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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT

D.J. by Guardian Ad Litem E.A.; E.A.; B.S. by Guardian Ad Litem C.L.; F.S. by Guardian Ad Litem C.L.; C.L.; S.M. by Guardian Ad Litem M.R.; M.R.; S.Z.; WALT DUNLOP Petitioner/Plaintiff, v. STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF EDUCATION; TOM TORLAKSON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, in his official capacity; STATE BOARD OF EDUCATION; DOES 1-20, INCLUSIVE, Respondents/Defendants.	CASE NO. BS142775 **STATEMENT OF INTEREST BY THE UNITED STATES OF AMERICA** Date: July 14, 2014 Time: 4:30 p.m. Dept: 85 Judge: The Honorable James C. Chalfant Action Filed: April 24, 2013

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I. INTRODUCTION

At issue in this case is whether a state, when presented with credible evidence of significant and persistent noncompliance by school districts in their programs for English Learner students ("ELs" or "EL students"), has an obligation under the Equal Educational Opportunities Act of 1974 ("EEOA") to respond to that evidence to ensure that the language needs of EL students are addressed.

The Petitioners in this case – who include current EL students enrolled in California public schools and their parents – allege that the State of California, the California Department of Education ("CDE"), the State Superintendent of Public Instruction, and the California Board of Education ("CBE") (collectively, "Respondents") have violated Section 1703(f) of the EEOA, among other laws. Specifically, Petitioners allege that Respondents have failed to meet their duties to supervise local educational agencies (*i.e.*, school districts and charter schools, hereinafter "districts") and ensure that they address EL students' language needs, and that this failure constitutes a violation of the "appropriate action" requirement of the EEOA. As evidence for these allegations, Petitioners point to, among other things, at least 16 years of Language Census data – data certified by California districts and published by CDE – reporting that tens of thousands of EL students across California were not receiving any EL instructional services. Petitioners further rely on admissions by CDE that it did not take any direct action in response to these district reports. Petitioners also present evidence of additional notice to CDE in 2013 of other district noncompliance, including using unauthorized teachers to provide EL services and not providing EL instructional services to EL students with disabilities, and CDE's admitted lack of follow up with these districts to ensure that their EL students' needs are addressed.

When Petitioners brought the Language Census data to Respondents' attention prior to this lawsuit being filed, Respondents initially admitted that the districts at issue failed to serve at least 20,000 EL

students.[1] This admission was consistent with an earlier CDE statement summarizing the 2010-11 Language Census data on its website: "A total of 20,318 English Learners do not receive any instructional services *required* for English learners."[2] Since this litigation began, however, Respondents have subsequently offered various unpersuasive explanations for these data. These explanations include assertions that a small percentage of these districts incorrectly reported EL students in that category in School Year ("SY") 2010-11 – the one school year of Language Census data that CDE asked districts to explain in a voluntary survey. Respondents also surmise that students in that category may have been receiving some assistance in a non-instructional setting (*e.g.*, through after-school tutoring), even though State law requires specific EL *instructional* services. Further, Respondents argue that they are not obligated to take action in response to the Language Census data because the purpose of these data was not to monitor the provision of services to EL students, and Respondents already monitor this through Federal Program Monitoring ("FPM").

Though Respondents argue they are meeting their EEOA obligation to monitor districts and ensure that EL students receive required services through the FPM system, Respondents have provided no evidence that this system has reduced district reporting of EL students without EL instructional services. Indeed, the Language Census data show the numbers of EL students not receiving EL instructional services have not improved since SY2007-08, and according to CDE's own analysis of the California Longitudinal Pupil Achievement Data System ("CALPADS") reports (which replaced the Language Census reports) from districts in SY2012-13, these numbers have *increased.* CDE has not conducted a similar analysis using SY2013-14 CALPADs data, arguing it is too burdensome. Thus, the most current

[1] (*See* Resp. April 15, 2014 RJN ("Resp. April 15 RJN") Ex. F ("School districts . . . currently report that more than 98% of the State's 1.4 million English learners are receiving services").)
[2] (*See* Pet. March 14, 2014 RJN ("Pet. March 14 RJN") at 74, Ex. 6 at 2 (emphasis added).)

evidence before this Court indicates that the numbers of EL students not receiving EL instructional services have gotten worse.

Respondents' core argument in this litigation is that the EEOA gives the state the discretion to monitor districts' compliance however it sees fit, including ignoring credible and persistent evidence of district noncompliance. Respondents misapprehend the nature of the discretion granted under the EEOA. The EEOA affords states and districts discretion in choosing the *type* of EL program services they provide; however, the EEOA does not provide states or districts the discretion to choose *not* to serve thousands of their EL students at all.

II. INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 1703(f) of the EEOA, 20 U.S.C. 1701 *et seq.*, which requires states and districts to take "appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs." (20 U.S.C. § 1703(f).) The Attorney General is authorized to enforce the EEOA through, *inter alia*, bringing civil actions or intervening in private actions brought under the statute. (20 U.S.C. §§ 1706, 1709.)[3]

As the agency charged by Congress with enforcing the EEOA, the United States Department of Justice ("DOJ") has a significant interest in ensuring that courts correctly interpret the statute in a manner that ensures the language needs of EL students are addressed.[4] The United States, therefore, files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States" in cases pending in state or federal court.

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[3] The United States also has filed amicus briefs addressing Section 1703(f) of the EEOA. (*See, e.g.*, U.S. Br. as Amicus Curiae Supporting Petitioners-Appellants and Urging Vacatur in Part (9th Cir.) (No. 13-15805) (filed September 13, 2013); U.S. Br. as Amicus Curiae Supporting Respondents, *Horne* v. *Flores*, 557 U.S. 433 (2009) (Nos. 08- 289 & 08-294) (filed Mar. 25, 2009).)

[4] The Civil Rights Division of DOJ has an EEOA compliance review of CDE and CBE that includes issues in this case as well as others. (*See* Resp. April 15 RJN, Exs. G & I.)

III. FACTUAL AND PROCEDURAL BACKGROUND

In the State of California, one in four students is an EL student. (Resp. Memo of Points and Authorities (July 25, 2013) (Resp. Mem. P. & A. Supp. Pet. Writ of Mandate & Compl.) (July 24, 2013) ("Resp. July 24 Memo") at 7.) To ensure that EL students receive instructional services to overcome their language barriers, California law mandates an instructional program – Sheltered English Immersion ("SEI") – for all EL students, with limited exceptions. (Cal. Educ. Code, §§ 300 *et seq.*) California regulations require that EL students continue to receive EL instructional services until they are formally reclassified as English proficient. (Cal. Educ. Code §§ 305, 310-11.)

State law tasks each of the Respondents with supervising some aspect of California's provision of services to EL students. The State of California is responsible for enforcing the State Constitution, including its guarantee to provide education to all children as one of their state-granted fundamental rights. (*See* Cal. Const. art. IX, § 5.) The State Superintendent of Public Instruction is charged with the supervision of all elementary and secondary educational programs. (Cal. Educ. Code §§ 33112(a), 64001(b).) The CBE sets policy, including promulgating rules and regulations, for the supervision and administration of all elementary and secondary districts. (Cal. Educ. Code §§ 33030-33032.) CDE is the state education agency tasked with administering and enforcing public elementary and secondary education laws. (*See, e.g.,* Cal. Educ. Code §§ 313, 33308, 52177, 60605.87(a), 60605.87(g)(1).) State law requires CDE to monitor districts' provision of EL services (Cal. Educ. Code § 64001(b)). This monitoring includes the FPM, which selects approximately 7% of school districts each year for review.[5] Through the FPM, CDE assesses districts' compliance with various state and federal laws, including

[5] Of the 1700 districts in California (Ashley Decl. ¶12), the FPM selects about 60 districts for onsite reviews and 60 for online reviews (i.e., 7%), (Kazanis Decl. ¶ 26.) The FPM does not require CDE to review all 1700 districts within a given time-frame (*id.* ¶¶ 25-26 (describing selection process)); even if it did, it would take over 14 years to reach all 1700 districts.

whether they provide all EL students with English Language Development ("ELD") instruction, supported content instruction, and teachers authorized by the State to provide such instruction. (Resp. April 15 RJN Ex. B.)

So that CDE has the information it needs to meet its state and federal obligations to EL students, state law requires districts to report to CDE regarding their provision of instructional services to EL students (*e.g.*, through the Language Census and CALPADs). (Cal. Educ. Code §§ 52164, 60900(c), 60900(d)(1).) In their Language Census reports, districts must certify how many of their EL students: receive ELD, Specially Designed Academic Instruction in English ("SDAIE"), and Primary Language Instruction ("PLI"); have teachers authorized to provide these instructional services; receive these services without authorized teachers or some "Other EL Instructional Services," and finally, are "not Receiving any EL Instructional Services."[6] Despite Respondents' assertions that the Census data are not intended or useful for monitoring (Resp. Amended Opp'n Br. (July 3, 2014) ("Resp. Am. Opp'n") at 2-3, 12, 16-17), these categories are plainly relevant to several compliance questions on CDE's FPM instrument.[7] In fact, between 1985 and 2002, CDE was required to use Language Census data in its monitoring to comply with the former *Comite* court orders, which aimed to resolve other parties' prior EEOA claims that CDE was not adequately supervising EL programs. (*See* U.S. Request for Judicial Notice ("U.S. RJN") at Ex. 1-3

[6] (*See* Pet. March 14 RJN at 300, Ex. 9 (Language Census Report); *see, e.g., id.* at 20-48, Ex. 4 (Language Census Directions for 2011, pages 9-10).) CDE requires districts to provide all ELs with a program of ELD instruction and EL instructional services that enable ELs to access the core content areas. (*See* Resp. April 15 RJN Ex. B at VII-EL 20; VII-EL 21.) Services in the content areas consist of SDAIE unless the LEA has a waiver permitting PLI. (Cal. Educ. Code § 52161-52163.6.)

[7] In fact, for the small percentage of districts for which FPM review is conducted, the FPM instrument also gathers information on: whether all ELs are placed in EL programs, receive ELD, receive access to the core instructional program through SDAIE or PLI, and receive ELD and their content instruction from teachers who are authorized to teach EL students. (*See* Resp. April 15 RJN Ex. B, CDE's SY 2013-14 FPM Instrument at V-EL 15 (Teacher EL Authorization); VI-EL 17 (Appropriate Student Placement); VII-EL 20 (ELD); and VII-EL 21 (Access to the Core).)

(filed concurrently).)[8] One *Comite* order described the Language Census data as "[t]he district's own reports that they are not providing required services for a substantial portion of ELs" and explained that the data "helps [CDE] focus on districts where the largest proportion of ELs are not receiving appropriate services." (*See* U.S. RJN Ex. 3 at Ex. A (*Comite* Selection Process, page 3 ¶ 4).) However, between SY2007-08 and SY2010-11, when districts across California certified Language Census data that included, in each year's aggregate, more than 20,000 EL students in the category "not Receiving any EL Instructional Services," (Pet. Am. Br. (June 12, 2014) ("Pet. June 12 Am. Br.") at 7; *see also* Resp. April 15 RJN, Ex. G at 1, n.1), Respondents admit that "neither the CDE nor the CBE have taken direct action in response to the annual census from California LEAs that place EL students in that category." (Resp. April 15 RJN, Ex. I at 5.)

On January 23, 2013, the American Civil Liberties Union of Southern California ("ACLU") sent Respondents a letter asking them to take action to address Language Census data showing that at least 20,000 EL students in 251 California districts were not receiving any EL instructional services. (Pet. March 14 RJN at 25-31, Ex. 3.) Contrary to Respondents' current litigation position that the data are not reliable, CDE responded to the ACLU's letter by touting these data as evidence of its own success. Specifically, CDE issued a press release stating that "school districts – which are responsible for providing instruction to students and appropriate services to [ELs] – currently report that more than 98

[8] In *Comite De Padres De Familia v. Honig* (No. 281824, Superior Court of California, In and For the County of Sacramento (February 3, 1985)), plaintiffs alleged that the state had failed to ensure that EL students received instructional services in a language they could understand, and sought to require CDE to monitor districts to ensure their compliance in providing those services. In 1985, the parties entered into a consent decree requiring, among other things, that CDE conduct annual audits to check the accuracy of the Language Census data to "assure that California's school districts are properly identifying each limited-English proficient child entitled to services so as to assure that each will be given an equal educational opportunity," 1985 Stip. at 4-5 (U.S. RJN Ex. 1), and conduct a compliance review of every district once every three years (later amended to every four years). (*See* U.S. RJN, Exs. 1 & 2.) As recently as 2001, the court amended the *Comite* agreement again, requiring the State to use the Language Census data as one of six criteria for "Comite follow-up." (See U.S. RJN., Ex. 3) In 2002, CDE successfully moved to terminate the *Comite* consent orders, and the trial court's dismissal of the case was affirmed on appeal in 2004.

percent of the state's 1.4 million [ELs] are receiving services" and that "[CDE] and the State Superintendent ha[ve] fulfilled their obligations related to onsite monitoring of English learners." (Resp. April 15 RJN Ex. F.) The State did not identify any action it had taken, or would take, to address the needs of the approximately 20,000 ELs whom districts reported as receiving no EL instructional services. (*Id.*)

On February 15, 2013, CDE took its first action in response to these Language Census data. (*See* Kazanis Decl. ¶ 4, Ex. A.) CDE distributed a *voluntary* survey to the 251 districts that had reported ELs without any EL instructional services in SY2010-11. (*Id.* Ex. C (Kazanis Dep. Tr. at 108:14-109:11).) CDE's survey neither directed these districts to ensure that all of their EL students receive EL instructional services, nor required the districts to produce evidence that they were providing such services. (*See id.* Ex. A) Instead, the survey simply asked for "further information regarding this data to assist [CDE] in responding to an allegation that these students did not receive any instructional services." (*See id.*)

Only 40 percent of the 251 districts responded to the survey. (*See* Kazanis Decl. Ex. B (survey results), Ex. C (Kazanis Dep. Tr. at 109:12-18).) Of the districts that responded, around one third confirmed that they did not provide required instructional services to EL students. (See Kazanis Decl. Ex. B.) Those districts explained that EL students were not provided EL services because, *inter alia*: the EL students were incorrectly placed in settings without EL instructional services, the EL students were placed with teachers lacking EL teaching authorizations, the EL students attended charter schools, and the EL students without services included special education students. (*See id.*; Resp. Apr. 15 RJN Ex. I at 3-4.) Fifty-two districts stated that reporting students in the "not Receiving any EL Instructional Services" category was the result of a data entry error, often contending that the report was in error because those

students had a teacher with an EL authorization. (Kanzanis Decl. Ex. B; Resp. April 15 RJN, Ex. I at 4.) Notably, simply having the authorization to provide EL services does not establish that the teacher was, in fact, providing EL services to EL students, as CDE's own guidance recognizes. (*See* Pet. March 14 RJN at 32, Ex. 4 (2011 Census Instructions at 11) ("If a teacher holds a CCTC bilingual, SDAIE, or ELD authorization and **is not providing direct instruction to ELs in any of the subjects mentioned above, do not report the teacher** in Part 5 [*i.e.*, as providing EL instructional services to EL students]" (emphasis in original).) Despite the many district responses admitting to noncompliance with the EEOA and CDE's own FPM monitoring instrument,[9] CDE did not follow up with the 40 percent of districts that responded to the survey. (*See* Kazanis Decl. ¶ 7 (assuming districts' survey responses confirmed the provision of EL services without conducting further follow up).) CDE also took no action to follow up with the 60 percent of districts that did not respond to the survey and thereby left their Language Census reports of ELs without any EL instructional services unexplained and unrefuted. (*Id.*.)[10]

Since SY2011-12, when CDE transitioned to CALPADS, CDE has ceased collecting and publishing the results of the Language Census. (Ashley Decl. at ¶¶ 8, 16.) Although the CALPADs data can be analyzed in a way that reports whether EL students are receiving services, through certified CALPADS 2.4 reports entitled, *English Learner Education Services – Student Count Unduplicated* (hereinafter "CALPADS reports"), (*see id.* ¶¶ 8, 16),[11] the State no longer conducts such analysis. (*See id.* ¶ 12.) CDE maintains that it is too burdensome for CDE to run CALPADS reports for all California districts to analyze their numbers of ELs "with no EL education services," (*see id.*; Resp. Am. Opp'n at

[9] *See supra* note 7 discussing questions in the SY2013-14 FPM Instrument regarding whether districts place EL students in EL programs and give them ELD, SDAIE, or PLI, and provide teachers authorized to provide such instruction.

[10] CDE asserts that "[t]here was no authority to compel compliance by LEAs who did not respond." (Kazanis Decl. ¶ 7). Yet "[CDE] may require a school district to submit other data or information as may be necessary for [CDE] to effectively administer any categorical program," which includes EL programs. (Cal. Educ. Code § 64001(c).)

[11] Respondents incorrectly contend that the relief sought in this case is moot because the Language Census data are no longer collected and have been replaced by CALPADS data. (*See* Resp. Am. Opp'n at 4, 24.)

24), yet each district can run this report and CDE can require districts to submit these reports for review. (Kazanis Decl. ¶19; Ashley Decl. ¶¶ 8, 12; Cal. Educ. Code § 64001(c).) In fact, CDE's own analysis of the SY2012-13 CALPADS reports shows that it has the capacity to generate, review, and analyze these reports. (*See* Kazanis Decl. Ex. D.) Indeed, in its February 27, 2013 letter to all districts regarding these CALPADs reports ("the February 27 letter"), CDE stated that "many districts have certified 'no EL education services' for all or a large proportion of their EL students" and reported that these numbers of unserved students had increased. (*See id.*; *see also* Ashley Decl. ¶ 16; Kazanis Decl. ¶ 19.)[12]

CDE also questioned the accuracy of the districts' certified CALPADS data, recommending that districts review their CALPADS reports and offering a way for districts to make their data look better by reporting EL students as being served as long as their teacher has the authorization to teach EL students. (*See* Kazanis Decl. Ex. D.) That guidance is contrary to CDE's own instructions for the Language Census data, because it does not ensure that EL students are actually receiving services. (Pet. March 14 RJN at 32, Ex. 4 (2011 Census Instructions at 11))

On April 24, 2013, Petitioners filed a complaint in this court alleging that the State Respondents' failure to respond to information showing that districts were failing to appropriately serve EL students, as well as the actual failure to provide EL services to approximately 20,000 EL students, violated both state and federal law. (Verified Pet. For Writ of Mandate & Compl. for Injunctive & Declaratory Relief, *D.J. v. California* (Apr. 24, 2013) ("Pet. April 24 Brief").) In the fifteen months since, Petitioners and

[12]CDE tries to explain away the increase in the SY2012-13 CALPADs data, arguing that the switch from Language Census to CALPADs reporting created confusion among some unidentified number of districts because this was the first year of the switch. (*See* Ashley Decl. ¶16; Kazanis Decl. ¶18-19.) However, the first year CALPADs began collecting data regarding EL services and instructional settings was SY2010-11, not SY2012-13 (Kazanis Decl. ¶15), and CDE has provided no district responses to the February 27 letter reflecting confusion or inaccurate reporting.

Respondents have filed numerous briefs, conducted discovery, and have now each filed the trial briefs pending before this Court.

IV. SUMMARY OF THE ARGUMENT

The EEOA requires that EL students receive educationally sound and effective instructional services so that they can overcome their language barriers and participate equally in the standard instructional program within a reasonable period of time. The EEOA places this responsibility in the hands of both states and districts. While districts must provide the day-to-day EL instructional services, the EEOA requires states to supervise districts' provision of those services to ensure districts' compliance with the EEOA. In this respect, states and districts share related but independent obligations under the EEOA to ensure that EL students' needs are addressed. States cannot delegate this obligation entirely to districts. Particularly when faced with credible evidence of significant or persistent district noncompliance, states must take action to fulfill this obligation and may not defend their inaction by relying on an existing monitoring system that includes no mechanism for responding to this evidence in a timely or effective way.

Here, Respondents' duty to take appropriate action to supervise districts and ensure their EEOA compliance is clearly triggered by the data they have received for close to two decades that at least 20,000 ELs annually were not receiving EL instructional services. The evidence further shows that the number of EL students reported as unserved in the Census Data remained above 20,000 since SY2007-08 and increased in the SY2012-13 CALPADs data, despite CDE's FPM monitoring system. This, along with other evidence in the record in this case, shows that Respondents have yet to take appropriate action as required by the EEOA to ensure that the districts reporting EL students without EL services are meeting the needs of their EL students.

V. ARGUMENT

A. *Both State and Local Educational Agencies Share the Duty Under the EEOA's Appropriate Action Mandate to Address EL Students' Language Needs*

The EEOA prohibits both states and districts from denying equal educational opportunity to any individual "on account of his or her race, color, sex, or national origin." (20 U.S.C. § 1703.) Such a denial occurs when, *inter alia*, an "educational agency fail[s] . . . to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program." (20 U.S.C. § 1703(f).) The term "educational agency" includes *both* state educational agencies and local educational agencies. (20 U.S.C. § 1720(a).) Thus, states and school districts share the duty to take appropriate action to serve EL students. (*See Horne*, 557 U.S. at 439 ("The question at issue . . . is not whether [the state] must take 'appropriate action' to overcome the language barriers that impede ELL students. Of course it must."); *see also United States v. City of Yonkers*, 96 F.3d 600, 620 (2d Cir. 1996); *see also Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) ("[Section] 1703(f) places the obligation on both states and districts to provide equal educational opportunities to their students").)

Over the forty years since the statute was enacted, courts have provided clear parameters for the meaning of "appropriate action" under Section 1703(f). A seminal Fifth Circuit decision, *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), established a three-prong framework for assessing compliance with Section 1703(f). Under the *Castaneda* framework, courts consider whether: (1) the EL program chosen by the state or district is based upon a sound educational theory; (2) the EL program is reasonably calculated to implement that theory effectively and is adequately resourced to do so (*e.g.*, with teachers qualified to deliver the program); and (3) the educational agency evaluates the EL program to determine if it is in fact overcoming EL students' language barriers and enabling them to achieve parity of participation in the standard instructional program within a reasonable period of time. (*Id.* at 1010-11,

1113-14.) The principles of this framework have been widely adopted and consistently applied when analyzing claims against states and districts, including by the United States in its enforcement of the EEOA. (*See, e.g., Gomez,* 811 F.2d at 1037; *C.G. v. Pennsylvania Dept. of Educ.*, 888 F. Supp.2d 534 (M.D. Pa. 2012); *Valeria v. Wilson*, 12 F. Supp.2d 1007, 1017 (N.D. Cal. 1998); *Teresa P. by TP v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713 (N.D. Cal. 1989); *Keyes v. School Dist. No. 1 Denver Co,* 576 F.Supp. 1503, 1510 (D. Colo. 1983). *See also Flores v. Arizona*, 516 F.3d 1140, 1146 (9th Cir. 2008) (citing *Castaneda*'s three-prong framework), *rev'd on other grounds sub nom Horne v. Flores*, 557 U.S. 433 (2009).)

Under *Castaneda*'s three-prong test, education officials retain discretion to choose among types of EL programs that will be most responsive to student needs. (*Castaneda*, 648 F.2d at 1008-09.) However, that discretion is limited. These limits are well defined by *Castaneda*: the EL programs must be educationally sound, adequately resourced, and effective in practice, as demonstrated and addressed through evaluation and monitoring. (*See id.* at 1010-11; *see also Gomez,* 811 F.2d at 1041 ("[A]lthough Congress has provided in § 1703(f) that the spectrum of permissible choice for educational agencies would be broad, that does not mean that the spectrum is without discernible boundaries").)

Analysis under the *Castaneda* three-prong framework is consecutive and dispositive. If an EL program lacks a sound educational theory, then it fails the first prong and the inquiry ends. (*Castaneda*, 648 F.2d at 1008-10.) Courts have held that many different types of EL programs may fulfill education officials' obligations under the first prong of *Castaneda*. (*See, e.g., Valeria*, 12 F. Supp.2d at 1016-1018; *Teresa P.*, 724 F. Supp. at 713; *Guadalupe Org., Inc v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1030 (1978).) In California, districts have almost no discretion regarding EL programs under prong

one; districts are required to provide SEI services, including ELD and SDAIE, subject to a few exceptions. (Cal. Educ. Code §§ 305-306, 310-11.)

Under *Castaneda*'s second prong, courts must determine whether a state's particular EL program and practices are reasonably calculated to implement its chosen educational theory effectively. (*Castaneda*, 648 F.2d at 1010.) Even assuming districts in California retain some discretion over how they provide the state-mandated EL services, neither state nor federal law permits districts to provide no EL services at all.[13] A state cannot be said to have taken "appropriate action" for purposes of the EEOA where "despite the adoption of a promising theory, [it] fails to follow through with practices, resources, and personnel necessary to transform that theory into reality." (*Id.*; *see also Gomez*, 811 F.2d at 1042 ("[P]ractical effect must be given to the pedagogical method adopted.").) If, as occurred repeatedly here, districts fail to provide EL instructional services and the state has notice of this failure, this triggers the state's duty to ensure that the EL students' needs are met. Accordingly, Respondents must take action that is reasonably calculated to ensure that their mandated EL program is delivered in a manner that meets those needs. Here, Respondents simply accepted the annual reported lack of language services for over 20,000 EL students for over a decade, thereby abdicating their responsibility under the EEOA.

B. States Have a Duty to Supervise Whether Districts Are Addressing English Learner Students' Needs

States have a mandatory duty under the EEOA to supervise districts' compliance "to ensure that needs of students with limited English language proficiency are addressed." (*Flores*, 516 F.3d at 1173

[13] Respondents argue that the EEOA affords them the discretion to ignore the Language Census and CALPADs data by invoking the "latitude" discussed in *Castaneda* and *Horne*. (Resp. Am. Opp'n at 15.) *Horne*'s discussion quotes from the part of *Castaneda* that determined only that Section 1703(f) did not require bilingual education and rather afforded states and districts "latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA." (*Horne*, 557 U.S. at 440-41 (quoting *Castaneda*, 648 F.2d at 1009).) Thus, neither *Castaneda* nor *Horne* supports Respondents' argument that they have the "discretion" to disregard data that activates their EEOA obligations. Respondents' reliance on *Coachella Valley Unified Sch. Dist. v. State of CA*, 176 Cal. App.4th 93, 115-116 (2009), a case about discretion under the No Child Left Behind Act, is also misplaced.

(quoting *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981)); *see also Idaho Migrant Council*, 647 F.3d at 71 ("[T]he State Agency has an obligation to supervise the local districts to ensure compliance."); *Yonkers*, 96 F.3d at 620-21; *Gomez*, 811 F.2d at 1037, 1043; *Bd. of Educ. of City of Peoria, Sch. Dist. No. 150 v. Illinois Bd. of Educ.*, 810 F.2d 707, 712-713 (7th Cir. 1987); *United States v. School District of Ferndale,* 577 F.2d 1339, 1347-48 (6th Cir. 1978).) This duty to supervise districts' provision of EL services is strengthened where, as here, such supervision is also mandated by state law. (*See Peoria,* 810 F.2d at 713.) California law requires not only that CDE supervise whether districts are providing services to EL students, but also that it regularly monitor those services. (Cal. Educ. Code § 64001(b).)

While states share the duty for addressing EL students' needs with districts, a state cannot completely delegate this duty to districts given its responsibility to supervise district compliance. (*See Idaho,* 647 F.2d at 71; *Gomez*, 811 F.2d at 1042-1043 ("[States] cannot . . . completely delegate in practice their obligations under the EEOA.").) To delegate in this way would mean that a state was taking "no action," (*id.*), in clear contravention of Section 1703(f)'s language. (*See* 20 U.S.C. § 1703(f); *Gomez*, 811 F.2d at 1043 (clarifying that the state's "appropriate action [duty] . . . must mean something more than 'no action'"); *see also Horne*, 557 U.S. at 439.)

Respondents argue that by simply having a monitoring system in place, they have fulfilled their obligation to monitor districts and ensure that EL students receive the services to which they are entitled. States' supervision of districts may take a variety of forms, but it must *at least* contain the following elements to constitute "appropriate action" under Section 1703(f) of the EEOA.

First, states must supervise whether districts are providing EL instructional services to their EL students. (*See Idaho*, 647 F.2d at 71; *Yonkers*, 96 F.3d at 620; *Gomez*, 811 F.2d at 1042-43; *Peoria,* 810

F.2d at 712 (the EEOA "requires that the *state* ensure compliance") [emphasis in original].) Second, state supervision must not merely confirm that districts have a program to serve EL students, but that the program comports with *Castaneda's* three-prong test by being educationally sound, adequately resourced, and effective in practice. (*Castaneda*, 648 F.2d at 1009-11; *see also Flores*, 516 F.2d at 1146; *Gomez*, 811 F.2d at 1042; *Idaho* 647 F.2d at 71.) Based on the record in this case, Respondents have not met either of these elements of their duty to supervise, despite the clear mandates of state and federal law and the persistent evidence of district noncompliance.

Third, a state must promulgate guidelines – whether in the form of regulations, policies, or otherwise – to ensure that districts are clear on their duties under the EEOA and are addressing their EL students' language needs. (*Gomez*, 811 F.2d at 1034 ("As a result of the [state's] failure to prescribe the proper guidelines, LEP children throughout the state have been denied the appropriate educational services they are entitled to under federal and state law").) In addition, states must actually enforce those guidelines through effective supervision of district compliance. (*See Gomez,* 811 F.2d at 1042.) In *Gomez*, the appellate court rejected "the [lower] court's decision . . . that the [state] Respondents need only issue regulations . . . [and] need not monitor and enforce the implementation of the program chosen by the state's legislature." (*Id. ("*"We cannot accept such an interpretation of the EEOA."); *see also Flores*, 516 F.3d at 1173; *Idaho*, 641 F.2d at 71.) Thus, states cannot abdicate their supervisory responsibilities by ignoring credible evidence of persistent or significant district noncompliance. Here, while Respondents have issued guidance regarding state-required EL services, Respondents have ignored credible and persistent evidence that this guidance is not being followed.

C. *Respondents Have Yet to Meet Their EEOA Obligations to Supervise Districts' Compliance and Ensure that the Needs of English Learner Students are Addressed*

Respondents' actions have not satisfied their supervisory obligations under the EEOA. Here, the State of California has determined that SEI services – including ELD and SDAIE by state-authorized teachers – are required to provide EL students with an educationally sound program. State law also empowers and requires CDE to monitor district compliance with these state-required services. Though Respondents now argue that *non-instructional* services could constitute appropriate EL services, this assertion is contradicted by the case law and is inconsistent with CDE's own monitoring practices.[14] *Castaneda* requires that EL programs provide not only ELD instruction to ensure EL students learn English, but also EL instructional services in the content areas so that EL students do not incur irremediable content deficits during the EL program. (*Castaneda*, 648 F.2d at 1011-1012.) Moreover, CDE is obligated to monitor whether districts comply with these requirements, and its FPM review of roughly 7% of California districts each year checks whether districts provide both ELD and accessible academic instruction to EL students, as well as whether that instruction is provided by qualified teachers.[15] Thus, the State not only is capable of assessing whether EL students actually are receiving the EL instructional services they need, but also is equipped to intervene to ensure that districts provide

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[14] Respondents argue that "[a]n EL student who is designated on the Language Census as not receiving 'instructional services' may still be receiving appropriate EL Services" because such "[n]on-instructional EL Services could include: after school tutoring or English language programs, English language counseling, parent literacy and community services." (Resp. Am. Opp'n at 20 (citing Fajardo Decl. ¶ 16), n.23 (citing *Castaneda*).) This argument is at odds with California law and CDE's longstanding guidance. It also misconstrues *Castaneda* and omits critical language in the case that qualifies an educational agency's discretion to first emphasize ELD over core content areas. The omitted language reads: "so long as the schools design programs which are reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system." (*Castaneda*, 648 F.2d at 1011.) Thus, all EL programs must be reasonably designed with respect to ELD and access to the core in ways that enable ELs to achieve English proficiency and to perform comparably to never-EL students in core content areas within a reasonable time-period.

[15] *See* supra note 7 discussing questions in the SY2013-14 FPM Instrument regarding whether districts place EL students in EL programs and given them ELD, SDAIE, or PLI, and teachers authorized to provide such instruction.

services when credible evidence indicates EL students' needs are going unmet. Here, unfortunately, Respondents have done nothing in response to such evidence to ensure that those needs are met.

Respondents also argue that Census and CALPADS data are neither intended nor useful for monitoring. These arguments are specious because a statutory purpose of the Census Data was to plan for sufficient numbers of EL instructional classrooms with authorized teachers to serve all EL students reported in the data (Cal. Educ. Code § 52164), and the CALPADS reports "were selected based, in part, on CDE's State and Federal statutory and regulatory reporting requirements." (Ashley Decl. ¶ 10.)[16] Furthermore, these data respond to the very questions the FPM instrument asks about whether the district's EL students receive ELD, SDAIE, and PLI with authorized teachers or no EL services at all. (*See* supra note 7.)

These data also demonstrate that Respondents have failed to meet their supervisory duties under the EEOA, despite having multiple opportunities to do so. For example, CDE could have considered these data when selecting districts for FPM reviews, as it did under the *Comite* orders from 1985 to 2002, and then required the districts under review to provide evidence that they are responding to the unmet needs of ELs.[17] CDE already considers a district's compliance history as one of its selection criteria for FPM reviews, (Kazanis Decl. ¶ 26), and could easily incorporate these data. Alternatively, CDE could have directed all of the districts that reported "ELs not Receiving any EL Instructional Services" in the Census data and those certifying "no EL education services 'for all or a large proportion of their ELs'" in the CALPADs data[18] to provide such services immediately and to submit evidence to CDE that this was

[16] (*See also* Cal. Educ. Code § 60900(d)(1) (stating that one of the goals of CALPADs is "to provide school districts and [CDE] access to data necessary to comply with federal reporting requirements...in the No Child Left Behind Act of 2001"); Fajardo Decl. ¶ 15 (discussing how CALPADS "give[s] us a truer picture of compliance.").)

[17] (*See* discussion of *Comite* orders at 7-8 & n.8.)

[18] (*See* quoted language in Kazanis Decl. Ex. D.)

done (*e.g.*, submit rosters of EL students' ELD and content classes with authorized teachers through the California Accountability and Improvement System ("CAIS")). (*See* Cal. Educ. Code § 64001(c); Cal. Educ. Code § 52164.2; Kazanis Decl. ¶ 23 (districts can upload documents in CAIS for CDE to demonstrate compliance).)

Instead of taking appropriate and practicable actions such as these, all CDE did was to send a voluntary survey in 2013 to only the districts at issue in the SY2010-11 Language Census data. CDE then failed to follow up with either the 60% of districts that did not respond or with the numerous districts that responded in ways that admitted noncompliance with the EEOA. (*See* Kazanis Decl. ¶ 7.) When CDE observed the increase in the number of EL students with "no EL education services" in the SY2012-13 CALPADS data, CDE merely sent the reporting districts a letter questioning the accuracy of these certified data. (*See* Kazanis Decl. Ex. D.) CDE then recommended in the February 27 letter that districts review their CALPADS data and offered that EL students could be reported as served if the teacher has the authorization to teach ELs (*see id.*), despite CDE's own guidance prohibiting this reporting practice. (*See* Pet. March 14 RJN at 32, Ex. 4 (2011 Census Instructions at 11).) These responses were not reasonably calculated, and therefore not "appropriate action," to ensure that the EL students in these districts actually receive the EL educational program that California has chosen, as required by *Castaneda's* first and second prongs. (*See Castaneda*, 648 F.2d at 1010-11.)

Even if this Court were to conclude that Respondents had complied with the first and second prongs of *Castaneda* with respect to their supervisory obligations under the EEOA, this Court should examine their conduct under the third prong. Respondents argue that the FPM ensures that EL students receive required services and that the FPM is "a much more effective monitoring program" than

responding to Language Census or CALPADs data." (Resp. Am. Opp'n at 3.[19]) However, the FPM, CDE's voluntary survey of the districts at issue in the SY2010-11 Census Data, and CDE's February 27 letter have not proven effective at ensuring that the needs of EL students in the reporting districts are being addressed. The record here is devoid of evidence that these actions have effectively reduced the number of EL students reported as lacking EL instructional services. Though Respondents no longer collect the Language Census data, the CALPADs reports continue to show the same lack of services and could be readily used in Respondents' monitoring to ensure EL students receive the services to which they are entitled under the EEOA. In sum, based on the record in this case, Respondents have yet to take appropriate action to rectify this longstanding and pervasive problem of districts certifying that they are not providing EL instructional services to at least 20,000 EL students across California.

Effective and timely responses from the Respondents reasonably calculated to ensure the appropriate delivery of educational services to EL students are needed not only to satisfy their supervisory obligations under the EEOA, but also to ensure EL students are provided with equal educational opportunities. The failure of a state to act in accordance with its EEOA obligations, especially in response to credible and persistent evidence of districts' noncompliance, is likely to have long-term, negative effects on EL students and their schools. (*See Lau v. Nichols*, 414 U.S. 563, 566 (1974) ("students who do not understand English are effectively foreclosed from any meaningful education"); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974) (discussing the negative effects of placing non-English speaking students in a class taught in the English language without EL instructional

[19] Respondents' only support for this sweeping assertion are two declarations from CDE personnel that merely reiterate this assertion with no supporting evidence. (*See* Fajardo Decl. ¶14 ("more effective"); Kazanis Decl. ¶ 23 ("an opportunity for effective monitoring").) Neither declarant relies on evidence demonstrating FPM's effectiveness, and there is no evidence in the record showing that the certified numbers of EL students without any EL services have declined since FPM started in 2009. (*See* Kazanis Decl. ¶ 21 (CDE began using the FPM in 2009).)

services); *Rios v. Read*, 73 FRD 589, 595 (E.D.N.Y. 1977) ("An inadequate program is as harmful to a child who does not speak English as no program at all.").) The obligations imposed under Section 1703(f) of the EEOA ensure that all students receive meaningful instruction that provides them with an equal educational opportunity.

V. CONCLUSION

Petitioners' request in this case is straightforward: that Respondents take appropriate action in response to the Language Census and CALPADs data to fulfill their duties to supervise districts' provision of EL services and ensure that EL students' needs are being addressed. As the legal standards discussed above make plain, a state's duties under the EEOA must mean taking appropriate and effective steps to ensure that EL students' need are addressed when it is faced with years of credible evidence that numerous districts are failing to serve their EL students. The Respondents have the duty, the data, and the tools to address this evidence. California's EL students cannot afford to wait any longer.

In resolving the factual and legal issues in this case, the United States respectfully requests that this Court apply the requirements set forth in Section 1703(f) of the EEOA as articulated in this Statement of Interest.

Dated: July 14, 2014

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: D.J., et al., v. Dept. of Education, et al.

Case No.: BS142775

I declare:

I am employed in the office of the United States Attorney for the Central District of California, which is the office of a member of the California State Bar and the United States Department of Justice, at whose direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the United States Attorney's Office for the Central District of California for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the United States Attorney's Office is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 14, 2014, I served the attached **STATEMENT OF INTEREST** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the United States Attorney's Office for the Central District of California at 300 North Los Angeles Street, Suite 7516, Los Angeles, CA 90012, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 14, 2014, in Los Angeles, California.

Lillian D. Arratia
Declarant

Lillian D. Arratia
Signature