase awareness and improve the	
14 appreciation of the student's own and other	
15 cultures. (p. 17)	

16
17 **Comments:** This is one of the state-wide goals for all LEP programs. My concern is how do we, as
18 educators, model this appreciation of the student's own culture when the home language of the
19 student is clearly not valued under this alternative program. The goal for these students is mono-
20 lingualism, English-only, not bilingualism, a valuable asset for the future of these children.

21 11. Component: Program Evaluation

22 Waiver Program	Current Bilingual Program
23 -The evaluation process will include assessment	-The growth of English language
24 of student academic achievement in English (p. 32)	proficiency for all LEP students, not
25 including tests for oral language proficiency growth	just those in bilingual programs is
26 (IPT and SOLOM) and cognitive ability in content	measured annually by the IPT or
27 areas. (norm-referenced tests, CAT-5).	SOLOM. The academic achievement
28	of bilingual students in grades 1-3 is

1 measured annually by the norm-refer-
2 enced test, SABE, and when appro-
3 priate, by the CAT-5.
4

5 **Comments:** The annual monitoring of English oral language proficiency is a state compliance
6 requirement, and has been in place in Orange for many years. Testing of non-English students using
7 an English-only norm-referenced test is currently under debate at the state level. Finally, the State
8 Department of Education did not recommend approval of alternative program due to its lack of
9 “rigorous evaluation plan” or even a “weak evaluation component.”

10 I would concur with the Department’s conclusion. While espousing very general goals for
11 the program, the waiver plan contains no specific goals or criteria upon to which to measure eventual
12 program success or failure. For example, although the District states that an overall goal is to
13 promote the development of English proficiency, it has set no criteria for measuring if or when that
14 goal is met. Does the District define program success as a LEP student reaching English proficiency
15 in 12 years, or 7 years, or 2 years? Does the District define success as 30% or LEP students
16 reaching, or 40%? What are the academic achievement standards that the District will use to
17 determine whether its former students are burdened with substantive academic deficits? Is the
18 program successful if language minority students are dropping out of school at rates higher than other
19 students?

20 The waiver plan simply lists certain instruments that the District may use to gather information
21 on student performance. The District provides no other information. Even if every language minority
22 student was administered every test instrument listed every school year, the District has indicated no
23 method for evaluating whether the test scores demonstrate that the program is successful.

24 Furthermore, the District fails to address the necessary mechanics of program evaluation. Its
25 waiver plan does not specify what data will be collected, the timeline for analysis and reporting, or
26 how the data will be analyzed to determine whether the goals and objectives have been met.

27 In summary, based on my extensive knowledge and thirty years of experience working with
28 LEP programs, I believe that the District’s waiver program is of inferior design and will not serve the

1 best educational interests of non-English speaking students currently succeeding in bilingual
2 classrooms. Furthermore, I also conclude that the waiver program will not result in “results
3 indicating that language barriers confronting students are actually being overcome.” If implemented
4 a large number non-English proficient children will suffer harms that are unlikely to ever be undone.
5

6 I declare under penalty of perjury that the foregoing is true and correct and based upon my
7 personal knowledge or constitutes my opinion based upon my professional expertise.

8

9 Dated: September ____, 1997, in Anaheim, California.

10

[See attached faxed signature page (over)]
Pam de Loetz

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2 classrooms. Furthermore, I also conclude that the waiver program will not result in "results
3 indicating that language barriers confronting students are actually being overcome." If implemented
4 a large number non-English proficient children will suffer harms that are unlikely to ever be undone.

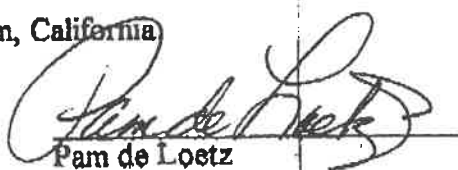
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6 I declare under penalty of perjury that the foregoing is true and correct and based upon my
7 personal knowledge or constitutes my opinion based upon my professional expertise.

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9 Dated: September 7, 1997, in Anaheim, California

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Pam de Loetz

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7 Attorneys for Petitioners
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9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

16 Petitioners,

17 vs.

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. Civ-S-97-1600 WBS GGH

DECLARATION OF MARYLIN
FERREY IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER

Date: September 18, 1997

Time: 1:30 p.m.

Dept: 41

DECLARATION OF MARYLIN FERREY

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I, Marilyn Ferrey, declare and depose as follows:

1. I have been employed as a bilingual teacher for the Orange Unified School District for the past two years. During these two years I have worked in the bilingual program at Jordan Elementary School. I recently completed my training for my BCLAD certification and have taken and passed the BCLAD language proficiency examination. I am just waiting for the paper work to go through so that I can receive my certification. I am fluent in both English and Spanish and I am a native speaker of Spanish.

2. During the 1996-97 school year I taught a self-contained second grade bilingual classroom at Jordan. At the beginning of the 1997-98 school year, which began on September 2, 1997, I continued at Jordan as a second grade bilingual teacher. I began the school year teaching my class totally in Spanish with 40 to 60 minutes of daily English language development (ELD) instruction.

3. Prior to September 2, I spent a considerable amount of time preparing myself and my classroom for the upcoming school year. In anticipation of this new school year, I spent several hours preparing the assessment instruments and procedures that would be needed to properly implement our program. The assessment would involve testing my students to determine their level in Spanish reading and language arts. We were then going to group our students on the basis of academic level not grade level, in order to focus on those students with the lowest level of reading skills. The other components of language arts was going to be taught at grade level.

4. I also spent many hours prior to September 2, planning and preparing my classroom bulletin boards. It is absolutely essential that a teacher create a classroom environment that is conducive to learning for her students, and one that takes into account the culture and language of her students, so that the classroom is a place that is nurturing and where children do not feel alienated. My bulletin boards play a key role in creating this type of nurturing environment.

5. I utilized several learning techniques when designing my bulletin boards for this school year. One area of space was designed to showcase my students' work and to display their successes. Another space was very instructional and designed to utilize "environmental reading." Here the

1 subject matter included the calendar, the seasons, and the weather. Another bulletin board was an
2 interactive design devoted to increasing my students' math skills. Here I had various math problems
3 on display and my students would try to solve them and we would add to and/or change the problems
4 as we went along. On the language arts bulletin board I had planned to display the first 100 high
5 frequency words used in language. I had planned to focus on 20 new words every month. This display
6 would be used to improve my students' vocabulary and to strengthen their sight reading skills.

7 6. My bilingual classroom includes 23 students. During this first week of school, I had
8 assessed every one of my students using the District's Spanish language arts series to determine if they
9 were at level 1, 2 or 3. I determined that most of my students were reading at or near grade level in
10 Spanish. My goal was to strengthen and expand their reading skills. It was absolutely imperative that
11 my students fully develop their reading and writing skills in Spanish so that they would be able to
12 transition into English reading and writing the following school year. The fact that most of my students
13 were at or close to grade level in reading was a strong indicator that we would have a successful year.

14 7. However, all my planning and expectations for the academic success of my students for this
15 1997-98 school year came to a sudden halt on September 10, 1997. On that day my principal called
16 a meeting with all the teachers and informed us that the District ordered us to implement its English-
17 only program. According to my principal, we had no choice in the matter. When I heard this news
18 I was in shock and I almost cried. I was also profoundly depressed because I care deeply for my
19 students and I knew as an educator that I was being asked to do something that would harm my
20 students' potential for successful English transition.

21 8. What was equally disturbing and troubling was what we were ordered to do. We were
22 given no guidance in terms of implementing a program other than being ordered to no longer speak
23 Spanish to our children and to expunge our classroom bulletin boards of all Spanish language
24 references. Concerned about the ramifications of my job security if I did not comply with this
25 directive, I showed up to my classroom at 6:00 a.m. the following morning and stripped my bulletin
26 boards of all the displays that had taken hours to plan and design. I was devastated. In their place I
27 hastily put up English-only materials that I managed to forage. The District gave us no resources or
28 replacement materials to help us in this effort.

1 9. When my students showed up to class that day, I had to inform them that I could no longer
2 speak Spanish to them. I also collected the outstanding Spanish language material we had been
3 working on to give to them to take home. Since school had started we had begun two language arts
4 projects. We had begun to write a group book about ourselves and a book about the importance of
5 family. I had begun to focus our shared reading time on the family. My students had also worked on
6 a whole alphabet book in Spanish in which each student had illustrated and decorated a letter.
7 Because I was told that my students could no longer work in Spanish, I gathered all these materials
8 and gave them to my students so that they could take them home.

9 10. To say the least, my students were in shock by this sudden turn of events. It is my
10 observation based on their questions to me that it was difficult for them to understand why their home
11 language could no longer be spoken by their teacher. They asked me, "Didn't you tell them that we
12 don't understand English?" "Why did they tell you to do this?" "What's wrong with us speaking
13 Spanish?" I tried to explain to them that I had signed a contract when I came to work for the District
14 and that I had to follow orders.

15 11. Without any direction from the District, I also tried to make some attempt to figure out
16 what I was to do with my students. So that first day I tried to determine how much English each of
17 them actually understood. My students were at the very lowest level of English language proficiency,
18 and several of them are recent arrivals to the United States; nevertheless, I was able to pair up those
19 who understood some English with those students who understood nothing. When I tried to force
20 some of the students to speak some English they became very frustrated and some eventually told me
21 in Spanish, "never mind, it is not important."

22 12. On the following day, Friday, I made some attempt to provide some English oral language
23 arts for my students. However, I was given no appropriate materials to use by the District. Although
24 the District has provided me with a new language arts series for the second grade, that curriculum is
25 designed for students who have been taught in English and are at grade level in English. It is not
26 appropriate for LEP students who are at grade level in Spanish and who are at a low level of oral
27 English language proficiency. The inappropriateness of these materials for my students was confirmed
28 by the half-day training I attended on the District's new English language arts materials. The training

1 did not touch on any subject related to the special needs of LEP students other than to refer us to the
2 ELD manual that comes with the series. However, if you review the ELD manual, Harcourt Brace,
3 the publishers of the new series, confirm that LEP students should be taught in their primary language.
4 In lieu of the grade level reading instruction my students would have been receiving prior to the
5 District's "no-Spanish" directive, I started to use some K/1 English curriculum with my students that
6 I managed to find in which I started to teach them the letter "S". I found this to be a total waste of
7 precious instructional time especially since my students would have fully transitioned into English next
8 year on the basis of the substantive reading and writing in Spanish they would have received this year.

9 13. Whereas my students were in shock on Thursday by this sudden change, by Friday their
10 dissatisfaction with this change began to express itself in the form of behavior problems. I was forced
11 to send four of my students to the principal's office because they were misbehaving. I was also forced
12 to relegate an entire row of my students to "time out" because they were acting out. These were all
13 students who had never previously caused any problems. I firmly believe based on my experience and
14 training that these children became bored because they simply could not understand what was going
15 on. In order for me to communicate to my students and to obey the District's new directive, I had to
16 draw out everything in pictures either on the blackboard or on the overhead. This process is tedious
17 and not conducive to learning or to maintaining a second grader's interest. If my students believe that
18 I am not talking to them anymore, they begin to talk to their friends. My students also stopped
19 experiencing success in the classroom. Their work was no longer on display on our bulletin boards
20 and I found myself constantly correcting them because they could not understand my instructions.
21 What was previously two days prior a vibrant environment for learning had now become a tedious and
22 frustrating environment for both myself and my students. My students became so frustrated on Friday
23 that several of them told me, "We won't tell them if you talk to us in Spanish." I lost count of the
24 number of times I told my students that I was sorry on Friday.

25 14. My frustration is compounded by the oppressive conditions under which I now work.
26 During the two years that I have worked for the District, the Superintendent has never visited my
27 bilingual classroom nor has he ever taken the time to inquire about how my students were performing.
28 Therefore, I was surprised when he showed up to my classroom unannounced on Friday. He stayed

1 in my classroom for a very brief period of time. Later I was made aware of the true purpose of the
2 visit when my principal approached me and told me that Superintendent French had noticed that a
3 poster remained up in my classroom with Spanish words on it. This poster was near the ceiling at a
4 corner section of my room. It included a picture of five colored balloons with the Spanish word for
5 each color indicated on each balloon. I was told, per Mr. French's directive, to immediately remove
6 the poster from my classroom.

7 15. Several days ago my students had access to a well thought out program in which I was able
8 to utilize my specialized training with appropriate and extensive educational materials that addressed
9 their particular needs. Now I have no idea what I am doing. I have been given no direction or training
10 by the District. The language arts materials I have been given are totally useless for my students. I
11 have no English language guided reading books. I have no English language library books appropriate
12 for their level. I have not even been given "one word" English books that could perhaps be a starting
13 place for my students. I have lost all the support the parents of my students were previously able to
14 give me in the classroom because they do not speak English. Every day that my students are
15 subjected to these thoughtless and ill-conceived actions by the District, is another day of precious
16 learning time lost. I would have no problem resuming where I left off for my students as of last
17 Wednesday and it would in the best interest of my students if they would be allowed to continue their
18 education.

19

20 I declare under penalty of perjury that the foregoing is true and correct.

21

22 Dated: September____, 1997, in Orange, California.

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[See attached faxed signature page (over)]

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Marylin Ferrey

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16 learning time lost. I would have no problem resuming where I left off for my students as of last
17 Wednesday and it would in the best interest of my students if they would be allowed to continue their
18 education.

19

20 I declare under penalty of perjury that the foregoing is true and correct.

21

22 Dated: September 16, 1997, in Orange, California

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Marilyn Ferrey

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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

16 Petitioners,

17 vs.

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNs, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. Civ-S-97-1600 WBS GGH

DECLARATION OF VIRGINIA
GILL IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER

Date: September 18, 1997
Time: 1:30 p.m.
Dept: 41

DECLARATION OF VIRGINIA GILL

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3 I, Virginia Gill, declare and depose as follows:

4 1. I am currently employed as a bilingual teacher with the Orange Unified School
5 District at Jordan Elementary School. I have spent my entire teaching career of 23 years employed
6 with Orange Unified. I have a Standard Lifetime Teaching credential and a Bilingual Crosscultural
7 Teacher Specialist certificate. I also have a masters degree in Bilingual Education from Cal. State
8 Fullerton. Throughout my 23 years with the District, I have worked as a bilingual classroom teacher
9 and as a bilingual resource teacher at the elementary grade level. As a bilingual resource teacher I
10 trained both instructional aides and teachers to work in the District's bilingual education program.
11 As part of my Master degree, I designed a Spanish Language Arts curriculum for Orange Unified.

12 2. During the 1996-97 school year I worked as a bilingual classroom teacher at
13 Cambridge Elementary School. Because Cambridge recently went year-round, I transferred to Jordan
14 for this school year because I wanted to work in a traditional schedule. For this school year I was
15 prepared to teach a kindergarten bilingual classroom at Jordan.

16 3. I spent many, many hours prior to the start of this school year preparing for my
17 program, as I have done in past years. As a bilingual teacher in the District, preparation is more
18 critical because we now receive less support from the District's Administration to implement our
19 program. For instance, last year we were able to check out materials from a centralized library
20 specially maintained for bilingual teachers. The District now no longer makes that available to us.
21 So for the start of this school year, we were left to fend for ourselves. Based on my many years of
22 experience and on what was already developed for the bilingual program during past years, I spent
23 many hours developing my language arts curriculum for my kindergarten classroom for this school
24 year. Part of my preparation involved gathering all the materials I would need for my classroom,
25 which included worksheets, textbooks, posters, cassettes and other materials. I purchased some of
26 these materials with my own money.

27 4. I also spent a considerable amount of time planning and designing the bulletin
28

1 boards for my kindergarten classroom. Bulletin boards are a critical teaching tool at any grade level,
2 but they are more so at the kindergarten level because these children don't yet read. I use my bulletin
3 boards to lay a foundation to prepare my students for reading. For these students, bulletin boards are
4 key in promoting what we call "environmental reading"- children will try to read what they see
5 around them. In order to promote this concept, it is important for a bilingual classroom that
6 everything on display is in Spanish because it is important to start with what the children already
7 know and take it from there. For instance, a kindergarten LEP student will likely be familiar with the
8 color "rojo." I can use that word and concept on my bulletin boards and the children will relate to
9 it. For my kindergarten class, I want them to learn to read and therefore my bulletin board are very
10 content based. I use my bulletin board to teach my students to follow directions, to develop their
11 motor skills, and to develop their writing skills. My bulletin boards play an integral part of my
12 teaching. They are not just cut and paste displays.

13 5. When the school year started, I had 20 children in my classroom. All but one of
14 my students tested at the lowest level of oral English language proficiency (level A on the IPT test).
15 The assessment of my students is very important because bilingual programs are much more
16 premised on the assessed needs of the students than other programs. On September 3, we had a
17 kindergarten orientation for the parents. On that day I met with my parents and I assured them that
18 their children would be learning in a bilingual setting for this school year. The parents of my children
19 do not speak English. It is very important that I establish trust with them. Not only are they
20 entrusting me with the care of their children but I also want them to know that they are welcome in
21 my classroom and that I will want them to become involved in the education of their children. It is
22 extremely important for the children to see that their parents are active in our school and in their
23 classroom.

24 6. During my first week with my students things went wonderfully well in my
25 classroom. We started immediately into our first textbook and we started learning the vowels which
26 is how you begin in Spanish. I began by using a very popular language arts program called "Pasitos"
27 or "small step." With this program you first utilize five books with each book covering a particular
28 vowel. The first vowel I reviewed with my students during that first week was the vowel "O". I

1 began by using stories about “osito” or ‘little bear.’ I utilized story telling quite a bit. Because I can
2 instruct in Spanish my students understand me and understand the stories. During this first week my
3 students were very enthusiastic.

4 7. On Wednesday, September 10, 1997, we were informed by our principal that we
5 could no longer instruct in Spanish as a result of the federal judge’s order. I was shown a memo sent
6 to my principal from the District’s Administration advising her of this directive. (See Attachment A
7 to this Declaration.) I was very disturbed when I was informed about this directive. I knew based
8 on my 23 years of teaching that what I was being asked to do something that would be very harmful
9 to my children and would be totally contrary to all my training and the expertise I have developed
10 concerning the unique needs of LEP students over my career.

11 8. What was equally disturbing is that apart from the directive not to instruct in
12 Spanish, the District has given no further guidance or resources with which to implement a
13 replacement program. I have received no training regarding the waiver program nor have I been
14 informed that any training has been scheduled. Although there are English language arts material
15 available, these materials are totally inappropriate for LEP students such as my kindergarten students
16 who are at the lowest level of English proficiency. I attended the District’s training concerning its
17 new English language arts series and no time was spent during that training to help teachers address
18 the needs of LEP students. I also have been given no instructional aide support for the preview-
19 review model proposed by the District, nor have any of our instructional aides received any such
20 training. I was also forced, as a result of the District’s “no-Spanish instruction” directive to expunge
21 all references to Spanish words from my bulletin boards. My bulletin boards, which were once
22 effective teaching tools, are now totally meaningless for by my students.

23 9. Since the “no Spanish instruction” directive, I have tried my best to teach
24 my students some concepts in English. However, without a curriculum or appropriate materials I feel
25 that I am being totally irresponsible to my students and their parents. As a result of the District’s
26 directive, my student’s reading preparation is at a standstill. I know that my students are very
27 confused. These children need a sense of security and continuity. I should be allowed to continue
28 my bilingual program in the best interest of my students.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: September____, 1997 in Orange, California.

[See attached faxed signature page (over)]
Virginia Gill

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Dated: September 16, 1997 in Orange, California.

Virginia Hill
Virginia Hill

Attachment A

September 10, 1997

TO: Principals: California, Cambridge, Esplanade,
Fairhaven, Handy, Jordan, Lampson, Palmyra,
Prospect, Sycamore and West Orange

FROM: Neil McKinnon *NM*

RE: Temporary Restraining Order - Bilingual

The Federal Court judge just issued his order concerning the temporary restraining order (TRO) on our English immersion program. He has lifted the TRO and remanded the state issues back to Superior Court. The Federal issues, i.e., Castenada, and its three prongs will remain in Federal Court.

He also refused to issue a temporary injunction. What this means to Orange is that we can and must proceed immediately with the implementation of the English immersion program.

I want you to immediately notify all teachers who are still instructing in a bilingual mode that they will teach an English immersion program effective tomorrow. Furthermore, please advise them that I have asked you to supervise them on a regular basis to insure that this is happening. We will give them all the support that they need to accomplish this task and I would like you to notify me if there are any resources you need. We must make this conversion immediately. Please FAX back to me the verification at the bottom of this page documenting that you have told your teachers this information. I would like this to be returned by 9:00 AM on Thursday, September 11th.

NM:jf



I have informed my teachers of the information provided in this memo regarding the lifting of the TRO and the immediate implementation of the English immersion program.

Ka Cameron
Principal Signature

9/10/97
Date

Jordan
School

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PETER D. ROOS (State Bar No. 41228)
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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

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26 FEARNs, RICK LEDESMA and ROBERT
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27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. 97CS01793
Sac. County No.

SUPPLEMENTAL DECLARATION
OF BARBARA HERNANDEZ IN
SUPPORT OF TEMPORARY
RESTRAINING ORDER

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 **SUPPLEMENTAL DECLARATION OF BARBARA HERNANDEZ**

2

3 I, Barbara Hernandez, declare and depose as follows:

4 1. I am currently employed as a bilingual teacher with the Orange Unified School District
5 at Lampson Elementary School. I have been employed with the district for seven (7) years and during
6 my entire tenure with the district I have taught in the bilingual program at Lampson. I have been a
7 teacher for approximately twenty (20) years. I possess a multi-subject credential and a Masters
8 Degree in Linguistics and Language Acquisition. For at least ten of my twenty years of teaching I have
9 taught limited English proficient (LEP) students through a specialized program. I have previously
10 provided a declaration in this matter.

11 2. I teach a multi-age bilingual program at Lampson. Lampson is a year-round school.
12 As a year-round school, Lampson's 1997-98 school year began on July 1, 1997. Its first cycle ended
13 on July 29, 1997. We were off cycle for the month of August and we began our second cycle for the
14 1997-98 school year on September 2, 1997. This cycle will end in November. During this entire
15 1997-98 school year, Lampson has maintained and fully implemented its bilingual education program
16 without any interruption. Spanish language displays remain on my classroom bulletin boards and no
17 Spanish language story books have been removed from my classroom library. The parents of my
18 students have been informed that the bilingual education program is intact and my students and their
19 parents are fully aware that their home language is fully accepted and welcome in my classroom and
20 at our school.

21 3. As I explained in my previous declaration, our bilingual program is an innovative one
22 and has been implemented and developed over time for over four years. I team teach this program
23 with another teacher in a self-contained classroom with multi-age, multi-grade LEP students.
24 Presently 37 kindergarten through second grade LEP students are enrolled in our program. Our
25 classroom has the full complement of educational materials necessary to provide our students access
26 to the full core curriculum in Spanish. Because this is an innovative program, I and my teaching
27 partner have developed our own instructional materials for use in our program. We refer to these
28 materials as our "Level Packets." These packets contain readings, phonics, and math worksheets that

1 our children use in lieu of traditional kinds of workbooks. These packets have taken thousands of
2 hours of our time to develop over the past four years. They are consistent with and complement our
3 curriculum. As a result of the uncertainty caused by the District's proposed waiver during the first
4 cycle of this school year, we were only allowed to xerox or print our "Level Packets" on an "as need"
5 basis. For the present cycle there is no uncertainty at our school site regarding the implementation of
6 our bilingual program, and our principal gave us the authority to print all our "Level Packets" in
7 sufficient number for the entire 1997-98 school year, which we have done. This was a substantial
8 resource expenditure for our site.

9 4. If we were suddenly told to dismantle our program now that we have started our
10 second cycle, it would be totally disastrous for our students and our staff. The first graders who have
11 been enrolled in our program since July 1 have learned their alphabet and are now beginning to read
12 and write. They have been taught through use of a particular methodology that is Spanish language
13 based. We use a whole different sound system and we have taught them to read by syllables. If our
14 program was suddenly halted, these children would lose their last six weeks of education. The last
15 crucial months of reading preparation for these children would be rendered meaningless.

16 5. The staff would also be incapable of implementing the District's waiver program. We
17 have had no training in implementing the proposed program. There is no curriculum for such a
18 program and Lampson presently has no available English language materials in language arts, math,
19 science, social studies, or in the classroom library with which to implement the waiver program for our
20 LEP students, nor have they ever been ordered. (In fact, because of enrollment growth, our site
21 presently has insufficient core materials for our non-LEP students.) Even if these materials were
22 ordered today, it would take months for the materials to arrive in our classroom. The staff would be
23 unfamiliar with them and we would need lead time to prepare ourselves to be able to use them in the
24 classroom.

25 6. Lampson currently has in place a sound bilingual education program which has been
26 developed with great care for over the past four years. As I explained in my previous declaration, our
27 evaluation of our program shows that our LEP students achieve academically when they are enrolled
28 in our bilingual program and after they are transitioned into mainstream classrooms. As an educator

1 who has taught LEP children for 20 years, I strongly believe that my students would be severely
2 harmed if they were now abruptly removed from their present bilingual program and subjected to an
3 untested waiver program which the District is simply not prepared to implement.

4

5 I declare under penalty of perjury that the foregoing is true and correct.

6

7 Dated: September ____, 1997, in Orange, California.

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[See attached faxed signature page (over)]
Barbara Hernandez

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 2 harmed if they were now abruptly removed from their present bilingual program and subjected to an
 3 untested waiver program which the District is simply not prepared to implement.

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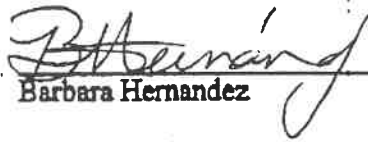
5 I declare under penalty of perjury that the foregoing is true and correct.

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7 Dated: September 7, 1997, in Orange, California.

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 Barbara Hernandez

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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11

12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

CASE No. Civ-S-97-1600 WBS GGH

SUPPLEMENTAL DECLARATION
OF BARBARA HERNANDEZ IN
SUPPORT OF TEMPORARY
RESTRAINING ORDER

16 Petitioners,

Date: September 18, 1997

17 vs.

Time: 1:30 p.m.

Dept: 41

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

1 SUPPLEMENTAL DECLARATION OF BARBARA HERNANDEZ

2
3 I, Barbara Hernandez, declare and depose as follows:

4 1. I am currently employed as a multi-age bilingual teacher at Lampson Elementary
5 School within the Orange Unified School District. I have been employed with the District for seven
6 years and I have been a teacher for twenty years. I have submitted previous declarations in this
7 matter.

8 2. The bilingual program at Lampson was fully maintained and implemented during the
9 entire 1996-1997 school year. As I explained in my supplemental declaration, it was also in effect
10 this 1997-98 school year which began at Lampson on July 1, 1997. However, the District has taken
11 actions recently to try to disrupt our program. On September 10, 1997 my principal and vice
12 principal called me and my teaching partner into a meeting and showed us a copy of the District's
13 directive ordering us to teach in English-only effective the following day. During this meeting we
14 discussed the ramifications of this directive to our program and it was decided that we would not
15 reconfigure our classroom and that our LEP children would remain with us in our self-contained
16 classroom.

17 3. Pursuant to this directive, the next morning my teaching partner and I went into our
18 classroom and began to pack up all of our Spanish language textbooks, and to clear our Bulletin
19 Boards of all references to Spanish, including Spanish language posters and vocabulary items. We
20 collected our children's work packets for the classroom, their individual dictionaries in Spanish and
21 their home parent participation packets. All these materials are being stored at our school site.

22 4. We did not have any prepared English materials for that first day, although some
23 materials were xeroxed for our children. We have not received the English language arts materials
24 for our students. Nor have we received English core curriculum materials in science and social
25 studies. We have some English reading materials available that were purchased last year to facilitate
26 LEP transitioning. My school site also gave us \$100 to buy additional materials this past weekend.
27 Although some of the English language materials we have in our classroom may be appropriate for
28 LEP students who possess high levels of English language proficiency, they are not appropriate for

1 LEP children who cannot hear English sounds, speak in grammatically correct sentences or
2 comprehend the spoken language. Because most of our LEP students are at the pre-literacy level
3 in English language development, it will be extremely difficult for them to learn how to read or write
4 by the use of these materials. And it will cause great delay in the acquisition of English reading and
5 writing skills for these children.

6 5. It is clear to me that there is much confusion regarding the District's latest directive
7 and what we can and cannot do in our classroom. I have received no training nor any clear directive
8 regarding how the waiver program is to be implemented. Initially I was told that I could not use
9 Spanish in our classroom. Later I was told that I could use a little Spanish and then I was told that
10 I could use sufficient oral Spanish in my classroom with the non-English proficient students so that
11 they could have some access to the curriculum. Specifically, Mr. McKinnon told me that he
12 suspected that I would need to use a lot of Spanish with my least English proficient kindergarten
13 students to ensure that they would have access to the curriculum and that I should then reduce my
14 Spanish as they became more proficient. None of these conflicting directives were given to us in
15 writing. Some persons in the District have told me that I must use the Hampton Brown series and
16 the Harcourt Brace materials. Others have told me that I can decide which materials to use based on
17 my professional opinion. Finally, others within the District have informed me that I could use either
18 the Hampton Brown or Harcourt Brace materials. As of the close of school today, there is no set
19 plan, no specific goals and no timeline for implementation of the District's waiver program that I am
20 aware of. Other than directing us not to instruct in Spanish and throwing some materials at us, there
21 is simply no program in place to replace our bilingual program.

22 6. The impact of the District's action this past week have been devastating on my LEP
23 students who at the lowest level of English proficiency. These students are experiencing a great deal
24 of anxiety. In fact, several of my parents have approached me for advice regarding the fact that their
25 children no longer want to come to school. Our LEP students who were just beginning to read and
26 write in Spanish are exhibiting their anxiety by their refusal to do the lessons or by crying when
27 presented with a lesson. They simply do not want to do the lessons in English because they believe
28 they cannot. If they do not try, they cannot fail. These children are no longer enthusiastic about

1 learning their lessons. During the last few days we have also seen an increasing number of students
2 who are experiencing stomach aches, head aches and vomiting. We are now sending a number of our
3 children to the office every day. I am convinced that this is occurring as a result of their anxiety over
4 the new and sudden change in their classroom environment.

5 7. The parents of these children are also very upset about these latest developments. We
6 had a meeting with our LEP parents this past Monday morning. Many of these parents expressed
7 grave concerns about the District's latest directive. They are also very upset that they will no longer
8 be able to participate in the education of their children and that they will no longer have a choice in
9 their children's education. They also asked me to show them my materials. When I showed them
10 what I had, they became very upset. They wanted to know why we couldn't continue the bilingual
11 program at least until the new materials were here.

12 8. It is my opinion, based on my many years working with LEP students and based on
13 my direct experience working with the LEP student now enrolled in my classroom, that it would be
14 in the best interest of these children if I were allowed to continue the bilingual program we had in
15 place prior to the District's ill-conceived directive to stop Spanish instruction. These children are
16 losing precious learning time.

17

18 I declare under penalty of perjury that the foregoing is true and correct.

19

20 Dated: September____, 1997 in Orange, California.

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[See attached faxed signature page (over)]
Barbara Hernandez

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10 what I had, they became very upset. They wanted to know why we couldn't continue the bilingual
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13 my direct experience working with the LEP student now enrolled in my classroom, that it would be
14 in the best interest of these children if I were allowed to continue the bilingual program we had in
15 place prior to the District's ill-conceived directive to stop Spanish instruction. These children are
16 losing precious learning time.

17

18 I declare under penalty of perjury that the foregoing is true and correct

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20 Dated: September 17, 1997 in Orange, California.

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Barbara Hernandez

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Telephone: (707) 528-9941

7 Attorneys for Petitioners

8
9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO,
13 GABRIEL MEDEL, PAUL H. GARCIA, LOS
AMIGOS OF ORANGE COUNTY, The
14 ASSOCIATION of MEXICAN AMERICAN
EDUCATORS, The CALIFORNIA
15 ASSOCIATION FOR BILINGUAL
EDUCATION, and The CALIFORNIA
16 LATINO CIVIL RIGHTS NETWORK as
Taxpayers,

17 Petitioners,

18 vs.

19 The STATE BOARD OF EDUCATION and its
members, YVONNE W. LARSEN, JERRY
20 HUME, NATALIE J. ARENA, KATHRYN
DRONENBERG, S. WILLIAM
21 MALAKASIAN, MARION MCDOWELL,
JANET NICHOLAS, SANFORD C.
22 SIGOLOFF, GERTI B. THOMAS, ROBERT L.
TRIGG, MARINA TSE, THE STATE
23 SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
24 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
25 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
26 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF,
27 JIM FEARNES, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
28 Superintendent, Does 1-100, inclusive,

Respondents.

CASE No. 97CS01793
Sac. County No.

DECLARATION OF MARIA S.
QUEZADA IN SUPPORT OF
APPLICATION FOR TEMPORARY
RESTRAINING ORDER

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 DECLARATION OF MARIA S. QUEZADA

2 I, María S. Quezada declare and depose as follows:

3 I. Professional History.

4 1. My name is María S. Quezada. I am an Associate Professor of Educational
5 Administration and Director of Professional Development at the Center for Language Minority
6 Education and Research at California State University, Long Beach. Formerly I held the position of
7 Title VII Director for the Multifunctional Resource Center Service Area 13 at CSU Long Beach.
8 Title VII is a federal program which provides funding and assistance to school districts to enable them
9 to better serve their limited English proficient (LEP) students.

10 2. I hold a doctorate in Educational Policy, Planning and Administration with a
11 supplementary specialization in Curriculum/Instruction and Linguistics conferred by the University
12 of Southern California (Los Angeles) in 1992. I also hold a Master's of Education in Bilingual
13 Education (1978) and a Bachelor of Arts in Liberal Education (1976) from the University of La
14 Verne and a Bachelor of Arts in Sociology from California State University, Fullerton (1975).

15 3. I have extensive experience in the administration and design of instructional programs
16 for English Learners. I have been a bilingual classroom teacher, a bilingual resource teacher (K-8)
17 and was a district-level administrator in two large districts in Southern California for 13 years. My
18 main responsibility as a district administrator was guiding the implementation of instructional
19 programs for English Learners and writing federal/state grants for innovative first and second
20 language acquisition instructional programs. As an administrator of programs for LEP students, a
21 major task was to determine what resources were needed to effectively implement a chosen strategy
22 and to develop evaluation plans which could guide our course. A copy of my *Curriculum Vitae* is
23 appended to this Declaration as Attachment A.

24 4. In my role as Coordinator of second language acquisition programs and Director of
25 the Multifunctional Resource Center in Service Area 13 (Los Angeles and Orange Counties) I
26 provided technical assistance and professional development in both counties for school districts who
27 had Federal Title VII language program projects. At that time, Service Area 13 had the major
28

1 portion of English Learners (660,000+) in the entire country. I worked with 123 projects in over 50
2 school districts in the two counties. I worked closely with school and district personnel as they
3 implemented their Title VII educational programs for English Learners. The projects written featured
4 innovative approaches for providing instructional services for English Learners. The Multifunctional
5 Resource Center staff and I provided assistance in implementation and program design issues;
6 professional development in first and second language acquisition methodologies; curriculum
7 development; school/home/community partnerships; and technology integration in the curriculum.

8 5. My professional experience includes over 15 years as a consultant, grant writer and
9 program evaluator for programs for English Learners. I am familiar with the scholarly research in the
10 field of Bilingual Education, English as a Second Language, program administration, and educational
11 services for English Learners. I have presented at numerous conferences and have taught courses in
12 Educational Foundations in Language Minority Education; Leadership, Decision Making &
13 Collaboration; Advanced Instructional Leadership; School Governance, Policy & Politics; and
14 Curriculum, Program Development and Evaluation. In addition to the above professional experience
15 I also have been a lead program quality reviewer and coordinated compliance review team member
16 for several districts in Southern California.

17 II. General Understanding of State Board Policy and Its Relationship to Minimally Acceptable
18 Procedures.

19 6. I am familiar with State Board of Education policies and guidelines, including its
20 guidelines for the development of a general waiver application. These are contained in a March, 1997
21 package which was sent to each district superintendent in the state by the State Superintendent of
22 Public Instruction and the President of the State Board of Education. It is my view as an educator,
23 and long-term administrator of programs for LEP children, that a program which failed to meet the
24 standards set out in the guidelines for development of a general waiver application would be one that
25 could not provide reasonable assurance that the program would achieve results for these children.
26 Indeed, a program that failed to meet these guidelines would be one that on its face failed to show
27 that the educational needs of students would be adequately addressed. The guidelines in that
28 document are truly the bedrock minimum that a program director would and should require; I am

1 somewhat familiar with the development of these guidelines and the other material in the packet, and
2 it is my understanding that it was in fact the desire of the authors to impose the least restrictive
3 requirements on school districts. My understanding is confirmed by statements to that effect
4 throughout the document, Attachment B to this declaration.

5 7. As stated in the cover memorandum signed by the Department and the State Board,
6 programs for LEP students “must ensure that all program participants acquire English quickly,
7 efficiently, and effectively and that these students make adequate progress in all of the academic
8 subject areas which comprise the core curriculum.” These are two distinct requirements, commonly
9 accepted in the field as necessary, and each requires an adequate implementation plan to assure that
10 the needs of the students are adequately addressed. To this end the State Board requires that waiver
11 applications submitted by school districts describe the theory, principles, research, or other evidence
12 which support the alternative program proposed. There needs to be sufficient detail of the resources,
13 staff and training in order to fully implement the proposed alternative program and how the services
14 to English Learners change over time as they acquire English. Districts applying for a waiver must
15 also include specific student performance objectives and standards of program effectiveness.

16 III. The Orange Unified School District Submission Measured Against State Board Guidelines.

17 8. Based on my professional expertise and experience, and my review of the Orange
18 Unified School District’s Waiver application and supporting materials, it is my professional opinion
19 that the application does not meet minimal professional standards. The program as described in the
20 waiver application lacks the detail needed to determine if the instructional program would fully meet
21 the State Board of Education policy for programs for English Learners. The waiver application does
22 not provide sufficient information to ascertain if the District has sufficient knowledge of sound
23 educational theory on instructional program design and implementation and whether the resources
24 outlined would fully meet the linguistic and instructional needs of the District’s English Learners.
25 Additionally, the plan for evaluating the program does not specify any quantifiable and reliable
26 methods for determining the educational progress made by English Learners and whether the
27 proposed program provides a viable alternative approach to educating second language learners.

28

1 A. The Failure to Set Forth an Educationally Sound Theory for Meeting the Need of Limited
2 English Speakers to Curricular Access.

3 9. The Orange Unified School District's waiver application does describe an adequate
4 theoretical basis for assisting students to learn English; however, it fails seriously in setting forth a
5 theory for the delivery of core curriculum to students at different stages of their language
6 development. The State Board guidelines require this, and it could in my professional view require
7 no less (see page 4 of "suggestions"). Certain all-English programs are more likely to be able to
8 deliver core curriculum to children at different levels of their development. If a plan were submitted
9 to me, it would have to show what modifications would be made for non-English speakers, what
10 standards of individual English attainment would lead to adjustment of the program and what
11 adjustments would be envisioned. This plan fails this test, and this was so found by the California
12 Department of Education (see their Staff Report, at pages 2-3, Attachment C).

13 10. It is impossible for me to determine how students at the beginning level of English
14 proficiency are going to have the opportunity to learn and have access to a challenging core
15 curriculum as outlined in the State School Board Policy. Their Waiver application states that "ELD
16 instruction offers opportunities to extend language skills through critical thinking, problem solving,
17 expressing ideas collaboratively, and developing conclusions based upon reason and evidence." Yet
18 in reviewing their ELD program summary in Appendix A it states that in ELD Level A (for beginning
19 students) "students will demonstrate comprehension through appropriate non-verbal responses." It
20 is unclear how students will be able to have access to the core curriculum if they are not proficient
21 enough in English to express or understand what they are learning. Students need to develop subject
22 matter competency as well as English language skills. The Waiver application heavily relies on
23 descriptions of how students will acquire English and does not fully address how they will be given
24 ample opportunities and time to master subject matter content. In their Reading-Language Arts
25 Standards, for example, there is no provision made for how beginning English level students will be
26 able to participate in all of the instructional activities outlined and meet district standards if they do
27 not fully understand English.

28 11. The waiver application seems to rely on optional pre-school, after-school and summer

1 programs to make up for its deficits. Experience teaches us that one cannot and must not rely upon
2 optional federally-funded (what I understand these to be) programs offered at other than ordinary
3 school times. Children cannot be made to attend these programs, and parents and children often have
4 other demands upon them. While extra programs, as described, are increasingly part of most school
5 systems, no administrator would see these as a substitute for an appropriate core program. Further,
6 there are problems with the description of these programs. The waiver application was unclear as
7 to how and which students would be able to participate in the optional pre-school, after-school and
8 summer programs. With so many English Learners in the district the demand for such services might
9 be quite high. Without a description of how and what type of services would be offered; at what
10 schools; the number of students to be served at each of those schools; and/or what resources are
11 available for the above programs it would be difficult to determine if these resources would be
12 adequate to fill the need for those services. The additional programs would be beneficial only if all
13 students who needed the assistance could or would participate. The limited description of their
14 program model and optional services does not give essential information.

15 B. The Failure to Set Forth Adequately What Resources Will Be Used to Implement the
16 Program.

17 12. A central resource of any program is a trained staff, including both teachers and
18 (where applicable, as here) aides. Professional development is key. As the Department of Education
19 found, OUSD's waiver application contains no statement of specific credentials or training that will
20 be required of those who provide SDAIE — a key component of the District's plan. While there are
21 some general references to professional development, the OUSD waiver application does not outline
22 a specific plan, number of participants, timeline and the topics or content to be covered in the
23 professional development they will be offering. The application only states "The District provides
24 staff development opportunities for classroom teachers and instructional assistants." This does not
25 give adequate information so that as a person reviewing the waiver application I could make a
26 determination that it meets the State Board established policy or good practice.

27 13. While there is reference to the provision of primary language support by aides, this
28 is only as "deemed appropriate." As is appears to me that this is the only mechanism suggested for

1 truly meeting the needs of those children with no English language skills, this failure is a critical one.
2 There need to be standards for determining who will get this assistance, what the ratio of aides to
3 students will be, and how the aides will work with professional staff. This is required in the State
4 Board guidelines and is missing from the application (see “suggestions” at p. 4).

5 C. Evaluation.

6 14. One of the most serious flaws in the Orange Unified Waiver application is the
7 inadequate description of their evaluation plan. State Board Policy requires that specific student
8 performance objectives and standards of program effectiveness for learning English and academic
9 achievement be included. There is absolutely no baseline data. How will Orange Unified determine
10 whether their program is successful after the one or two years the waiver is in force if there is nothing
11 with which to compare? Orange Unified must already have at its disposal some testing information
12 on students. Monitoring student progress and achievement has always been an integral part of the
13 instructional program for English Learners. This information should be available in a disaggregated
14 format so that academic achievement results for each subset of their student population can be used
15 for evaluation purposes. The Waiver application does not provide this information or establish any
16 measurable objectives as is required under the State Board Policy. Without a fully developed
17 evaluation plan it would be difficult to determine any weaknesses and/or strengths of the proposed
18 alternative program. Therefore, adjustments to the program could not be easily made without a
19 comprehensive formative and summative evaluation plan.

20 15. In summary, my professional expertise in program design and implementation of
21 programs for English Learners brings me to the conclusion that this waiver application is fatally
22 flawed. The State Board policy is quite clear in its request for detailed information about the
23 alternative instructional program proposed. This detail is necessary to determine if indeed the District
24 is providing a program which assists students in learning English quickly and effectively and which
25 provides access to the entire core curriculum. This is especially important for students who do not
26 fully understand, speak, read, and write English. It is my understanding that the Board Policy gives
27 districts the flexibility to choose an alternative program, but this program must be educationally
28 sound, have the requisite resources and demonstrate effectiveness. At no time should the State Board

1 policy endorse a loosely designed program that does not provide a way of monitoring and reporting
2 academic achievement for a large segment of students in the District.

3 I declare under penalty of perjury that the foregoing is true and correct.

4 Dated: September _____, 1997 in Long Beach, California.

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6 [See attached faxed signature page (over)]
7 María S. Quezada, Ph.D.

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1 policy endorse a loosely designed program that does not provide a way of monitoring and reporting
2 academic achievement for a large segment of students in the District.

3 I declare under penalty of perjury that the foregoing is true and correct.

4 Dated: September 17, 1997 in Long Beach, California.

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María S. Quezada
María S. Quezada, Ph.D.

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Attachment A

VITA (1997)

María S. Quezada, Ph.D.
9 Palmera
Rancho Santa Margarita, CA 92688
(714) 858-9266
E-Mail: mariasq@csulb.edu

CURRENT POSITION AND PROGRAM AFFILIATIONS

Associate Professor (California State University, Long Beach)
Educational Administration (Department of Educational Psychology &
Administration, College of Education)

Other Invited Faculty Affiliations

Director of Professional Development, Center for Language Minority Education
and Research, CSULB (1993-present)

Doctoral Committee Member, University of La Verne (1993-present)

Other Professional Affiliations

California Association for Bilingual Education, President, (1996-1999)

Field Colleague, California Department of Education, Information Management and
Bilingual Compliance Department (1989-present).

Committee Panel, Commission for Teacher Credentialing, Administrative Credential
Review Panel (1996-present)

Career-Ladder University Liaison, Los Angeles Unified School District,
(1996-present)

Conference Planning Committee Member for:
California Association for Bilingual Education--Research Strand
Jornada Pedagógica Internacional -Chairperson
Two-Way Bilingual Immersion Conference

EDUCATION

FORMAL EDUCATION

Ph.D., Education (1992). University of Southern California.

Major Program: Policy, Planning and Administration.

Minor Program: Curriculum and Instruction.

Outside Area: Linguistics

Masters Studies in Public School Administration, University of La Verne (Fall 1980-Spring 1982)
M.Ed., Education (1978). University of La Verne Specialization: Bilingual Education
B.A., Liberal Studies (1976). University of La Verne
B.A., Sociology (1975). California State University, Fullerton.
A.A., Early Childhood Education (1973). Mount San Antonio College, Walnut California

CREDENTIALS

Administrative Services Credential-Clear (1983)
Multiple Subjects Teaching Credential-Life (1977)
Bilingual Certificate of Competence (1977)
California Community College Credential (1976). Area: Early Childhood Education and Sociology

PREVIOUS PROFESSIONAL EXPERIENCE

Director, Multifunctional Resource Center Service Area 13, CSU Long Beach, Center for Language Minority Education and Research (October 1993 to April 1996)
District Instructional Coordinator-Bilingual Services, Saddleback Valley Unified School District (April 1989 to September 1993)
Bilingual Coordinator, Ontario-Montclair School District (August 1983 to March 1989)
District Administrative Intern: Bilingual Services, Ontario-Montclair School District (October 1980 to July 1983)
Elementary Teacher-K/1st grade, Ontario-Montclair School District (September 1977 to September 1980)
Instructor of Early Childhood Development, Mount San Antonio College (September 1975 to August 1982)
Child Development Center Teacher, Mount San Antonio College (September 1974 to September 1977)
Children's Center Teacher/Parent Education ParaEducator, Hacienda La Puente Unified School District (1972-1974)

AWARDS AND HONORS

ACADEMIC AWARDS AND HONORS

- Title VII Bilingual Education Doctoral Fellowship, University of Souther California 1982-1985
- Title VII Educational-Administration Fellowship, University of La Verne 1980-1982
- Outstanding Preschool Education Student Award, Mount San Antonio College 1973

- President Honor Roll Award, Mount San Antonio College (1970-1973 four semesters)
- Dean's List, California State University, Fullerton (1973-1975)

AWARDS AND HONORS FOR COMMUNITY SERVICE

- Outstanding Hispanic Educator -Orange County, League of United Latin American Countries September 1991
- Certificate of Appreciation in Recognition of Contributions to the Annual Conference Planning Committee, California Association for Bilingual Education (1995)
- Commendations for Recognition of Contributions as a Program Quality Review Team Leader (1991-1992) Saddleback Valley, Irvine, and Capistrano Unified School Districts
- Outstanding Administrator of the Year, San Bernardino County (1986)
- Commendations in Recognition of Contributions as a Planning Team Member for the Bilingual Education Service Center-District consultant, San Diego State University (1984-89)

RESEARCH INTERESTS

Multilingual, multicultural program implementation and evaluation; professional development models; educational leadership in implementing inclusive educational programs for racially, culturally and linguistically diverse student populations; multilingual, multicultural education; curriculum and instructional practices in multilingual, multicultural settings; and alternative assessment practices for culturally and linguistically diverse students.

Publications

NON-JURIED PUBLICATIONS, REPORTS & DOCUMENTS

PUBLICATIONS

Quezada, M.S. (1996) Two Way Immersion Education: Valuing Language and Culture (submitted for publication to the International Immersion Education Conference Proceedings Board)

Quezada, M.S. (1994) Educación en dos idiomas: Valorización de Lengua y Cultura. Conference Proceedings for Multiculturalismo: El Reto de la Globalización.

ARTICLES UNDER REVIEW AND PREPARATION

Quezada, M.S. (1997) Organizing Professional Development for School Change (in progress)

Quezada, M.S. (1997) Leadership Factors in Establishing Learning Communities for Culturally and Linguistically diverse students (in progress)

Quezada, M.S. & Wickman, A. (1997) Investing in Human Capital: CETA Bilingual Teacher Preparation Program Twenty Years Later (in progress)

Quezada, M.S. & Tarrow, N. (1997) Teacher Values in Multicultural Settings: A Tri-National Study of Teacher Preparation Programs (in progress)

REPORTS

- Quezada, M.S. (December 1993). Multifunctional Resource Center Service Area 13-Service Delivery Plan Report, CSULB Center for Language Minority Education and Research.
- Quezada, M.S. (Fall 1994). Multifunctional Resource Center Service Area 13-Annual Report, CSULB Center for Language Minority Education and Research.
- Quezada, M.S. (December 1994). Multifunctional Resource Center Service Area 13-Service Delivery Plan Report, CSULB Center for Language Minority Education and Research.
- Quezada, M.S. (Fall 1995). Multifunctional Resource Center Service Area 13-Annual Report, CSULB Center for Language Minority Education and Research.
- Quezada, M.S. (December 1995). Multifunctional Resource Center Service Area 13-Service Delivery Plan, CSULB Center for Language Minority Education and Research.
- Quezada, M.S. (Fall 1996). Multifunctional Resource Center Service Area 13-Annual Report, CSULB Center for Language Minority Education and Research.

DOCUMENTS

- Quezada, M.S. et. al. (1996) Student Assessments (K-3) for Scholastic Solares Spanish Reading Series.

DISSERTATION AND MASTER'S THESIS

- Quezada, M.S. (1992): District Plans for Eliminating the Shortage of Qualified Teachers of Limited English Proficient Students in Selected Districts in California. Doctoral dissertation, University of Southern California
- Quezada, M.S. (1978). Instructional Models in Bilingual Education. Master's thesis in Education. University of La Verne

TEACHING AND CURRICULUM DEVELOPMENT

EDUCATIONAL ADMINISTRATION (CSULB 1996-PRESENT)

- Educational Leadership, Decision-making, and Collaboration (EDAD 541-taught)
- Advanced Instructional Leadership (EDAD 641-taught)
- Curriculum/Program Development and Evaluation (EDP 677-taught)
- Governance, Policy and Politics (EDAD 659-taught)

BILINGUAL AND MULTICULTURAL EDUCATION

California State University, Long Beach

- Foundations of Language Minority Education: Theory (Center for Language Minority Education and Research -CSULB EDP 485 co-taught)

UC Irvine

- Bilingual and Bicultural Methodology (developed and taught)
- Spanish for Bilingual and Language Development Teachers (taught)

School District Courses

- Cooperative Learning in Multicultural Settings (Ontario-Montclair, San Bernardino County, and Saddleback Valley School Districts-developed and taught)

EARLY CHILDHOOD EDUCATION (1975-1982; MOUNT SAN ANTONIO COLLEGE)

- Home School Community Relationships (taught)
- Child, Growth and Development (taught)
- Preschool Music & Rhythm (taught)

PUBLIC SCHOOL EXPERIENCE

- Kindergarten and First Grade Teacher, Ontario Montclair School District
- Fourth and Fifth Grade Teacher, Chino Unified School District--Student Teaching
- Child Development Center-Preschool Teacher, Mount San Antonio College

PROFESSIONAL PRESENTATIONS

SELECTED PAPERS AND PRESENTATIONS

Immersion Education--Two-Way Bilingual Model. Annual Conference on Immersion Education. Barcelona, Spain, September 1996--INVITED

Two-Way Bilingual Immersion Programs--Valuing Student's Culture and Language. Annual Meeting of the American Educational Research Association (AERA). New York, April 1994

Dual Language Programs--Panel Symposium for the "Encuentro Cultura y Diversidad: Un reto para la Globalización" Conference held in Mexico City at the Universidad Pedagógica Nacional, November 1994--INVITED

Keynote Address, CABE ParaProfessional Conference, Riverside, California : It Takes a Village to Raise a Child--Your valuable contributions for linguistically and culturally diverse students, October 1994

Plans to Remedy the Shortage of Qualified Teachers of Limited English Proficient Students--Five Year Follow-up on Recruitment Strategies. Annual Meeting of the American Educational Research Association (AERA). New Orleans, April 1994

District Remedies to Eliminate the Shortage of Qualified Teachers of Limited English Proficient Students. Annual Meeting of the American Educational Research Association (AERA). San Francisco, April 1992

PROFESSIONAL DEVELOPMENT ACTIVITIES AND WORKSHOPS

- Title VII Bilingual Fellowships--Reporting on Progress and Programs, Annual Conference for the National Association for Bilingual Education. Albuquerque, New Mexico, February 1997.
- Implementing Two Way Immersion Programs. Annual Conference for the Association of Mexican American Educators. Los Angeles, California, December 1996
- Organizing Technical Assistance for Schools/Districts--Programs and Centers, Annual Conference for the National Association for Bilingual Education. Orlando, Florida, March 1996
- Title VII Bilingual Fellowships--Research Agenda, Annual Conference for the National Association for Bilingual Education. Orlando, Florida, March 1996
- Two Way Bilingual Immersion Programs: How to get them started. CSU Long Beach, California, February 1996
- Challenges and Strengths--Organizing for Success. Center for Language Minority Education and Research, CSU Long Beach, California, January 1996
- Developing a Service Delivery Plan--MRC SA 13 Regional Meeting. Long Beach, California, October 1995
- CSU Long Beach/Universidad Pedagógica Nacional Binational Bilingual Teacher Preparation Program--Design and Implementation. El Paso, Texas, September 1995
- Asian Pacific American Forum--Policy Development and Action Plans. New York, New York, June 1995
- Knowledge is Power Parent and Student Conference. Rio Hondo College, Whittier, California, May 1995
- Language Acquisition and Bilingual Education. CSU Long Beach, May 1995
- Collaborative Planning for Title VII Classroom Instructional Projects--MRC Regional Meeting. CSU Long Beach, March 1995
- Program Design for Language Minority Students. Roosevelt School, Long Beach, California March 1995
- Designing Instructional Programs for English Learners. San Bernardino, California, February 1995
- Program Design --Roosevelt School, Long Beach, California, February 1995
- Parent Involvement in LASA/Title VII Programs--OBEMLA Management Institute. Phoenix, Arizona, February 1995
- Superintendent/Board Member Symposium on Goals 2000. California Association for Bilingual Education Annual Conference. Anaheim, California, February 1995

Concerns-Based Adoption Model--Planning for Staff Development. CSU Long Beach, California
December 1994

Using Alternative Assessments for Student Evaluation. Encuentro Culture and Diversity
Conference, Mexico City, November 1994

Partnerships for Improving California's Schools--Leadership Training. Los Angeles, California
November 1994

Mexico/United States Collaboration Meeting--Instructional Materials for Language Diverse
Classrooms. Austin, Texas, November 1994

Comite Principal Symposium--Technical Assistance in Designing Programs for Linguistically and
Culturally diverse students. November 1994

Assessing Program Concerns--Title VII Regional Meeting. CSU Long Beach, California,
October 1994

Developing Innovation Configurations--CBAM. Paramount, California, July 1994

Alternative Assessments for Limited English Proficient Students: A Task Force Report, National
Association for Bilingual Education and Title VII Management Institute. Los Angeles,
California, February 1994

EDITORIAL BOARDS & REVIEWERSHIPS

GUEST REVIEWERSHIPS

Guest Reviewer, *Building Bilingual Instruction: Putting the Pieces Together*. California
Department of Education Publication.

GRANTS/CONTRACTS & ADMINISTRATIVE RESPONSIBILITIES

GRANTS, & CONTRACTS

Since 1983 I have written/co-written and/or developing/co-developing approximately \$54.6 million
in federal grants and contracts. All of these efforts have been targeted at working with or
improving instructional programs and services for linguistically, culturally, and racially diverse
student populations and their families.

Principal Grant Writer for Ontario-Montclair School District's Project Learn. A proposal for a Title
VII Transitional Bilingual Education program for Pre-K to Third Grade; Awarded \$760,000,
Fys 1984-1989

Principal Grant Writer for Ontario-Montclair School District's Project Intermediate School. A
proposal for a Title VII Transitional Bilingual Education program; Not funded

Principal Grant Writer for Ontario-Montclair School District's Project Capacity. A proposal for a
Title VII Short Term Training program; Not Funded.

Co-Grant Writer for Saddleback Valley Unified School District's Project Special Alternative. A proposal for a Title VII Special Alternative Instructional Program; Awarded \$438,060, FYs 1989-1994.

Principal Grant Writer for Saddleback Valley Unified School District's Project English Language Development. A proposal for a Title VII Special Alternative Instructional Program; Awarded \$470,057, FYs 1990-1995.

Principal Grant Writer for Saddleback Valley Unified School District's Project Bilingual Immersion. A proposal for a Title VII Developmental Bilingual Education Program; Awarded \$322,245, FYs 1990-1995.

Co-Grant Writer for Saddleback Valley Unified School District's Project Portales--Literacy Development for Spanish-speaking Parents. A proposal for a Title VII Family English Literacy Education Program; Awarded \$360,630, FYs 1991-1993.

Principal Grant Writer for Saddleback Valley Unified School District's Project PROMOTE. A proposal for a Title VII Transitional Bilingual Education Program for Recent Arrivals; Awarded \$200,000, FYs 1992-1996.

Contributing Writer with J.D. Ramirez, Kevin Rocap, Lori Orum, proposal for a Comprehensive Assistance Center for Eight Counties in Southern California, July 1995. \$5.4 million --Not funded

Contributing Writer with J.D. Ramirez, for a technical proposal for continuation funding for the Multifunctional Resource Center-Service Area 13. Awarded \$345,650; FY 1995-1996

Contributing Writer with J.D. Ramirez, Kevin Rocap, Lori Orum, proposal for a OERI Diversity Research Center Cooperative Agreement December 1995. \$5.2 million Not funded

Principal Grant Writer for a FIPSE proposal for the Binational Bilingual Teacher Preparation Program between Mexico and CSULB, October 1995 (preliminary proposal accepted) and March 1996 (final proposal). \$420,000--Not funded

Contributing Writer with J.D. Ramirez, proposal for a OERI Research Grant for Studying High Performance Learning Communities, July 1996. \$5.5 million --Not funded

PROGRAM DEVELOPMENT

Member of the Two-Way Bilingual Immersion-Alternative Assessments Task Force for Title VII Developmental Bilingual Education Programs in California, 1991-1993

Member of the Orange County LEP Task Force for the development of Alternative Assessments for Limited English Proficient Students, 1992-1993

Establishing a Technical Assistance and Training Center--Multifunctional Resource Center--for Los Angeles and Orange Counties. Developed Service Delivery Plan

PROJECT ADMINISTRATION

Project Director, Ontario-Montclair School District's Title VII Project Learn, Fys 1984-1989.

Project Director, Saddleback Valley Unified School District's Title VII Project Special Alternative, FYs 1989-1993.

Project Director, Saddleback Valley Unified School District's Title VII Project English Language Development, FYs 1990-1993.

Project Director, Saddleback Valley Unified School District's Title VII Project Bilingual Immersion, FYs 1990-1993.

Project Director, Saddleback Valley Unified School District's Title VII Project Portales--Literacy Development for Spanish-speaking Parents, FYs 1991-1993.

Project Director, Saddleback Valley Unified School District's Project Title VII PROMOTE, FYs 1992-1993.

Project Director, Center for Language Minority Education and Research/CSULB Multifunctional Resource Center-Service Area 13, FY 1993-1996.

CONFERENCE PLANNING AND DEVELOPMENT

Co-Chair (with Magaly Lavadenz and Reynaldo Macias), Jornada Pedagógica International Conferences, 1993-present

Co-Chair (1994 with Marcia Vargas) and Committee Member for the Two-Way Bilingual Immersion Summer Conferences, 1994-present

Planning Committee and Strand Facilitator for California Association for Bilingual Education Annual Conferences, 1993-present

Co-Chair (with Chuck Acosta, Janet Lu and Sylvia Carrizales--MRC Directors) for the Title VII Management Institute at CABE Annual Conference in Los Angeles 1995

Co-Chair (with Anna Hernandez) Developmental Bilingual Program Conference, Manhattan Beach May 1992

Co-Chair (with Rocio Moss, MRC San Diego) Management, Program Development and Evaluation Conferences --a series of three and MTTI Training Institutes, 1984-86

Co-Chair (with Tina Marinez), ParaEducator Conference, San Bernardino/Riverside, California, 1982-89

CONFERENCE PROPOSAL REVIEWERSHIPS

Reviewer, *California Association for Bilingual Education* (CABE) Annual Conferences, (1993-present)

Reviewer, *American Educational Research Association* (AERA), Bilingual and Hispanic SIG (1994)

UNIVERSITY SERVICE

Presented for the Spanish Parent Orientation for SOAR students, Fall 1996

Served as Marshall for the Latino Graduation, May 1996

Member of the Goals 2000 Committee for the College of Education, January 1997

Member of the Administrative Credential Community Advisory Committee, January 1997

COMMUNITY SERVICE

Educational consultant in the area of Program Design for linguistically and culturally diverse students for the following school districts:

Saddleback Valley Unified School District, (1993 -present)

Santa Ana Unified School District (1993 -present)

Long Beach Unified School District (served on committees for four district schools (1993 -present)

Paramount Unified School District (1994-present)

Capistrano Unified School District (Lead in Program Quality Review Committee--3 schools), 1992-1994

San Bernardino Unified School District (1995)

Compton Unified School District (1994)

Ontario-Montclair School District (1994)

Los Angeles Unified School District 1995

Attachment B



March 1997

Dear Superintendents:

One of the most pressing issues facing the public schools in California is the provision of equal educational opportunity to the large and growing population of English learners. These students now number more than 1.3 million and represent approximately one of every four pupils enrolled in kindergarten through grade 12. In order to benefit from schooling, English learners must be provided with high quality instruction which includes organized programs of English language development and complete access to a challenging core curriculum.

Attached you will find an advisory related to programs and services for English learners. Currently these students are referred to in law as limited-English proficient (LEP) students. The purpose of this advisory is to clarify the legal responsibilities of school districts to provide adequate educational services to English learners, including the districts' obligations when applying for and implementing waivers of current legal requirements. These obligations are explained in light of the State Board of Education's 1995 policy statement regarding programs for LEP students.

The Department and the State Board are fully in agreement regarding the emphasis that must be placed on all programs for English learners, specifically, that these programs must ensure that all program participants acquire English quickly, efficiently, and effectively, and that these students make adequate progress in all of the academic subject areas which comprise the core curriculum.

If you need additional assistance or information on this topic, please call Norman C. Gold, Manager, Complaints Management and Bilingual Compliance Unit, at (916) 657-4674, or Francisca Sánchez, Manager of the Bilingual Education Team, at (916) 657-2916. Listings of additional program contacts may be found in Attachments A, B, and D of this advisory. Thank you for all your efforts on behalf of California's students.

Sincerely,

Handwritten signature of Delaine Eastin in cursive.

Delaine Eastin
State Superintendent of Public Instruction
California Department of Education

Handwritten signature of Yvonne W. Larsen in cursive.

Yvonne W. Larsen, President
California State Board
of Education

PROGRAM ADVISORY FOR PROGRAMS FOR ENGLISH LEARNERS

Purpose of this Advisory

On July 14, 1995, the California State Board of Education (Board) revised its policy statement on local district programs for limited-English proficient (LEP) students, or English learners¹ (Enclosure A). The purpose of this advisory is to clarify districts' responsibilities for services to English learners, including waivers of current legal requirements, in light of the Board's revised policy statement. It suggests what the contents of a general waiver application should contain. Also included are resource and contact lists for districts and schools to use in obtaining assistance in implementing high quality programs for English learners.

The following suggestions provide additional guidance for districts wishing to use the general waiver procedure. The suggestions are illustrations of how, on a case-by-case basis, the Board will be evaluating waiver requests under the federal Castañeda decision. They illustrate a new, reinvigorated emphasis of the Board: namely, what the district will be doing to produce educational results for its English learners.

The Board's revised policy identifies two goals that school districts should seek to achieve in developing programs for English learners: 1) rapid development of English proficiency (literacy), including speaking, reading, and writing, and 2) the opportunity to learn, including access to a challenging core curriculum and access to primary language development.

State Law

The State Board of Education makes clear in its policy that it supports local flexibility in determining instructional programs and methodologies to meet the state required general purposes which have remained operative since the 1987 "sunset" of the Moscone-Chacon Bilingual-Bicultural Education Act of 1976. The Board also expressed the intent to approve waiver requests necessary to enhance such flexibility.

The Board found and declared that the general purposes of the Act are eight in number and expressed as follows, based upon the language contained in *Education Code* section 52161. The general purposes are listed here in the same order as they appear in the statute.

1. "[T]he Legislature directs school districts to 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...[and] intends that the public institutions of higher education establish programs to qualify teachers and administrators in the bilingual and crosscultural skills necessary to serve these pupils."

¹"Limited-English proficient students" and "English learners" are synonymous and are used interchangeably in the Board's policy statement. The Board recognizes that the term "English learners" is becoming more widely used because it does not imply that the identified students are in any way *limited* participants in the educational process.

2. "The Legislature finds and declares that the primary goal of all programs under this article is, as effectively and efficiently as possible, to develop in each child fluency in English."
3. "The programs shall also provide positive reinforcement of the self-image of participating pupils... ."
4. "The programs shall also...promote crosscultural understanding... ."
5. "The programs shall also...provide equal opportunity for academic achievement, including, when necessary, academic instruction using the primary language."
6. "It is the purpose of this article to require California school districts to offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools... ."
7. "It is the purpose of this article to require California school districts...to provide adequate supplemental financial support to achieve [the purpose set forth in 6]."
8. "Insofar as the individual pupil is concerned, participation in bilingual programs is voluntary on the part of the parent or guardian."

Federal Law

The revised policy also includes the three-part analysis districts are to use to determine the federally required "appropriate action" they are to take to overcome language barriers that impede students' equal participation in instructional programs. The three-part analysis is as follows:

The 1974 U.S. Supreme Court decision in *Lau v. Nichols* as codified in the *Equal Education Opportunities Act* and other federal laws require that each educational agency "...take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." The following three-part analysis is used to determine "appropriate action:"

- ▶ Use sound theory. The educational theory upon which instruction is based must be recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy.
- ▶ Provide adequate support. The school system must provide the procedures, resources, and personnel necessary to apply the theory in the classroom. The resulting program must be implemented effectively.
- ▶ Achieve results. After a reasonable period, application of the theory must actually overcome English language barriers confronting the students and must not leave them with substantive academic deficits.

Principles for Educational Programs and Services for English Learners.

The Board also established five principles relating to educational programs and services for English learners which can be used to guide districts in meeting the requirements of state and federal law:

- Maximum local flexibility to determine which instructional programs and methodologies best achieve results.
- Instructional programs based on sound educational theory, emphasizing that local programs may include primary language instruction, English language development through "sheltered" content instruction, and/or other sound instructional methodologies.
- Adequate resources and personnel to implement local plans and programs.
- 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.²
- Due process in all compliance matters.

Waivers

The State Board of Education stated that it intends to approve general waiver requests from districts wishing to carry out alternative approaches to meeting the state and federal legal requirements described above where results are being or will be achieved. The general waiver procedures are to be followed to apply for a waiver of one or more provisions of state law (the general purposes) related to programs and services for English learners. For example, a district may wish to waive the requirement for primary language instruction at certain grade levels.

The Board will use the standards of the Castañeda federal court decision to review requests for waivers. As noted above, these standards include 1) a sound educational theory upon which instruction will be based; 2) assurances that adequate procedures, resources, and personnel are in place to apply the theory in the classroom and to implement an effective program; and 3) a method for measuring or evaluating results that demonstrate that students have actually overcome English language barriers and do not have substantive academic deficits.

² Note that district bilingual advisory committees are to be consulted on any waiver application related to programs for English learners.

Suggestions for Development of a General Waiver Application

**State Legal Requirements for English Learners
(See General Waiver Request Form, Enclosure B)**

Part I. Education Code section to be waived: EC 62002 and former EC 52161.

Part II. Purpose and Desired Outcomes.

- 1) Specify the general purpose(s) of former EC 52161 to be waived, pursuant to the Castañeda decision.
- 2) [Provide attachment.]

Theory, Principles, and Research. Once the specific provision(s) to be waived are identified, the application should describe the theory, principles, research, or other evidence which support the alternative program proposed. Evidence might come from pilot programs or practices used in the district or in other districts, as well as from published research. The principles or theory upon which the program is built should be recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy.

In determining whether primary language instruction is or is not necessary, districts should link this determination to individual student assessed needs. Student assessed needs are determined at the district's discretion; however, such determinations should be based upon objective information. Items for districts to consider may include the following: 1) written and oral assessments of English proficiency, 2) performance assessments based upon locally-determined performance standards of academic achievement, 3) written and oral assessments of primary language proficiency, 4) teacher evaluations of the student's work, and 5) other standardized norm-referenced measures of the student's achievement.

If a district proposes a program for English learners which provides no direct instruction through the primary language, it should describe how the program's theory will lead to use of objective information for the selection and modification of instructional programs for individual students over time. Such objective information may include the same measures of language and academic achievement stated above.

Description of Program and Resources. The alternative instructional program needs sufficient detail to set forth the resources, staff, and training which will be dedicated to meeting the language and academic goals for English learners. For instance, if the program relies extensively on paraprofessionals, the application should describe their role, their special skills and training, how many will be deployed, and how teachers and paraprofessionals will be trained to work effectively together.

Suggestions for Completing a General Waiver Application
Continued...

The application should describe staffing patterns, special materials and techniques to be used, and the proposed professional development efforts which will enable the district to design, implement, and evaluate the chosen program in the schools where it will be operated. This section should describe how the specific services for English learners change over time as they acquire more English proficiency. It would be useful to provide several sample student schedules for selected grade spans and English proficiency levels to illustrate how students will be served.

Evaluation of Educational Results. An evaluation plan must be included. It should include specific student performance objectives and standards of program effectiveness for learning English and academic achievement. The plan can include some or all of the following:

- Describe the district's redesignation process, including student performance standards for English oral language, reading, and writing, and explain how student performance will be measured.
- Provide the district's current and most recent years' redesignation data. This will provide an important baseline to judge district progress.
- Describe how staff follow-up with students who have been redesignated to ensure that they continue growth of English and academic achievement.
- Describe how district and school site personnel collaborate to implement instruction and monitor the program processes as well as student results. Explain what changes will be made in schools where students do not meet English or academic achievement performance standards.
- Describe the current measures of academic achievement of students affected by this waiver in language arts, mathematics, history, and science. Indicate expected improvement in academic achievement to be obtained as a result of implementation of this waiver, and provide specific student performance improvement targets for the waiver period.
- Establish a reasonable timeline for accomplishing these objectives. The plan should specify what data will be collected, the timeline for analysis and reporting, and how it will be analyzed to determine whether the objectives have been met. Data reporting should include individual results and should be disaggregated by key subgroups by language, grade span, etc. Redesignation data should be reported by home language, length of time in program, and other relevant variables.

Compliance Review, Due Process, and Administrative Flexibility

The State Board of Education policy directs that the California Department of Education should focus all support and compliance activity on conformity by school districts with the requirements of federal law and applicable requirements of state law as they pertain to educational programs and services for English learners. Compliance requirements for all English learner programs with or without approved waivers on file are to emphasize results; *i.e.*, after a reasonable period of time, the program must actually overcome English language barriers confronting the students and not leave them with substantive academic deficits. In the Board's view, what is a reasonable amount of time will vary according the age and educational background of the district's various English learners. Moreover, the Board expects that the standards for student achievement will have the same rigor for all English learner programs: for primary language programs, English learner programs operating under waiver, and alternative programs designed by local districts which have determined that primary language instruction is "not necessary."

In addition to the flexibility provided to districts by the general waiver authority of the Board, there are six options developed by the CDE and others which are available for local districts in conducting instructional programs for English learners. These six options are being widely used in California and are set forth in the enclosed chart. (See Enclosure C) The flexibility provided by these options or other appropriate programs may be used in combination with the flexibility offered by general waivers.

Additional Questions

The CDE has received the following two specific questions regarding the status of programs and services for English learners.

1. Did the State Board of Education policy eliminate the requirements to provide primary language instruction or support for English learners?

Federal law does not require primary language instruction or support. A provision of state law (which remained operative after the 1987 sunset of most program requirements for bilingual education) requires primary language instruction or support when it is determined to be necessary for individual students in accordance with locally adopted policies. However, this provision of law can be waived by the State Board of Education when so requested by local educational agencies. The State Board recognizes that for practical reasons, some local agencies are simply unable to provide instructional or support in the primary language of every pupils for whom the agencies have determined such instruction or support is necessary. The State Board also recognizes that some local agencies have determined that they can better serve the needs of English learners without primary language instruction or support. The State Board has expressed its commitment to approving requests to waive the post-sunset state requirement for primary language instruction or support where an applying local agency shows that "results are being or will be achieved." Local agencies wishing to apply for a waiver may do so and may wish to use this advisory for guidance.

2. How does the U.S. Department of Education, Office for Civil Rights (OCR) policy on services for English learners relate to the State Board of Education policy?

The two policies are aligned. The State Board policy reinforces the Castañeda standard applied by OCR as the ultimate test of appropriateness of all programs for English learners; i.e., that (1) the program is based on a sound theory; (2) adequate procedures, resources, and personnel are provided to implement the program; and (3) evaluation shows that, after a reasonable period, students actually learn English and do not suffer any substantive academic deficits.³

³The policies agree that the evaluation requirement applies equally to all programs for English learners -- those that use primary language instructional methodologies and those that do not. Local agencies are expected to use evaluation results to modify and improve programs that are not effective.

Please address additional questions regarding this advisory or about the general waiver application described above to the Complaints Management and Bilingual Compliance Unit (CMBC), at (916) 657-4674 or FAX: (916) 657-3112. For technical assistance on compliance issues for English learners, contact the CMBC consultant assigned to your county or district. (Please see Enclosures D and E.)

Enclosures

- A. California State Board of Education, *Policy Statement on Educational Programs and Services for Limited-English Proficient Students*. July 14, 1995.
- B. General Waiver Application Packet, July 1995
- C. English Learner Options
- D. Contact List for English Learner Services
- E. CMBC Assignments for Technical Assistance

References

Castañeda v. Pickard (5th Cir. 1981) 648 F.2d 989.

Office of Administrative Law Determination No. 94-1, issued pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3, Sections 121-128.
Office of Administrative Law, December 22, 1994.

Opinion of John K. Van De Kamp No. 87-1001. California Attorney General, January 20, 1988.

Policy Statement on Educational Programs and Services for Limited-English Proficient Students.
Sacramento: California Department of Education, Revised July 14, 1995.

NOTICE

THE GUIDANCE IN THIS PROGRAM ADVISORY IS NOT BINDING ON LOCAL EDUCATION AGENCIES OR OTHER ENTITIES. EXCEPT FOR THE STATUTES, REGULATIONS, AND COURT DECISIONS THAT ARE REFERENCED HEREIN, THIS PROGRAM ADVISORY IS EXEMPLARY, AND COMPLIANCE WITH IT IS NOT MANDATORY. (See Education Code section 33308.5.)

CALIFORNIA STATE BOARD OF EDUCATION

POLICY

ADOPTED:	January 10, 1986
AMENDED:	August 11, 1987
REVISED:	July 14, 1995

SUBJECT:	Policy Statement on Educational Programs and Services for Limited-English Proficient Students ¹
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After considerable deliberation and discussion, the California State Board of Education adopts the following policy statement on educational programs and services for limited-English proficient students (or "English learners").¹ This policy statement is intended to guide school districts and motivate them to implement high quality language and academic programs for English learners.

Intent. Whereas the state recognizes that the size and diversity of the population of English learners is constantly increasing, and these students require supplemental services, funding, and staffing, the State Board of Education strongly encourages districts to monitor closely the development of these students' English proficiency and academic achievement so they might be placed in mainstream English programs as quickly, efficiently, and effectively as possible.

Federal Law. The 1974 U.S. Supreme Court decision in *Lau v. Nichols* as codified in the *Equal Education Opportunities Act* and other federal laws require that each educational agency "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." A three part analysis is used to determine "appropriate action."

- ▶ Use sound theory. The educational theory upon which instruction is based must be sound.
- ▶ Provide adequate support. The school system must provide the procedures, resources, and personnel necessary to apply the theory in the classroom. The resulting program must be implemented effectively.
- ▶ Achieve results. After a reasonable period, application of the theory must actually overcome English language barriers confronting the students and must not leave them with substantive academic deficits.

¹"Limited-English proficient students" and "English learners" are synonymous and are used interchangeably in this policy statement. The State Board recognizes that "English learners" is becoming more widely used, because it does not imply that the identified students are in any way *limited* participants in the educational process.

**Policy Statement on Educational Programs and Services for
Limited-English Proficient Students**

State Law. The specific programmatic provisions of California's "bilingual education" program "sunset" on June 30, 1987, in keeping with *Education Code* section 62000.2(d). However, funds for that program "continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program," in keeping with *Education Code* section 62002. Moreover, parent advisory committees required by that program "continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979," in keeping with *Education Code* section 62002.5.

The State Board finds and declares that the "bilingual education" program that sunset under *Education Code* section 62002.2(d) is the *Moscone-Chacon Bilingual-Bicultural Education Act of 1976*, Article 3 (commencing with section 52160) of Chapter 7 of Part 28 of the *Education Code*.

The State Board of Education finds and declares that the general purposes of the *Act* are eight in number and expressed as follows, based upon the language contained in *Education Code* section 52161. The general purposes are listed here in the same order as they appear in the statute.

1. "[T]he Legislature directs school districts to 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...[and] intends that the public institutions of higher education establish programs to qualify teachers and administrators in the bilingual and crosscultural skills necessary to serve these pupils."
2. "The Legislature finds and declares that the primary goal of all programs under this article is, as effectively and efficiently as possible, to develop in each child fluency in English."
3. "The programs shall also provide positive reinforcement of the self-image of participating pupils..."
4. "The programs shall also...promote crosscultural understanding..."
5. "The programs shall also...provide equal opportunity for academic achievement, including, when necessary, academic instruction using the primary language."

Policy Statement on Educational Programs and Services for Limited-English Proficient Students

6. "It is the purpose of this article to require California school districts to offer bilingual learning opportunities to each pupil of limited English proficiency enrolled in the public schools..."
7. "It is the purpose of this article to require California school districts...to provide adequate supplemental financial support to achieve [the purpose set forth in 6]."
8. "Insofar as the individual pupil is concerned, participation in bilingual programs is voluntary on the part of the parent or guardian."

State Board of Education Guidance. Based upon the provisions of federal and state law, the State Board of Education hereby establishes two goals which the State Board urges all school districts to achieve through educational programs and services for English learners:

- Rapid development of English language proficiency (literacy), including speaking, reading, and writing.
- Opportunity to learn, including access to a challenging core curriculum and access to primary language development.

Principles for Educational Programs and Services for English Learners. The State Board of Education hereby establishes five principles relating to educational programs and services for English learners:

- Maximum local flexibility to determine which instructional programs and methodologies best achieve results.
- Instructional programs based on sound educational theory, emphasizing that local programs may include primary language instruction, English language development through "sheltered" content instruction, and/or other sound instructional methodologies.
- Adequate resources and personnel to implement local plans and programs.
- 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.
- Due process in all compliance matters.

Policy Statement on Educational Programs and Services for Limited-English Proficient Students

Goals and Principles Not Binding on School Districts. In keeping with *Education Code* section 33308.5, the State Board of Education makes clear that the guidance provided above is advisory in nature and that only the requirements of federal and state law (and, where applicable, decisions of courts of law) are binding upon school districts, as they develop and implement educational programs and services for English learners.

Focus of Department of Education Support and Compliance Activity. The State Board of Education by policy directs that the California Department of Education focus all support and compliance activity toward the objective of conformity by school districts with the requirements of federal law and applicable requirements of state law as they pertain to educational programs and services for English learners. In particular, compliance efforts shall emphasize results, i.e., after a reasonable period, application of the locally selected educational theory actually overcomes English language barriers confronting the students and does not leave them with a substantive academic deficit.

Waivers. The State Board of Education recognizes that the general purposes provisions of the *Moscone-Chacon Bilingual-Bicultural Education Act of 1976* that remain after the 1987 sunset are subject to various statutory waiver authorities, including the general waiver authority set forth in *Education Code* section 33050, et seq. The State Board hereby expresses its intent to approve waiver requests relating to those general purposes requirements where results are being or will be achieved by the applying agency.

Compliance Monitoring and Due Process. The California Department of Education shall use the compliance monitoring and due process procedures for educational programs and services for English learners that it uses for other categorical programs and shall advise local educational agencies that they may avail themselves of due process in all compliance matters related to those programs.

A memorandum of understanding between the Superintendent of Public Instruction and the State Board shall be prepared regarding procedures to be followed to address any dispute between the California Department of Education and a local educational agency immediately prior to the presentation to the State Board of any recommendation for restricted approval of the agency's consolidated application or for interruption of funds.

GENERAL WAIVER REQUEST

GW-1 (12/96)

Return to: Office of the Chief Deputy Superintendent for Instructional Services
 721 Capitol Mall, Suite 546
 Sacramento, CA 95814
 (916) 654-6853

CDS CODE					

LEA:	Contact/recipient of approval/denial notice:		
Address:	(City)	(State)	(ZIP)
			Phone: ()
Period of request: From:	To:	Local board approval date:	Date of public hearing:

PART I. LEGAL CRITERIA

(PLEASE PROVIDE THE INFORMATION REQUESTED IN THE SPACES DESIGNATED.)

1. Education Code, California Code of Regulation Section(s), or portion(s) thereof to be waived: _____

2. Position of the bargaining unit. Does the district have any employee bargaining units? Yes No

Date(s) the bargaining unit(s) was (were) consulted: _____ / _____ / _____

Name of bargaining unit person(s) consulted: _____

The position(s) of the bargaining unit(s) was/were: Neutral Support Oppose *(Please summarize below.)*

If the existing unit was not consulted, *please summarize below.*

3. Procedure for advertising public hearing. (A public hearing is not simply a board meeting, but a properly noticed public hearing held during a board meeting at which time the public may testify on the waiver proposal. Distribution of local board agenda does not constitute notice of a public hearing. Acceptable ways to advertise include: (1) print a notice that includes the time, date, location, and subject of the hearing in a newspaper of general circulation; or (2) in small school districts, post a formal notice at each school and three public places in the district (modeled after E.C. Section 5362). How was the required public hearing advertised?

Notice in a newspaper? Notice posted at each school? Other: _____ *(Please summarize below.)*

4. Advisory committees/school site councils. Please identify the council or committee that reviewed this waiver:

Date the committee/council reviewed the waiver request: _____ (Date)

Check here, if there were objection(s). *(Please summarize the objection(s) below.)*

GENERAL WAIVER REQUEST

GW-1 (12/96) Page 2

PART II. PURPOSE AND DESIRED OUTCOMES

1. Summary of the Education Code or California Code of Regulation section to be waived. (Please summarize the meaning of the Education Code or California Code of Regulation section to be waived.)

2. Desired outcome/rationale. (State what you hope to accomplish with the waiver. Describe briefly the circumstances that brought about the request and why the waiver is necessary to achieve improved student performance and/or streamline or facilitate local agency operations.)

District or County Certification—I hereby certify that the information provided on this application is correct and complete.

Signature of Superintendent or Designee
>

Title:

Date:

FOR CALIFORNIA DEPARTMENT OF EDUCATION USE ONLY

Responsible Office:

Scheduled for SBE:

Waiver No.

Guidelines: Met Not Met Don't Exist

DEPARTMENT OF EDUCATION RECOMMENDATION: Approve Deny

Staff (Type or print)

Staff (Signature)

Date:

>

Unit Manager (Type or print)

Unit Manager (Signature)

Date:

>

Division Director (Type or print)

Division Director (Signature)

Date:

>

Deputy (Type or print)

Deputy (Signature)

Date:

>

General Waiver Request

Identification Information:

CDS Code (7-digit) - this code number can be found in the *California Public School Directory*. It is printed before the listing of each district or county office of education.

Contact - list the name of the person who is most knowledgeable about this waiver request, which may be the person completing the form.

Address, City, State, Zip, Phone - this is the address and the phone number of the LEA making the request.

Period of Request - Generally this is established by the language of the authorizing law. For example, Section 33050 restricts General waivers to two years, but some topics have SBE guidelines that restrict them to one year.

Local Board Approval Date/Date of public hearing - Please refer to those sections below.

Part I. Legal Criteria

1. **Education Code, California Code of Regulation Section or portion to be waived.** If the topic to be waived is listed in item three of the Table of Contents, list the section number and the topic. If it is not, state the E. C. Section number(s) and the sentence from the law and state the precise issue.
2. **Position of the bargaining unit.** General waivers require the district to consult with the teachers and/or classified bargaining units, as appropriate, prior to the local public hearing. The district's or county's obligation to consult unions is not restricted to contract issues. Although union support is not a required condition for State Board approval, the request must reflect the district's efforts to involve any affected bargaining units. If an existing union was not contacted, an explanation must be attached.
3. **Procedure for advertising public hearing.** General waivers require the local board to conduct a public hearing on the waiver request before it can be considered by the SBE. A public hearing is not simply a board meeting, but a properly noticed public hearing held during a board meeting at which time the public may testify on the waiver proposal. Distribution of local board agenda does not constitute notice of a public hearing. Acceptable ways to advertise include: (1) print a notice that includes the time, date, location, and subject of the hearing in a newspaper of general circulation; or (2) in small school districts, post a formal notice at each school and three public places in the district (modeled after E.C. Section 5362).
4. **Advisory committees/school site councils.** For some topics, there may be a committee or council with an interest in the waiver and they must be consulted. For example, waivers related to School Improvement (SIP) must be approved by the school site council; those related to sale/lease of property must be reviewed by the district facilities committee; those related to assessment of LEP students must be reviewed by the bilingual advisory committee, etc. If the committee has objections, summarize them on an attachment.

Part II. Purpose and Desired Outcomes.

1. **Summary of the Education Code or California Code of Regulation section to be waived.** Summarize the meaning of the Education Code or California Code of Regulation section to be waived. Please do not copy the language of the law, but restate in your own words what this section means for your purposes.

2. **Desired Outcome/ratio.** State as briefly as possible what this waiver will accomplish. Please do not restate the law. Briefly describe the circumstances that brought about this request and why the waiver is necessary to achieve improved student performance and/or streamline local agency operations.

District or County certification. The District or County Office of Education Superintendent or designee is to sign where indicated and date the request application.

Specific Waiver Request

Identification Information:

CDS Code (7 digit) - this code number identifies the district or county office of education and can be found in the *California Public School Directory*. It is printed before the listing of each district and county office of education.

Contact - list the name of the person who is most knowledgeable about this waiver request, which may be the person completing the form.

Address, City, State, Zip, Phone - this is the address and the phone number of the LEA making the request.

Period of Request - Generally this is established by the language of the authorizing law. For example, Section 33050 restricts General waivers to two years, but some topics have SBE guidelines that restrict them to one year.

Local Board Approval Date - State the date that the local School Board approved this waiver request.

Part I. Legal Criteria

1. **Type of Waiver.** Indicate here the type of waiver requested, Specific, Special Education, or Special Education SBCP Waiver.

Specific - The Education Code contains several provisions that authorize districts and counties to request the SBE to waive specific parts of the Code. Such waivers require local board approval and may require consultation with a relevant council or committee.

Special Education/SBCP - The following sections of the Education Code refer to Special Education or Special Education School-Based Coordinated Plan (SBCP) issues:

<u>E. C. Section</u>	<u>Purpose</u>
56362(c)	to exceed the maximum caseload for resource specialist
56364	Inclusion of Special Day Class Students
56362(c)	to allow programmatic flexibility under school-based coordination <ul style="list-style-type: none"> • Resource Specialist to exceed caseload under School-Based Coordinated Plan (SBCP)
52860, 56364 & CCR5 3053(c)	for some special day classes to participate in SBCP
52860, 56362(c), 56364, CCR5 3953(c)	Special education SBCP waiver renewal request
56366.1(a)	to waive any of the requirements pertaining to nonpublic schools/agencies.
56365(f)	reporting of out-of-state nonpublic, nonsectarian school and agency placements

2. **Education Code, California Code of Regulation Section or portion to be waived.** If the topic to be waived is listed in item three of the Table of Contents, list the section number and the topic. If it is not, state the E. C. Section number(s) and the sentence from the law and the states the precise issue.

2. WAIVER CONTACT JDE (ALL PHONE NUMBERS ARE IN THE 916 AREA CODE)

<u>Topic</u>	<u>Contact</u>	<u>Office</u>
Alternative Education, EC 58509	Lynn Hartzler, 323-5034	Educational Options Office
Assessment	Bonnie Williamson, 654-6528	Student Performance Division
Pupil Testing	Barbara Abbott, 657-5029	Student Performance Division
Bilingual Issues		
Primary Language Instruction	Hector Burke, 657-4681	Academic Support Office
Bilingual Tester/Alternative Instrument	Gloria Cardenas, 657-3713	Complaints Management & Bilingual Compliance
Other	Norm Gold, 657-4674	Complaints Management & Bilingual Compliance
Career-Vocational Education	Stu Greenfeld, 657-2532	High School Teaching and Learning Division
Carl Perkins/Agric.	Lee Murdoch, 657-3915	High School Teaching and Learning Division
Incentive Grants	Bob Heuvel, 657-5358	High School Teaching and Learning Division
General	Suzanne Rios, 657-2795	High School Teaching and Learning Division
	Carolyn Machiavelli, 657-3839	High School Teaching and Learning Division
	Jeff Cohen, 654-6064	High School Teaching and Learning Division
Class Size	Dennis Turner, 657-2446	High School Teaching and Learning Division
Work Experience	Barbara Krabbenhoft, 322-6233	Child Development Division
Child Development	Duwayne Brooks, 445-0850	Child Nutrition/Food Distribution
Child Nutrition	Byron West, 322-1564	Child Nutrition/Food Distribution
	Fred Tempes, 657-3115	Compliance and Consolidated Programs Division
Consolidated Programs	Shirley Leonard, 653-0325	Compliance and Consolidated Programs Division
	Mary Chenier, 324-8988	School Business Services
District Reorganization	Daniel Reibson, 322-1468	School Business Services
	Vickie Lee, 657-3252	District and School Support Division
District and School Support	Sue Bennett, 323-5015	Educational Options
Educational Options		
Fiscal Penalties		
Admin./Teacher Ratio	Hanna Walker, 657-2577	District and School Support Division
Class Size	Leroy Munsch, 322-1471	School Business Services
Morgan-Hart Class Size Reduction Act	Jeff Cohen, 654-6064	High School Teaching and Learning Division
GATE	Cathy Barkett, 657-5257	High School Teaching and Learning Division
Instructional Time	Robert Miyashiro, 445-4766	Education Finance Division
	John Gilroy, 323-8478	Education Finance Division
	Anne Just, 657-4296	Research, Evaluation and Technology
Intradistrict Transfers	Roger Wolfertz, 657-2453	Legal Office
Legal Issues	Don Kelly, 657-4512	Teacher Education & Professional Development
Mentor Teacher Program	Nancy Sullivan, 654-1123	Elementary Grades Academic Support
Miller-Unruh	Kim Clement, 327-0857	Education Finance Division
Non-standard school year	Bruce Hagen, 657-2984	Teacher Education & Professional Development
Professional Development	Wade Brynerson, 653-3314	Healthy Kids
Physical Education Testing	Shirley Hazlett, 657-2810	Healthy Kids
	Gwen Stephens, 657-3011	Student Performance Division
	Bill Padia, 657-2757	Research Evaluation and Technology
Pupil Proficiency	Norma Carolan, 657-3799	Educational Planning and Information Center
EC 51215-51225.4 and 51412	Pamela Davis, 654-6518	Middle Grades Academic Support
School Improvement Program	Tom Payne, 322-6249	School Facilities Planning
Sale or Lease of Real Property	Henry Heydt, 322-1461	School Facilities Planning
EC 39290-39545	Jenny Singh, 654-6170	Policy and Program Coordination
School-Based Management, EC 44669	Dianna Elzey, 322-2241	Special Education Division
Special Education	Romona Burton, 327-3690	Special Education Division
Non-public schools and agencies, EC56366		
School Based	Barbara Castillo, 657-5081	Middle Grades Academic Support
Coordinated Programs		
State Board of Education Issues	Greg Geeting, 657-5478	State Board of Education

3. **Position of the bargaining unit.** Note that this item only applies to those requests for waivers of Education Code section 44669. Since this item is part of the legal requirement for waiver of this code section, please complete this item fully.

Part II. Rationale and Desired Outcome

1. **Section to be waived.** Type the text of the pertinent sentence of the law. Please be judicious in your selection so that the following summary clarifies your use of this section of the law.
2. **Summary of the Education Code or California Code of Regulation section to be waived.** Summarize the meaning of the Education Code or California Code of Regulation section to be waived. Please do not copy the language of the law, but restate in your own words what this section means for your purposes.
3. **Desired Outcome/rationale.** State as briefly as possible what this waiver will accomplish. Please do not restate the law. Briefly describe the circumstances that brought about this request and why the waiver is necessary to achieve improved student performance and/or streamline local agency operations

Important Note: The SELPA Administrator's name and/or signature on the submitted form indicates accuracy and completeness of the waiver request. If a SELPA Administrator is not supportive of the waiver request, a statement of explanation is required. All statements will be considered in the Department's review and recommendation to the State Board of Education. If no statement to the contrary is attached, it will be concluded that the SELPA is neutral or supportive of the waiver request. If this form is submitted electronically, the name/signature will be verified.

District or County certification. The District or County Office of Education Superintendent or designee is to sign where indicated and date the request application

English Learner Options

Option/Resource	Description
<p>1 - Results Based Assessment of District Services to English Learners <u>Option 1 Alternatives: Technical Standards and Recommended Practices for Development of Outcome Based Assessment of District Services to Limited-English-Proficient (LEP) Students</u>, 1991</p>	<p>A district provides evidence that its program for English learners is effective in developing their English proficiency, and in providing them equal opportunity for academic achievement. Data show that the district's program does not result in substantive academic deficits for English learners (or former English learners).</p>
<p>2 - CTC Authorized Teachers Commission on Teacher Credentialing</p>	<p>Districts assign CTC authorized teachers to meet all or part of the need for bilingual and ELD teachers. These teachers may also include holders of SB 1969 certificates.</p>
<p>3 - Local Designation of Teachers <u>Technical Assistance Manual: Local Designation of Qualified Teachers - LEP Staffing Option 3</u> (September, 1989) <u>Guidelines for Proficiency Tests</u> (1982)</p>	<p>Districts may develop procedures and criteria as alternatives to CTC authorizations, and, upon approval by CDE, issue local certifications to teachers who meet established standards of competence as ELD or bilingual teachers.</p>
<p>4 - LEP Staffing Plan and Annual Report Sample Plan to Remedy the Shortage of Qualified Teachers for LEP Students (1989)</p> <p><u>A Resource Guide: Plan to Remedy the Shortage of Qualified Teachers</u> (1989)</p> <p><u>Overcoming Teacher Shortages for LEP Students: A Promising Practices Guide</u> (1991)</p>	<p>Districts with a shortage of bilingual or ELD teachers develop a plan to remedy that shortage, and annually report to CDE on progress in the implementation of that plan.</p>
<p>5 - Waiver of Primary Language instruction</p> <p><u>Sample General Waiver Request</u> (1989)</p>	<p>Districts that are unable to provide the academic instruction through the primary language that some English learners are diagnosed to require, may develop an alternative program of instruction, and apply to CDE for a one to two-year general waiver. During the time of the waiver the district continues to implement its <u>LEP Staffing Plan</u>, as well as the alternative instructional program described in the waiver.</p>
<p>6 - Small or Scattered Distributions</p> <p>Memorandum: Six Staffing and Instructional Options and CCR Implications (September 18, 1989)</p>	<p>Districts that enroll one or more language groups of English learners who number no more than 50 district wide, and no more than 20 at any one school, may participate in this option for such language group(s). The specific CCR requirements for the instructional program (LEP.2, 3, 4) and staffing (LEP.6, 7) are not reviewed. Alternative procedures are recommended.</p>

CONTACT LIST FOR LEP SERVICES

LEP PROGRAM REQUIREMENTS AND UNIFORM COMPLAINT PROCEDURES INFORMATION

Complaints Management and Bilingual Compliance Unit (CMBC)

Manager: Norman C. Gold

(916) 657-4674

Bilingual Compliance Consultants:

Lauri Burnham-Massey

654-8787

David Dolson

657-3938

Suanna Gilman-Ponce

657-2898

Leroy Hamm

657-3699

Jan Mayer

657-4683

Complaints Consultants:

Maria Chavez

654-9247

Howie DeLane

657-3679

Information Systems Analyst:

Gloria Cardenas

657-3713

LEP Administrative Options

Opt. 1 Results Based Alternative

Tony Salamanca

657-4420

Opt. 2 CTC Authorized Teachers

CTC

445-7254

Opt. 3 Local Designation of Teachers

CMBC

657-4674

Opt. 4 LEP Staffing Plan and Annual Report

CMBC

657-4674

Opt. 5 Waiver of Primary Language Instruction

Hector Burke

657-4681

Opt. 6 Small and Scattered Populations

Hector Burke

657-4681

Identification and Assessment

R-30 Language Census Survey and Data BiCal

Tony Salamanca

657-4420

Primary Language Assessment and Alternative

Gloria Cardenas

657-3713

Instrument Waiver

Authorized Testing Instruments

Dan Zuckerman

657-4291

Staffing and Training

CTC Authorizations

Bob Carlson

327-8663

SB 1969 Regulations

Bob Carlson

327-8663

Bilingual Teacher Training Program

Priscilla Walton

657-3393

IASA, Title VII

Francisca Sanchez

657-2566

LEP Staffing Plan & Annual Report

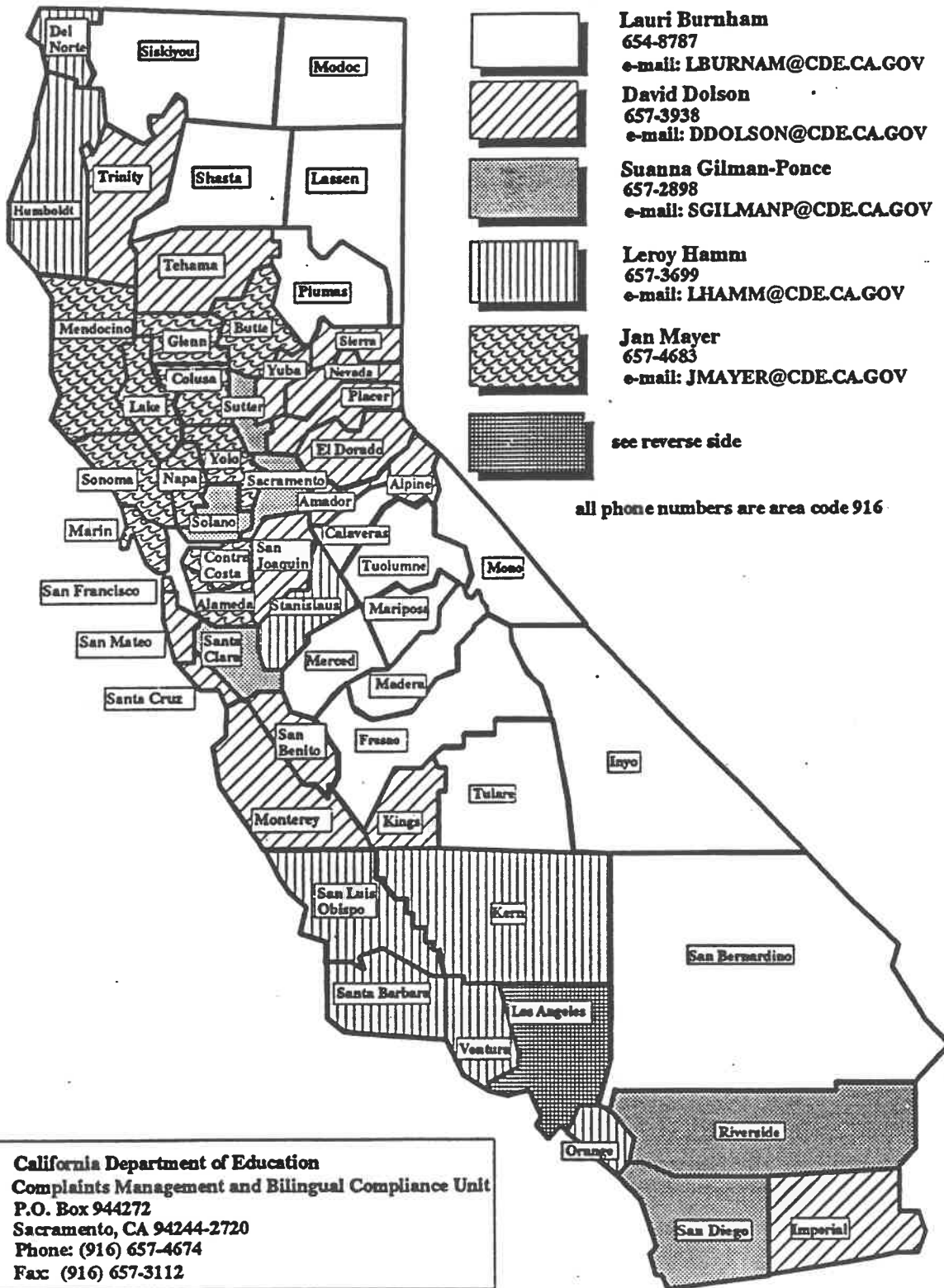
CMBC

657-4674

LEP PROGRAM SERVICES: STATE AND FEDERAL OFFICES

	<u>TELEPHONE</u>	<u>FAX</u>
Complaints Management and Bilingual Compliance (CMBC)	(916) 657-4674	(916) 657-3112
Elementary Academic Support Unit (Bilingual education support)	(916) 657-2916	(916) 657-2928
Consolidated Programs and Information Management (CPIM)	(916) 657-2973	(916) 657-4989
Commission on Teacher Credentialing (CTC)	(916) 445-7254	(916) 327-3166
Coordinated Compliance Review Unit (CCR)	(916) 657-3146	(916) 657-3632
Office for Civil Rights (OCR) (United States Department of Education)	(415) 437-7700	(415) 437-7783

**Complaints Management and Bilingual Compliance Unit
Bilingual Consultant Assignment by County**



California Department of Education
Complaints Management and Bilingual Compliance Unit
P.O. Box 944272
Sacramento, CA 94244-2720
Phone: (916) 657-4674
Fax: (916) 657-3112

September, 1996

Complaints Management and Bilingual Compliance Unit

Consultant Assignments for Districts in Los Angeles County

<u>District</u>	<u>Consultant</u>	<u>District</u>	<u>Consultant</u>
ABC UNIFIED	David Dolson	LAWNDALE ELEMENTARY	Jan Mayer
ACTON-AGUA DULCE UNI	David Dolson	LENNOX ELEMENTARY	Jan Mayer
ALHAMBRA CITY ELEMEN	David Dolson	LITTLE LAKE CITY ELE	Jan Mayer
ALHAMBRA CITY HIGH	David Dolson	LONG BEACH UNIFIED	David Dolson
ANTELOPE VALLEY UNIO	Jan Mayer	LOS ANGELES COUNTY S	Leroy Hamm
ARCADIA UNIFIED	Jan Mayer	LOS ANGELES UNIFIED	Jan Mayer
AZUSA UNIFIED	Jan Mayer	LOS NIETOS ELEMENTAR	Jan Mayer
BALDWIN PARK UNIFIED	Jan Mayer	LOWELL JOINT ELEMENT	Jan Mayer
BASSETT UNIFIED	David Dolson	LYNWOOD UNIFIED	Jan Mayer
BELLFLOWER UNIFIED	David Dolson	MANHATTAN BEACH UNIF	Jan Mayer
BEVERLY HILLS UNIFIE	David Dolson	MONROVIA UNIFIED	Jan Mayer
BONITA UNIFIED	Jan Mayer	MONTEBELLO UNIFIED	Jan Mayer
BURBANK UNIFIED	David Dolson	MOUNTAIN VIEW ELEMEN	Jan Mayer
CASTAIC UNION	Jan Mayer	NEWHALL ELEMENTARY	Jan Mayer
CENTINELA VALLEY UNI	Jan Mayer	NORWALK-LA MIRADA UN	Leroy Hamm
CHARTER OAK UNIFIED	Jan Mayer	PALMDALE ELEMENTARY	Jan Mayer
CLAREMONT UNIFIED	David Dolson	PALOS VERDES PENINSU	Jan Mayer
COMPTON UNIFIED	Leroy Hamm	PARAMOUNT UNIFIED	David Dolson
COVINA-VALLEY UNIFIE	Suanna Gilman-Ponce	PASADENA UNIFIED	Jan Mayer
CULVER CITY UNIFIED	Suanna Gilman-Ponce	POMONA UNIFIED	David Dolson
DOWNEY UNIFIED	David Dolson	REDONDO BEACH UNIFIE	Jan Mayer
DUARTE UNIFIED	David Dolson	ROSEMEAD ELEMENTARY	Jan Mayer
EAST WHITTIER CITY E	David Dolson	ROWLAND UNIFIED	Jan Mayer
EASTSIDE UNION ELEME	David Dolson	SAN GABRIEL UNIFIED	Jan Mayer
EL MONTE CITY ELEMEN	David Dolson	SAN MARINO UNIFIED	Jan Mayer
EL MONTE UNION HIGH	Leroy Hamm	SANTA MONICA-MALIBU	Jan Mayer
EL RANCHO UNIFIED	David Dolson	SAUGUS UNION ELEMENT	Jan Mayer
EL SEGUNDO UNIFIED	Jan Mayer	SOUTH PASADENA UNIFI	Jan Mayer
GARVEY ELEMENTARY	David Dolson	SOUTH WHITTIER ELEME	Jan Mayer
GLENDALE UNIFIED	David Dolson	SULPHUR SPRINGS UNIO	Jan Mayer
GLENDORA UNIFIED	Jan Mayer	TEMPLE CITY UNIFIED	Jan Mayer
GORMAN ELEMENTARY	David Dolson	TORRANCE UNIFIED	Jan Mayer
HACIENDA LA PUENTE U	Leroy Hamm	VALLE LINDO ELEMENTA	Jan Mayer
HAWTHORNE ELEMENTARY	Jan Mayer	WALNUT VALLEY UNIFIE	Jan Mayer
HERMOSA BEACH CITY E	Jan Mayer	WEST COVINA UNIFIED	Jan Mayer
HUGHES-ELIZABETH LAK	David Dolson	WESTSIDE UNION ELEME	Jan Mayer
INGLEWOOD UNIFIED	Suanna Gilman-Ponce	WHITTIER CITY ELEMEN	Jan Mayer
KEPPEL UNION ELEMENT	Jan Mayer	WHITTIER UNION HIGH	Leroy Hamm
LA CANADA UNIFIED	Jan Mayer	WILLIAM S. HART UNIO	Jan Mayer
LANCASTER ELEMENTARY	Jan Mayer	WILSONA ELEMENTARY	Jan Mayer
LAS VIRGENES UNIFIED	Jan Mayer	WISEBURN ELEMENTARY	Jan Mayer

Attachment C

Staff Report
Orange Unified School District
General Waiver Application

Alternative Instructional Plan for
Limited-English Proficient Students

June 11, 1997

This is a recommendation that the General Waiver Application of the Orange Unified School District regarding services for limited-English proficient students be denied in its current form, for Waiver Reasons #1 (*The educational needs of the pupils are not adequately addressed*), #4 (*Pupil or school personnel protections are jeopardized*), and #5 (*Guarantees of parental involvement are jeopardized*). (See Education Code section 33051, sub.(a) (1), (4), and (5).

Specifically, the waiver does not meet the guidelines set forth by the State Board of Education in its "Program Advisory for Programs for English Learners, March 1997" (adopted in October, 1996). In that advisory, districts who are seeking general waivers were advised that the Board would use the Castañeda federal court requirements to review requests for waivers. A complete analysis of the district's waiver application in terms of the federally-required (Castañeda) "appropriate action" pursuant to 20 U.S.C. section 1703 (f), outlined in the State Board "Program Advisory for Programs for English Learners," is attached. The left column contains quotes directly from the program advisory; the right column contains a description of how the waiver application fails to adequately respond to the Castañeda standards as set forth in that advisory.

Background

The Orange Unified School District (OUSD) enrolls approximately 28,000 students in 37 schools. Over 7,000 (25%) of the students are limited in English proficiency (LEP). The major language group (86%) is Spanish (over 6,000 LEP students). Other language groups include Vietnamese (approximately 500 LEP students), Korean (approximately 90 LEP students), and several other language groups (with small and scattered numbers of LEP students).

The waiver proposal has generated substantial controversy in Orange. Unlike the three previous districts that have requested and been granted general waivers regarding the LEP program, OUSD is proposing to dismantle an existing program. The department has received fifteen separate complaints about the content of the waiver application, and about the Procedures employed by the district to garner community input. Several allege possible violation of state or federal law. Over eight hundred parents (documented by signed petitions), have expressed serious concern about the effect that the proposed changes in the educational program would have on their children. Many parents have stated that their right to parental choice (to choose participation in a voluntary program) is being taken away. Also, numerous teachers and other staff members who have seen the success of their LEP students both in acquisition of English and in academic achievement are expressing opposition to the waiver, and are concerned that the current program would be taken away from children. The waiver is not supported by either of the district's employee bargaining units or by the District Bilingual Advisory Committee.

c: Alan Keown
Norm Gold
Lauri Burnham

Theory, Principles, and Research

...the application should describe the theory, principles, research, or other evidence which support the alternative program proposed. Evidence might come from pilot programs or practices used in the district or in other districts, as well as from published research. The principles or theory upon which the program is built should be recognized as sound by some experts in the field or at least deemed to be a legitimate experimental strategy.

In determining whether primary language instruction is or is not necessary, districts should link this determination to individual student assessed needs.

(The) district should describe how the program's theory will lead to use of objective information for the selection and modification of instructional programs for individual students over time.

The application submitted by the Orange Unified School District cites no research or other evidence to support the proposed alternative program and fails to provide a set of principles which can be translated into action in the classroom. The application (p.13) asserts that "the District's program is based on an English as a Second Language (ESL) model ...", but never fully describes the model, nor cites research to support it. There is a reference to "time on task" theory (p.14), but no research evidence is provided to support a valid theory.

The application states that the program will include academic support in the primary language "where the district determines it to be appropriate..." (P.3). Specifically how this determination will be linked to individual student needs and to the core curriculum is not stated.

A distinction is made in the application between "sheltered" instruction and specially designed academic instruction in English (SDAIE), but no citations are given to support this distinction. The descriptions of SDAIE and "sheltered" given in the application appear very similar. The most noticeable difference is that students at "intermediate or higher levels of English proficiency"(p. 26) would receive SDAIE and would "receive academic instruction at grade level..." (P. 27), while students at "lower levels of English proficiency" would receive "sheltered" instruction (p. 26). Since students at the

lower levels of English proficiency are not able to understand grade level instruction in English, these students are likely to incur substantive academic deficits. It is therefore incumbent on the district to explain how these students will catch up and achieve grade level after they have acquired intermediate or higher levels of English proficiency.

Some description of the "Natural Approach", which is mentioned as the district's methodology for implementing its ESL based program, is given (p. 15) as well as a reference to "thematic instruction" (p.16). However, the application fails to set forth a clear set of principles that can be used to design a specific plan of action for the selection and modification of instructional programs for individual students over time.

At no time does the waiver proposal describe or refer to research or other evidence to support the proposed program. As currently written, the District's waiver proposal clearly fails to meet the first prong of the Castañeda analysis.

Description of Program and Resources

The alternative instructional program needs sufficient detail to set forth the resources, staff, and training which will be dedicated to meeting the language and academic goals for English learners.

The application should describe staffing patterns, special materials and techniques to be used This section should describe how the specific services for English learners change over time as they acquire more English proficiency.

The district describes its proposed program (p. 13) as "based on an English as a Second Language (ESL) model.." A number of "program features" are described (pp. 16-18 & pp. 26-29), but clear descriptions of which students will receive the various "features," what staff members will be involved, and how services will change as students acquire more English are not provided.

•Although contending that its program relies on an ESL model, the district does not describe any English language development for secondary LEP students (grades 7-12).

The Addison-Wesley program, which is designed for students in grades K-6, is described in the waiver application on pages 24-26 and in appendices A, B, and F, and G. No ELD curriculum or materials are given for students at the secondary level. The Orange Unified School District enrolls approximately 2,321 LEP students at the secondary level. The application lacks a description of English language development for these students.

- Specially Designed Academic Instruction in English (SDAIE) is to be provided for LEP students at intermediate or higher levels of English proficiency. However, the application does not provide a sufficiently detailed description of how specific services for English learners change over time as they acquire more English proficiency.

- “Sheltered” core instruction is to be provided for LEP students who speak little or no English. It is not clear how this instruction differs from SDAIE nor what authorizations will be held by staff who provide it. Criteria for placement of students in this instruction are not included, nor is it explained how students are to be moved from “sheltered” to SDAIE. The application omits a description of how progress will be assessed and how students will be grouped for instruction. Neither does the application describe how the program will ensure that these students catch up to grade level after they have acquired English proficiency.

- Three voluntary instructional features (pre-K, summer/intersession, and after school tutorial programs) are described in general terms, but no budget is provided to explain whether these features will be made available to 100 LEP students or to all 7,101. The application does not make a claim that any of these features are essential to the overall LEP

program design, nor does it state that all students will have access to them. There is no description of criteria for access or placement in these features, nor does the application make a commitment for staffing these or for training of the staff who will provide these features.

•Primary language instructional support is to be provided by bilingual instructional aides “where deemed appropriate.” There is no description of who will decide that this support is appropriate or what criteria will be used to do so. Neither is there a description of how bilingual aides and the classroom teachers work together to ensure an articulated program. There is no mention of training that will be provided to the aides or what primary language materials will be available to students.

The alternative program and resources described in the District’s waiver application do not adequately describe how all LEP students will both acquire English and have access to grade level core curriculum. It therefore fails to meet the second prong of Castañeda.

Evaluation of Educational Results

An evaluation plan must be included. It should include specific student performance objectives and standards of program effectiveness for learning English and academic achievement.

The plan can include...

Describe how district and school site personnel collaborate to implement instruction and monitor the program processes as well as student results. Explain what changes will be

The Department has a major concern with the evaluation description provided in the waiver application (pp. 32-33). No baseline data is reported for acquisition of English proficiency or for academic achievement. With the exception of the redesignation criteria, no specific objectives for student achievement are given. No district goals for program effectiveness are provided. Four instruments for assessing student achievement are listed, but no district standards or criteria are provided.

made in schools where students do not meet English or academic achievement performance standards.

Describe the current measures of academic achievement of students affected by this waiver.... Indicate expected improvement in academic achievement to be obtained as a result of implementation of this waiver and provide specific student performance improvement targets for the waiver period.

Establish a reasonable timeline for accomplishing these objectives. The plan should specify what data will be collected, the timeline for analysis and reporting, and how it will be analyzed to determine whether the objectives have been met. Data reporting should include individual results and should be disaggregated by key subgroups by language, grade span, etc. Redesignation data should be reported by home language, length of time in program, and other relevant variables.

Although significant discretion is left to the district in designing an evaluation component, failure to set any standards for success for LEP students and for the program overall is not acceptable. Without a rigorous evaluation plan, the Department cannot recommend approval of any general waiver application. This proposal does not provide even a weak evaluation component.

The legal guarantees for LEP students require the setting of some specific goals for program effectiveness. All LEP and former LEP students must be addressed. The goals must be specific enough to make it possible to determine whether specific schools and the district as a whole are implementing successful programs. In this waiver application, the Orange Unified School District has failed to set standards for students or goals for program effectiveness. It has therefore clearly failed to satisfy the third prong of Castañeda.

June 12, 1997

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7

Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11

12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

16 Petitioners,

17

vs.

18

The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNS, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. Civ-S-97-1600 WBS GGH

SUPPLEMENTAL DECLARATION
OF MARIA QUIROZ IN SUPPORT
OF TEMPORARY RESTRAINING
ORDER

Date: September 18, 1997

Time: 1:30 p.m.

Dept: 41

1 **SUPPLEMENTAL DECLARATION OF MARIA QUIROZ**

2 I, Maria Quiroz, declare as follows:

3 1. I am a parent with children enrolled in Orange Unified School District. I have
4 previously given a declaration in this matter. At the start of this school year which began on
5 September 2, I enrolled my youngest daughter, Elizabeth, in Jordan elementary school's bilingual
6 kindergarten program. Her teacher's name is Ms. Wartburk.

7 2. On September 3, I attended an orientation for the parents at Jordan. During this
8 orientation the teacher explained to us in Spanish the school rules, what was expected of our children,
9 how we as parents could help at the school and the type of program our children would receive this
10 school year. At this time we were assured that our children would receive bilingual program. During
11 the first week of school, I visited my daughter's classroom and I was very pleased with what I saw.
12 The teacher was teaching the children in Spanish and my daughter and the other children appeared
13 to be very enthusiastic.

14 3. On Wednesday, September 10, I heard on the television that the federal judge had
15 ruled against the parents. I was very upset when I heard this news. When I visited the school the
16 following day I was even more upset to learn that the District had ordered the teachers not to speak
17 Spanish to our children. I don't understand why the District would care so little about the children
18 that they would make such a sudden change without thinking about how this change might harm our
19 children.

20 4. I visited my daughter's classroom again on Friday and was very upset to see that
21 the teacher was no longer teaching in Spanish to the children. When the teacher read a story in
22 English to the children, the children just stared at her and there was no reaction from them. I know
23 my daughter was confused. I saw that the teacher felt very bad and she explained to me that she had
24 to speak in English because of the District's order. She explain some things in Spanish to the children
25 because it was clear that they simply did not understand her.

26 5. When the children were given some time for free play I asked the teacher if I could
27 read one of the Spanish language story books to them and she gave me her permission. I wanted the
28 children to be able to understand at least something that day in their classroom. When I was reading

1 the book, the children payed close attention and were able to ask about the colors and shapes in
2 Spanish. I was also saddened because unless the District is stopped from harming the children, I, and
3 other Spanish speaking parents, will not be able to read to our children in the future or to help in the
4 classroom.

5 6. I am also the chairperson of Jordan's bilingual parent site advisory committee. By law
6 the District is supposed to consult with us regarding changes to our children's programs. We were
7 never consulted regarding the District's "no-Spanish" order. We should have been given the
8 opportunity to speak on behalf of our children and to tell the District our views about this change.
9 It has been made very clear to us that the District shows little interest in the views of Latino parents
10 and what they believe is best for their children. We are sending a letter signed by Jordan parents to
11 the Superintendent expressing to him our concerns about what the District is now doing to harm our
12 children. (See Attachment A to this Declaration).

13 7. I believe strongly that my child could benefit from the bilingual program and that she
14 and other children will be harmed if the bilingual program that was in place at the beginning of the
15 school year is no longer allowed to continue.

16

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Dated: September __, 1997 in Orange, California.

19

20

[See attached faxed signature page (over)]
Maria Quiroz

21

22 I, Celso Rodriguez, certify that I am fluent in English and Spanish and that I orally translated
23 the above declaration from English to Spanish to the above named individual to the best of my ability.

23

24 I declare under penalty of perjury that the foregoing is true and correct.

24

25

Dated: September ____, 1997

26

[See attached faxed signature page (over)]
Celso Rodriguez

27

28

1 the book, the children payed close attention and were able to ask about the colors and shapes in
2 Spanish. I was also saddened because unless the District is stopped from harming the children, I, and
3 other Spanish speaking parents, will not be able to read to our children in the future or to help in the
4 classroom.

5 6. I am also the chairperson of Jordan's bilingual parent site advisory committee. By law
6 the District is supposed to consult with us regarding changes to our children's programs. We were
7 never consulted regarding the District's "no-Spanish" order. We should have been given the
8 opportunity to speak on behalf of our children and to tell the District our views about this change.
9 It has been made very clear to us that the District shows little interest in the views of Latino parents
10 and what they believe is best for their children. We are sending a letter signed by Jordan parents to
11 the Superintendent expressing to him our concerns about what the District is now doing to harm our
12 children. (See Attachment A to this Declaration).

13 7. I believe strongly that my child could benefit from the bilingual program and that she
14 and other children will be harmed if the bilingual program that was in place at the beginning of the
15 school year is no longer allowed to continue.

16

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Dated: September 16 1997 in Orange, California.

19

20


Maria Quiroz

21

22 I, Celso Rodriguez, certify that I am fluent in English and Spanish and that I orally translated
23 the above declaration from English to Spanish to the above named individual to the best of my ability.

24


25 I declare under panalty of perjury that the foregoing is true and correct.

26

27

Dated: September 16, 1997

28


Celso Rodriguez

Attachment A

September 16, 1997

Dr. French,

As parents, we are very concerned about your decision to go from Bilingual Education to English only when the courts are still deciding what is best for our children. You have made it very difficult for our teachers and our children who have had to go from a Bilingual Program to English only in one day. It is not fair to our children who came in one day and were able to understand what was going on in their classroom and were learning, to the next day when they were told that there would be no more Spanish. Our children are confused and sad. And as parents we can no longer help our children with their homework. We can no longer help the teacher in the classroom. This is wrong. Please think of our children and not of your needs.

Jordan Parents,

TOMASA ESPINOZA

Hilda Varquez

EVA ARCOS V.

Marta Lopez
Guadalupe B.

INEZ Dominguez

Reynalda Corona

Antonia Rivera

Hilda-medel

LOURDES - MERCADO

GISELA GUTIERREZ

Marina Salazar

SILVIA GALICIA

Irma Lopez

Julia Sanchez

D. I. I. D.

TOMASA Hernandez

Marlene Sanchez.

ALEXANDRA BARRETO

MARIA HERNANDEZ.

Imo Lora

Gloria Flores

Virginia Elizarraras

Ernesto Elizarraras

Gloria Jimenez

Eligio Moreno M.

Francisco Moreno

Leonila Moreno

Dominga Rosas

Humberto Trancoso

Guadalupe

Alicia Rojas
Cathy Escobedo

Maria Palacios
Gabriela Garcia
Hilario de Resas.

Consuelo Gutierrez
maria Lopez

Ines Izrada

Patricia Aguilar.

Alicia Santiago D.

Lucia Rojas

Maria Muñoz

Josefina Rosales
Difunta ANA ROSAS

Petra Moreno
Susana Rodriguez
Victoria Galicia

EVALUZ CARRETO

GUADALUPE Villanueva

Rosalía Cerón
Maria Bauno.

patricia Dalgado

ANA M^a OLIVAR

Rosa Benita

Elizabeth Campos

~~Elizabeth Campos~~

Agustina Sanchez

Eva Orozco

Susana Peralta

zenaida Rosas

Margarita Prado

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7 Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO,
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers,

16 Petitioners,

17 vs.

18 The STATE BOARD OF EDUCATION and its
members, YVONNE W. LARSEN, JERRY
19 HUME, NATALIE J. ARENA, KATHRYN
DRONENBERG, S. WILLIAM MALAKASIAN,
20 MARION MCDOWELL, JANET NICHOLAS,
SANFORD C. SIGOLOFF, GERTI B.
21 THOMAS, ROBERT L. TRIGG, MARINA TSE,
THE STATE SUPERINTENDENT of PUBLIC
22 INSTRUCTION DELAINE EASTIN, The
CALIFORNIA DEPARTMENT OF
23 EDUCATION, ORANGE UNIFIED SCHOOL
DISTRICT, The BOARD OF EDUCATION OF
24 ORANGE UNIFIED SCHOOL DISTRICT and
its members MARTIN JACOBSON, MAX
25 REISSMUELLER, MAUREEN ASCHOFF, JIM
FEARNS, RICK LEDESMA and ROBERT
26 VIVIANO, and ROBERT FRENCH,
Superintendent, Does 1-100, inclusive,

27 Respondents.
28

CASE No. 97CS01793
Sac. County No.

**SUPPLEMENTAL DECLARATION
OF CELSO RODRIGUEZ IN
SUPPORT OF TEMPORARY
RESTRAINING ORDER**

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 SUPPLEMENTAL DECLARATION OF CELSO RODRIGUEZ

2

3 I, Celso Rodriguez, declare and depose as follows:

4 1. I am currently employed as a Bilingual/Title I Resource Teacher with the Orange
5 Unified School District at Jordan Elementary School. I have been a teacher for approximately 24
6 years. I have a Lifetime Teaching Credential for elementary grades K-8 and a Certificate of Bilingual
7 Competency. I have previously provided declarations in this matter.

8 2. Prior to the start of this school year I worked with my principal to ensure that Jordan's
9 bilingual education program would be properly implemented for the 1997-98 school year, which
10 began on September 2, 1997. As I explained in my previous declaration, little, if anything, had been
11 done to implement the District's waiver program at Jordan. Since the bilingual program had been
12 in effect during the 1996-97 school year there already was a well-established framework for the
13 implementation of the bilingual program for this school year. As noted in my previous declaration,
14 our bilingual program currently has the full complement of instructional materials necessary to
15 provide our LEP students access to the full core curriculum (language arts, math, science, and social
16 studies) in their primary language. There was no need to purchase additional materials to ensure
17 implementation of the program.

18 3. Prior to the start of the school year, our site worked to ensure that our LEP students
19 would have access to qualified personnel and that those students who were in most need of primary
20 language instruction would have access to that instruction to ensure their academic progress. Based
21 on assessed need and their level of English language proficiency, we grouped our LEP students in
22 specific bilingual classrooms and made the appropriate teacher assignments based on teacher language
23 skills, experience and qualifications. To compensate for the loss of our bilingual credentialed
24 (BCLAD) and ESL credentialed (CLAD) teachers who left our site as a result of the District's
25 proposed waiver, we will utilize team teaching strategies and our eight (8) bilingual instructional
26 assistants to facilitate primary language instruction. Our efforts to ensure the best qualified staff
27 were hampered by the fact that the District's administration would not allow our site to rehire a
28 bilingual teacher who was prepared to come back to staff one of our bilingual classrooms for this

1 school year. This teacher had previously taught in our bilingual program. To my knowledge, the
2 District continues to do nothing to specifically recruit either CLAD or BCLAD credentialed teachers,
3 or similarly qualified teachers for Jordan or other schools impacted by staff losses.

4 4. Based on my observations of our school site, it would be very difficult, if not
5 impossible, to implement the District's proposed waiver program now that the school year has begun.
6 As noted in my previous declaration, neither I nor other staff at our site have received any training
7 in the methodologies proposed by the waiver nor have I as a bilingual teacher received any training
8 to "adjust" my teaching techniques. No curriculum has been planned to replace the curriculum we
9 currently have in place in our bilingual program. No English language basic texts have been ordered
10 in the core curriculum areas of math, science or social studies for our LEP students. It would take
11 months to receive those materials even if they were ordered now and our bilingual teachers would
12 need training on how to use them.

13 5. To my knowledge, since the Superior Court's order was issued, no one from the
14 District's administration has told our site not to implement the bilingual program; in fact, the opposite
15 has occurred. In my view, as an educator who has taught LEP students for over 20 years, it would
16 be in the best interest of our LEP students if the District took aggressive steps, as they have done in
17 the past, to actively recruit and hire BCLAD, CLAD or similarly qualified teachers to replace both
18 the CLAD and BCLAD teachers who left the District as a result of its proposed waiver. Prior to and
19 during this first week of school, we have made every effort to ensure that our bilingual program was
20 implemented. I believe based on my own observation of our LEP program at Jordan and on my
21 experience working with LEP students that it would very extremely harmful for our students if their
22 educational program was abruptly changed.

23

24 I declare under penalty of perjury that the foregoing is true and correct.

25

26 Dated: September ____, 1997 in Corona, California.

27

28

See attached faxed signature page (over)
Celso Rodriguez

1 school year. This teacher had previously taught in our bilingual program. To my knowledge, the
2 District continues to do nothing to specifically recruit either CLAD or BCLAD credentialed teachers,
3 or similarly qualified teachers for Jordan or other schools impacted by staff losses.

4 4. Based on my observations of our school site, it would be very difficult, if not
5 impossible, to implement the District's proposed waiver program now that the school year has begun.
6 As noted in my previous declaration, neither I nor other staff at our site have received any training
7 in the methodologies proposed by the waiver nor have I as a bilingual teacher received any training
8 to "adjust" my teaching techniques. No curriculum has been planned to replace the curriculum we
9 currently have in place in our bilingual program. No English language basic texts have been ordered
10 in the core curriculum areas of math, science or social studies for our LEP students. It would take
11 months to receive those materials even if they were ordered now and our bilingual teachers would
12 need training on how to use them.

13 5. To my knowledge, since the Superior Court's order was issued, no one from the
14 District's administration has told our site not to implement the bilingual program; in fact, the opposite
15 has occurred. In my view, as an educator who has taught LEP students for over 20 years, it would
16 be in the best interest of our LEP students if the District took aggressive steps, as they have done in
17 the past, to actively recruit and hire BCLAD, CLAD or similarly qualified teachers to replace both
18 the CLAD and BCLAD teachers who left the District as a result of its proposed waiver. Prior to and
19 during this first week of school, we have made every effort to ensure that our bilingual program was
20 implemented. I believe based on my own observation of our LEP program at Jordan and on my
21 experience working with LEP students that it would very extremely harmful for our students if their
22 educational program was abruptly changed.

23

24 I declare under penalty of perjury that the foregoing is true and correct.

25

26 Dated: September 7, 1997 in Corona, California.

27

Celso Rodriguez
Celso Rodriguez

28

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Attorneys for Petitioners
8

9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers

16
17 Petitioners,

vs.

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOLOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARNs, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. Civ-S-97-1600 WBS GGH

DECLARATION OF SANTA
RODRIGUEZ IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER

Date: September 18, 1997
Time: 1:30 p.m.
Dept: 41

Declaration of Santa Rodriguez

I, Santa Rodriguez, declare and depose as follows:

1. I have two children enrolled at Lampson Elementary School in the Orange Unified School District. My youngest child, Donna, is enrolled in Lampson's bilingual program. She is in kindergarten and started her school year on July 1, 1997. My older daughter, Jennifer, was enrolled in the this same bilingual program from kindergarten through second grade. She is now enrolled in fourth grade. Jennifer learned English as a result of her enrollment in the bilingual program and has been enrolled in Lampson's regular program since third grade. She has done very well.

2. I really like the program because by oldest daughter learned English and is doing very well in the regular program. She was also able to keep her Spanish. Because my first language is Spanish, I was able to help Jennifer with her homework when she was in the bilingual program. I do speak some English and I know how difficult it is to learn a second language. I want my children to understand what the teacher says and I know they will understand in a bilingual classroom where the teacher speaks their language.

3. I often went to the classroom and helped the teacher whenever I could with both my daughters. I think it is very important for parents to be involved at their schools and for their children to see them involved. I always felt welcome in my daughter's classroom. The teacher was able to speak to us directly in Spanish and the classroom was set up in such a way that the children knew that their language and culture had value and was welcome. I was always pleased to see the classroom bulletin boards full of both Spanish and English words to help the children. The classroom learning center was full of Spanish and English books, signs and other materials for the children. It was clear to me that both languages were very welcome in the classroom.

5. I went to Lampson's "Open House" last Thursday and the teacher explained to the parents present what was going to occur in the bilingual program this cycle. This presentation was given to us in Spanish. At the time I was very pleased to hear that the program would continue as

1 it had in the past. The teacher showed us what she was going to do with our children, and
2 showed to us what materials she was going to use with our children. At that time no one told us
3 that the program was going to change.

4 6. I was very surprised and upset when I received a notice the following day from the
5 school informing me that there was no longer going to be a bilingual program. The notice is
6 attached to my declaration and reads in part:

7
8 “As you know, the Federal Court decided on Wednesday, September 10 that the Orange Unified
9 School District has the right to remove the Bilingual Education Program and replace it with English
10 Programs. Because of this decision, your son/daughter will receive their education in English
11 only. This will be effected today, September 11. All of the lessons will be in English and the
12 language in the classroom will be English.” (Attachment A).


13 7. I am very upset by this change because my daughter will not be able to learn
14 properly. I will not be able to help my daughter. It is not fair for the child to teach them only in
15 English when they do not speak English and for the parents who do not speak English. My
16 youngest daughter is also very upset. She told me “Mommy now I can’t speak in Spanish, just in
17 English.” When I asked her what she thought, she just nodded her head in sadness. She is also
18 worried that I will not be able to read to her in Spanish any more. My daughter was very lucky to
19 get into the bilingual program because there were too many children at Lampson who were tested
20 as needing the bilingual program and only ten were allowed to enroll. So myself and the other
21 parents were very happy at the time. Now I cannot believe that the District would do this to the
22 parents and the children.

23 8. I am very worried that my daughter will lose everything she has learned this school
24 year. I am also worried that she will feel that her family is no longer welcome in the school. I
25 want to know why other parents have a choice in deciding what program their child should receive
26 and why that choice is being taken away from me and other Latino parents.
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I declare under penalty of perjury that the foregoing is true and correct.

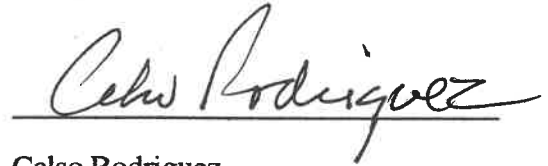
Dated: September 14, 1997, Garden Grove, California.


Santa Rodriguez

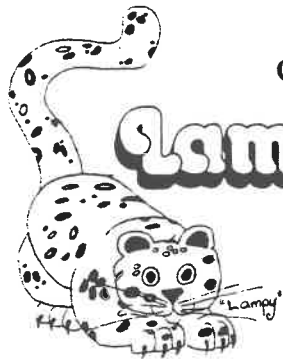
I, Celso Rodriguez, certify that I am fluent in English and Spanish and that I orally translated the above declaration from English to Spanish to the above named individual to the best of my ability.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 14, 1997


Celso Rodriguez

Attachment A



ORANGE UNIFIED SCHOOL DISTRICT

Lampson Elementary

LAMPSON ELEMENTARY SCHOOL ● 13321 Lampson Avenue
Garden Grove, California 92840 ● Telephone: (714) 997-6153

Estimados Padres de Familia;

Como ustedes han de saber, la Corte Federal decidió en miércoles 10 de septiembre que el Distrito Unificado de Orange tiene derecho de quitar el programa de Educación Bilingüe y reemplazarlo con programas en inglés.

Por esta decisión, su hijo/a recibirá su educación solamente en inglés. Esto será efectivo hoy 11 de septiembre. Todas las lecciones serán en Inglés y el lenguaje del salón será en inglés.

Es imposible para nosotros explicarles todo e indicar cual será el impacto para sus hijos/as en su educación en esta carta. Nosotros les pedimos que asistan a una junta de gran importancia el lunes 15 de septiembre a las 8:30 a.m. Allí trataremos de explicar lo que está pasando y contestar cualquier pregunta cual ustedes puedan tener.

Por favor de regresar la porción de abajo mañana, para nosotros poder prepararnos apropiadamente para la junta.

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Telephone: (707) 528-9941

7 Attorneys for Petitioners

8
9 **SUPERIOR COURT OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SACRAMENTO**

11
12 MARIA QUIROZ, ALICIA CONSTANTINO,
GABRIEL MEDEL, PAUL H. GARCIA, LOS
13 AMIGOS OF ORANGE COUNTY, The
ASSOCIATION of MEXICAN AMERICAN
14 EDUCATORS, The CALIFORNIA
ASSOCIATION FOR BILINGUAL
15 EDUCATION, and The CALIFORNIA LATINO
CIVIL RIGHTS NETWORK as Taxpayers,

16 Petitioners,

17 vs.

18 The STATE BOARD OF EDUCATION and its
19 members, YVONNE W. LARSEN, JERRY
HUME, NATALIE J. ARENA, KATHRYN
20 DRONENBERG, S. WILLIAM MALAKASIAN,
MARION MCDOWELL, JANET NICHOLAS,
21 SANFORD C. SIGOFF, GERTI B.
THOMAS, ROBERT L. TRIGG, MARINA TSE,
22 THE STATE SUPERINTENDENT of PUBLIC
INSTRUCTION DELAINE EASTIN, The
23 CALIFORNIA DEPARTMENT OF
EDUCATION, ORANGE UNIFIED SCHOOL
24 DISTRICT, The BOARD OF EDUCATION OF
ORANGE UNIFIED SCHOOL DISTRICT and
25 its members MARTIN JACOBSON, MAX
REISSMUELLER, MAUREEN ASCHOFF, JIM
26 FEARN, RICK LEDESMA and ROBERT
VIVIANO, and ROBERT FRENCH,
27 Superintendent, Does 1-100, inclusive,

28 Respondents.

CASE No. 97CS01793
Sac. County No.

**SUPPLEMENTAL DECLARATION
OF ELENA STOCES IN SUPPORT
OF TEMPORARY RESTRAINING
ORDER**

DATE: September 18, 1997
TIME: 1:30 p.m.
DEPT: 41

1 **DECLARATION OF ELENA STOCES**

2

3 I, Elena Stoces, declare and depose as follows:

4 1. I have been a teacher for six years. I possess a Preliminary Multiple Subjects Teaching
5 Credential and a CLAD Certificate. I am bilingual, Spanish, and am working on completing my
6 BCLAD credential. The last four years I have been teaching bilingual first and second grade classes
7 at Sycamore Elementary school, a year-round school, in Orange Unified School District. I was
8 nominated last year as one of the District's teachers of the year. For the 1997-98 school year, I have
9 been selected by my principal to serve as the school's Site-Curriculum Leader.

10 2. I have extensive experience and training in literacy learning for young children. My
11 main instructional goal each year is to make sure that all of my LEP students are reading and writing
12 by the end of first grade. In my four years of teaching bilingually, I have found my students to be
13 successful with learning to read and write in a language they can comprehend, while they are
14 developing their oral English. I feel I have also been successful in motivating the parents of my
15 students to work with their children at home. I have set up a home reading library with Spanish
16 language story books and my students regularly take books home to read with their parents,
17 something that I would not be able to do with the District's proposed English-only program. I also
18 send home a weekly classroom newsletter in Spanish to keep parents abreast of what their children
19 are learning and to enlist their support. Parents of my students have always been eager and interested
20 to help in whatever way they can. I believe that this cooperation is at least partly maintained because
21 they know their home language is valued in my classroom.

22 3. On July 1, 1997, I began the current, 1997-98, school year with a bilingual first grade
23 class of 18 non-English speaking students. My class is composed of students who had begun a
24 reading foundation in Spanish in my school's bilingual kindergarten along with one student who is
25 new to our school with little prior academic preparation. The previous kindergarten teacher
26 commented that many of my students were way below grade level when they first entered
27 kindergarten, and are only now beginning to make progress.

28 4. In the middle of July, two weeks before our first cycle was to go on break for a

1 month, we were notified by the District that all students were to be moved from bilingual instruction.
2 This presented me with a great deal of stress and an enormous dilemma. As of the end of July the
3 only core curriculum instructional classroom materials I had in English, besides my personal ELD
4 materials, was the recent English Language Arts series adopted for first grade. I have no math, no
5 science, and no social studies materials in English.

6 5. The first cycle ended on July 29, 1997 and I continued to teach my classroom as a
7 bilingual classroom using all my Spanish language core materials through the end of the cycle. I spent
8 much of my vacation reviewing the English Language Arts program and re-creating my classroom
9 environment into English. Although I attended the District's staff development training concerning
10 the new Language Arts series, little time was spent on LEP-related issues. In fact, the trainer merely
11 raised up the book and informed us that we could look at the index for references to techniques for
12 using the materials to address the needs of LEP students. As I looked at the English Language Arts
13 materials on my own and thought about my students' English language levels, I came to the
14 conclusion that my goal for students, that they be reading and writing by the end of the first grade,
15 would have to be drastically changed in an English-only program. I concluded that it would take a
16 minimum of six months of intensive oral/aural English for my students to be able to be somewhat
17 successful with the new English Language Arts program. I would waste half of my school year doing
18 what my students would normally do in kindergarten in Spanish, something which frustrates me as
19 a professional, since my students were already well on the road to learning to read and write. I would
20 have to divert my instruction, and the instruction they had received in kindergarten, to focus entirely
21 on oral English language development. We are taught and trained to educate the whole child and to
22 provide a balanced curriculum. How would I teach concepts with no materials in a language they
23 were barely understanding? How could I use the "preview-review" method to teach reading and
24 writing? Currently, I teach students to write from their heads and their hearts. I try to make the
25 environment risk free. How are my students to feel comfortable when they only can write in a
26 language that is "new" to their heads and their hearts?

27 6. I have spent hundreds of dollars developing a classroom library of Spanish language
28

1 books that emerging readers can read, enjoy and share with their parents. Under the English-only
2 plan, how do I encourage the parents to be involved with their children's reading when all their work
3 will be sent home in English? At Back to School Night, July 22, when I explained the proposed
4 program, parents expressed concern to me about how they would be able to help support children
5 in their homework.

6 7. As a result of the Court's order, I was able to continue with my bilingual program
7 when our current cycle began on September 2, 1997. I believe that I am providing my students with
8 the educational program best suited to their language needs. While they continue to receive English
9 language development their English improves, they are visibly excited about learning and they are
10 successful learning what any normal first grade student would learn: to read and write, compute,
11 science and social science concepts. I am confident, based on my training and experience, that if
12 these students are allowed to continue in our bilingual program, by the end of second grade these
13 students will be at or near grade level when they are ready to transition to the mainstream English
14 program.

15

16 I declare under penalty of perjury that the foregoing is true and correct.

17

18 Dated: September ____, 1997, in Orange, California.

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[See attached faxed signature page (over)]
Elena Stoces

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 13 students will be at or near grade level when they are ready to transition to the mainstream English
 14 program.

15
 16 I declare under penalty of perjury that the foregoing is true and correct.

17
 18 Dated: September 7, 1997, in Orange, California.

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 20 
 21 Elena Stoces

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