



LATHAM & WATKINS LLP



January 23, 2013

Tom Torlakson
State Superintendent of Public Instruction
California Department of Education
1430 N Street
Sacramento, CA 95814-5901

Mike Kirst
President of the State Board of Education
1430 N. Street, Room 5111
Sacramento, CA 95814

Dear State Superintendent Torlakson and State Board of Education President Kirst:

We write today on behalf of parents, students and community members throughout California to express serious concern about the State's long-standing abdication of its responsibility to ensure that California school districts provide language instructional services to their English Learner (EL)¹ students. In California, over 20,000 English Learner children are not receiving any language instructional services. The State is aware of the lack of services because it receives data from the districts regarding the provision of services to EL students. Despite the available data showing the devastating consequences that the lack of EL services has on the education of EL students, the State has ignored reports by districts showing that numerous districts have failed to provide EL services to students as required by established federal law and state statutory and constitutional law for at least seventeen years.

As the California Education Code states, "[t]he government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important."² Pursuant to California's Constitution, the ultimate and mandatory responsibility for the provision of EL services rests with the State.³ We urge you, the California Department of Education ("CDE"), the State Board of Education, the Governor and the Legislature to take immediate corrective action to do what the State Constitution and Education Code requires for students in dire need of EL services.

I. The Failure to Provide Services Has a Debilitating Effect on the Education of Thousands of EL Students Every School Year

¹ An English Learner is defined as "a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English." Cal. Educ. Code 306(a).

² Cal. Educ. Code § 300(c).

³ "Local districts are the State's agents for local operations of the common school system, and the State's ultimate responsibility for public education cannot be delegated to any other entity." *Butt v. California*, 4 Cal. 4th 668, 681 (1992) (citation omitted).

The United States Supreme Court recognized almost forty years ago that “students who do not understand English are effectively foreclosed from any meaningful education” and, in fact, “are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.”⁴ ELs in California are more likely to be students of color and economically disenfranchised compared to their English only counterparts. EL students who are not provided services are most at risk of dropping out or experiencing persistent academic failure,⁵ and such neglect can stunt their potential and drastically limit their work and life opportunities. On the other hand, those ELs who receive basic language support services have better academic achievement overall, including significantly higher scores in both reading and math,⁶ and lower dropout rates, than those who lack such support.⁷

The California Department of Education has recognized that, “of course, all ELs *must* receive additional and appropriate educational services,”⁸ and CDE has articulated an essential requirement for California schools that “[e]ach English Learner receive[] a program of English language development in order to develop proficiency in English as rapidly and effectively as possible.”⁹ Notwithstanding this acknowledgement, far too many California’s students are denied equal educational opportunity (or, indeed, any meaningful opportunity at all) due to their district’s failure to provide appropriate English language instruction. The Department admitted last year that “a total of 20,318 English learners do not receive any instructional services *required* for English learners.”¹⁰

Last year, 251 districts (over a quarter of the 960 districts in the State that serve ELs) reported that they did not provide some or all of their EL students with any EL services. For example, William S. Hart Union High School District and Salinas Union High School District each reported that they denied services to more than 1,000 students, representing 53 percent and 43 percent of their EL population, respectively. Fremont Union High School District and Grossmont Union High School District each reported that half of their EL population—representing hundreds of EL students—received no specialized language support whatsoever.

Prompted by this data, which is as readily available to the public as it is to the State (including CDE and other State education entities), our offices investigated the EL instructional practices in a number of districts. Our review of the data and follow up inquiries revealed that:

- (1) EL students falling into the “no services” category are, in fact, not receiving any language instructional services;

⁴ *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

⁵ Kathryn Lindholm-Leary and Graciela Borsato, Academic Achievement, in *Educating English Language Learners, A Synthesis of Research Evidence*, 202 (eds. Genessee et al. 2006) (citing Thomas and Collier, 2002).

⁶ *Id.*

⁷ Olsen, Laurie, PhD, *Reparable Harm: Fulfilling the Unkept Promise of Educational Opportunity for California’s Long Term English Learners*, 15 (Californians Together 2010).

⁸ CDE, *English Learners in California, Frequently Asked Questions*, August 21, 2006, available at <www.cde.ca.gov/sp/el/er/documents/elfaq.doc> (last visited November 13, 2012) (emphasis added).

⁹ CDE, *Facts About English Learners in California - CalEdFacts*, March 8, 2012, available at <<http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>> (last visited November 26, 2012); Cal. Educ. Code § 300(f).

¹⁰ *Id.* (emphasis added).

- (2) teachers confirm that some EL students are not provided EL services;
- (3) many districts do not understand what it means to provide services, and some of those that lack any program for ELs are not even captured in the “no services” data. There is reason to believe that the numbers officially reported under represent the number of EL students not receiving appropriate services;
- (4) parents often do not know their children are ELs or that they are being denied access to EL services. Many parents do not receive notice of the description of the EL program in which their child has been placed, in violation of Cal. Educ. Code § 440, and in many cases no such program exists;
- (5) districts are creating barriers to parents’ access to their children’s records by failing to translate them in violation of Cal. Educ. Code § 48985 and by refusing to produce student records in violation of Cal. Educ. Code § 49069;
- (6) where some programs are so poor that parents opt out of them so as to avoid seeing their children languish in classes with no redeeming value, school staff mistakenly believe these parents have waived their children’s rights to any EL instructional support, which is both misguided and illegal;
- (7) EL students who do not receive EL services are left to languish in their classes without language support, perform poorly on the California English Language Development Test (CELDT), and are held back in their grades; and
- (8) even where districts are attempting in good faith to provide services to EL students, they lack sufficient support and guidance from the State.

Each additional day that an EL child goes without language instructional services is another day that child may be foreclosed from a meaningful education. EL children, who are denied the language instructional services to which they are entitled, are at risk of becoming the long term English learners of tomorrow, sometimes struggling their entire lives to attain a basic level of English proficiency.¹¹ Where one quarter of all California’s K-12 public schools students are EL students, it is clear that the State’s failure to ensure mastery of English for this population has broad implications for the integrity of the entire system.

II. The State’s Refusal to Ensure ELs Access to the English Instructional Services to Which They Are Entitled Violates the Equal Educational Opportunities Act, the California Constitution, and California Statutory Law

By failing to guarantee EL instructional services for all English learners, the State is violating federal law and state law, including the California Constitution.

In *Lau v. Nichols*, the United States Supreme Court first held that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum.”¹² English Learners who are not provided language instructional services are clearly

¹¹ See Menken, Kate and Kleyn, Tatyana. “The Difficult Road for Long-Term English Learners.” (Educational Leadership vol. 66, Number 7, April 2009), available at <http://www.ascd.org/publications/educational_leadership/apr09/vol66/num07/The_Difficult_Road_for_Long-Term_English_Learners.aspx> (last visited November 13, 2012).

¹² *Lau*, 414 U.S. at 566.

and unjustifiably denied educational opportunity that is essential to their scholastic advancement.¹³

The Equal Educational Opportunities Act of 1974 (EEOA) preserves this principle and provides that “[n]o state shall deny equal educational opportunity to an individual . . . by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”¹⁴ Under the Act, “schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district.”¹⁵ The Act “obligat[es] schools to address the problem of language barriers,” “insur[ing] that schools make a genuine and good faith effort to remedy language deficiencies.”¹⁶ The failure to provide EL services to thousands of English Learner children every year, and the State’s failure to take corrective action, simply does not constitute a “genuine and good faith effort” to provide language support under *any* educational theory.¹⁷

Under both California constitutional law and State statutory law, the State and the Superintendent of Public Instruction have a mandatory duty to ensure that EL students receive services. The California Constitution “prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts.”¹⁸ Because education is a fundamental right, any action that has a real and appreciable impact upon such right is subject to strict scrutiny.¹⁹ Accordingly, the State “is obliged to intervene when a local district’s fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so.”²⁰

Our laws have clearly and repeatedly established that the State must ensure that ELs with less than reasonable fluency in English receive an education through sheltered English immersion for one year, that English is taught as rapidly and effectively as possible, that school districts provide language instructional services to ELs, that districts provide parents a description of the program for ELs in a language they can understand, that districts expend

¹³ *Id.*

¹⁴ 20 U.S.C. 1703(f).

¹⁵ *Castaneda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981); 20 U.S.C. § 1700 et. seq.

¹⁶ *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017 (N.D. Cal. 1998); *Idaho Migrant Council v. Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981) (concluding that “the State Agency is . . . required under federal law to ensure that needs of students with limited English language proficiency are addressed”).

¹⁷ *Castaneda v. Pickard* set out a three-prong disjunctive test to determine whether a program violates the EEOA: 1) The English learner program is not based on a sound educational theory; 2) the programs and practices are not reasonably calculated to effectively implement the educational theory; or 3) after a legitimate trial period, the English learner program fails to overcome the language barriers that ELL students face. 648 F.2d at 1009-10. Since English learners in these circumstances are not receiving any program, current practices cannot begin to meet the *Castaneda* test.

¹⁸ *Butt v. California*, 4 Cal. 4th 668, 685 (1992); *see also* Cal. Const. Article I, § 7(a), Article IV, § 16(a) and Article IX, § 1.

¹⁹ *Serrano v. Priest*, 18 Cal. 3d 728, 761, 766-68 (1976); *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982).

²⁰ *Butt*, 4 Cal. 4th at 692.

certain State funds to assist ELs upon receipt of Economic Impact Aid,²¹ and that the State must expend federal funds to improve the instruction of ELs as a condition of acceptance of Title III funds.²² The State has made such assurances to the public.²³ Further, the California Code of Regulations requires explicitly that districts provide ELs additional and appropriate services until they have been reclassified out of the EL program:

School districts shall continue to provide additional and appropriate educational services to English learners in kindergarten through grade 12 for the purposes of overcoming language barriers until the English learners have: (a) demonstrated English-language proficiency comparable to that of the school district's average native English-language speakers; and (b) recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of language barriers.

5 C.C.R. § 11302.

III. The State Must Act to Ameliorate the Profound Educational Deficits Suffered by its EL Students as a Result the Failure to Provide EL Services

The State provides funding for EL programs, and in turn, requires districts to report on the services that are provided to ELs. When the State does nothing to address reports from districts that admit to providing no services or inadequate services to thousands of children, the State abdicates its constitutional and statutory duty to ensure that these children receive the EL instruction required by law. We recognize the importance of providing flexibility to districts to encourage creative educational solutions, but the complete denial of language support to EL students is unacceptable, as is the State's failure to provide sufficient support and guidance to districts attempting to provide proper services.

Whatever approach to addressing the needs of EL students that the State of California ultimately adopts, one thing is certain: California must immediately address the systematic denial of EL services to thousands of students in hundreds of its districts. Any further delay in addressing the needs of these children is as unconscionable as it is detrimental to the students and the economic future of California.

We look forward to working with you to ensure that the State takes appropriate steps to protect all EL students' fundamental right to education. Given the State's expressed commitment to ELs, we are confident that the current leaders of our State will take the necessary steps to protect our EL children. We recommend some possible courses of action:

²¹ Economic Impact Aid is a State categorical program to support programs for ELs and disadvantaged students in grades kindergarten through twelve.

²² See Cal. Educ. Code § 300(f), 305, 440(a), 3115, 54025.

²³ CDE, Facts about English Learners in California - CalEdFacts, *available at* <<http://www.cde.ca.gov/ds/sd/cb/cefelfacts.asp>> (last visited December 3, 2012).

First, the State should investigate any “no services” report to determine how and why the local educational agency (LEA) is failing to comply with the legal mandate to provide ELs with instructional services.

Second, the State should notify any LEA that is failing to provide EL instructional services to ELs that it is violating the law and direct the LEA to develop and submit a written plan that includes providing required services to all students, and where appropriate, compensatory services.

Third, the State should develop and implement accountability measures to verify that LEAs are adhering to the approved remedial plans and providing appropriate English language development services to all EL students. The accountability measures should include site visits or other independent monitoring and technical assistance and guidance where monitoring reveals ongoing failures to serve all ELs appropriately.²⁴

Fourth, the State should track the number of long term English learners (LTELS) and English learners at risk of becoming LTELS (as defined last in AB 2193 (Lara)) who are not receiving any specialized instructional services required by law.

Finally, the State should develop regulatory guidance for LEAs, including guidelines for a variety of programs and policies that LEAs can adopt to ensure all EL students receive appropriate services, taking into account the range of unique challenges, needs, and instructional settings in schools across California.

* * *

The State may not ignore its responsibility to ensure that EL students are given the opportunity to achieve their potential and succeed academically. As discussed above, we urge you to act immediately and pursuant to the mandates entrusted to you by the people of the State of California and by the federal government to ensure that California’s EL students are no longer deprived of their fundamental right to an education, that these longstanding violations of federal, state and constitutional law are rectified, and that the process of recouping lost time and educational opportunities begins.

We look forward to working with you on this critical issue. Please respond within 30 days to set up a meeting, or to indicate in concrete terms how you intend to comply with your legal duties, or we will have no alternative but to pursue litigation to vindicate the rights of tens

²⁴ The State already generates a report using district data to notify State officials of the instructional settings available for ELs in each district, and the number of ELs for whom no instructional setting has been made available, but this data is under inclusive, as our investigations reveal that some districts that report providing services for ELs are not, in fact, providing ELs with any EL instructional program. For this reason, the State must both address the “no services” report and ensure that districts understand that placing EL students into mainstream settings with no EL instructional support whatsoever is legally insufficient. Because of the flaws in the current monitoring and compliance mechanisms associated with the disbursement of funds for ELs, simply adding a “no services” priority to the existing mechanisms will not suffice and meaningful consequences are necessary for any remedy of the “no services” issue to be effective.

of thousands of EL students statewide. We can be reached at (213) 977-5233 if you have any questions or wish to discuss this matter further.

Sincerely,



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On Behalf of:
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