U.S. Department of Justice

Civil Rights Division

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Department of Justice
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July 6, 2009

VIA OVERNIGHT MAIL
Charles R. Fulbruge, III, Clerk
United States Court of Appeals
for the Fifth Circuit
United States Courthouse
600 Maestri Place
New Orleans, LA 70130-3408

Re: Supplemental Letter Brief in *United States* v. *Texas*, Nos. 08-40858, 09-40047 (5th Cir.)

Dear Mr. Fulbruge:

Pursuant to Judge King's request at oral argument on June 2, 2009, the United States hereby submits this supplemental letter brief to describe the State Defendants' obligations under state law regarding the "substantive content of programs for improving [English language proficiency] in lower and secondary schools and for monitoring" such programs.

1. State Defendants' letter brief argues (Letter Br. 2) that TEA has only "indirect" responsibility for the substantive content of LEP programs. To be sure, "school districts and charter schools created in accordance with the laws of [Texas] have the primary responsibility for implementing the state's system of public education and ensuring student performance in accordance to this code." Tex. Educ. Code § 11.002 (Vernon 2006). State law, however, specifically provides that TEA "*shall administer and monitor compliance* with education programs required by *federal* or state law, including federal funding and state funding for those programs." Tex. Educ. Code § 7.021(b)(1) (Vernon 2006) (emphases added). In particular, 19 Texas Administrative Code § 97.4(a) (2009) requires the head of TEA, the commissioner of education, to "take any necessary action to comply with all requirements of * * * federal statutes and regulations," while 19 Texas Administrative Code § 97.4(b) provides that "[t]he commissioner of education may impose sanctions as authorized under * * * federal statutes and regulations in addition to those imposed under Texas Education Code, Chapter 39, Subchapter G [for non-compliance with accreditation standards]."

Accordingly, regardless of how State Defendants characterize TEA's responsibilities under state law, state law nonetheless obligates TEA to ensure that the LEP programs offered in primary and secondary schools in the State comply with federal law, including the Equal Educational Opportunities Act (EEOA), 20 U.S.C. 1703(f).

2. In any event, contrary to State Defendants' assertions, state law imposes significant obligations on TEA regarding substantive aspects of the LEP programs offered in school districts:

First, state law requires TEA to establish procedures for identifying which school districts must provide LEP programs. Texas Education Code § 29.053(a) (Vernon 2006) provides that TEA "shall establish a procedure for identifying school districts that are required to offer bilingual education and special language programs," while Texas Education Code § 29.053(d) (Vernon 2006) states that in school districts with twenty or more LEP students in the same grade level, school districts must provide bilingual education in elementary grades; bilingual education, ESL, or other language instruction approved by TEA in post-elementary through eighth grade; and ESL in secondary grades. Any school district seeking an exception from providing a bilingual education program must file documentation for the exception with TEA and obtain TEA's approval. See Tex. Educ. Code § 29.054(a) (Vernon 2006); 19 Tex. Admin. Code § 89.1207 (2009). An exception under this Section is valid for one year, and the school district must reapply to TEA for an exception for each succeeding year. See Tex. Educ. Code § 29.054(c) (Vernon 2006). Texas Education Code § 29.054(d) (Vernon 2006) further provides that "[d]uring the period for which a district is granted an exception under this section, the district must use alternative methods approved by [TEA] to meet the needs of" LEP students, "including hiring teaching personnel under a bilingual emergency permit."

Second, state law requires TEA to "establish standardized criteria for the identification, assessment, and classification of students of limited English proficiency eligible for entry into the program or exit from the program." Tex. Educ. Code § 29.056(a) (Vernon Supp. 2008). Accordingly, school districts must administer oral language proficiency tests approved by TEA to identify LEP students. 19 Tex. Admin. Code § 89.1225 (2009). "The grade levels and the scores on each test which shall identify a student as [LEP] shall be established by TEA," while "[t]he commissioner of education shall review the approved list of tests, grade levels, and scores annually and update the list." 19 Tex. Admin. Code § 89.1225(d) (2009). In determining when students may exit LEP programs, schools must use TEA-approved tests that measure "the extent to which the student has developed oral and written language proficiency and specific language skills in English" and, if applicable, evaluate the student's performance on TEA-approved criterion-referenced written tests and a TEA-approved language arts assessment instrument administered in English. Tex. Educ. Code § 29.056(g) (Vernon Supp. 2008); 19 Tex. Admin. Code § 89.1225(h) (2009); see also 19 Tex. Admin. Code § 101.1003 (2009).

Although state law requires school districts to create language proficiency assessment committees to identify and evaluate LEP students, see Tex. Educ. Code § 29.056(c) (Vernon Supp. 2008); Tex. Educ. Code § 29.063(a)-(c) (Vernon 2006), it also recognizes the importance

TEA plays in ensuring the success of the State's LEP programs by providing that TEA "may prescribe additional duties for language proficiency assessment committees." Tex. Educ. Code § 29.063(d) (Vernon 2006). In addition, Texas Education Code § 29.053(b) (Vernon 2006) requires local school districts to report annually to TEA the numbers of LEP students identified at each school by the language proficiency assessment committee. State law also provides that a parent or student may appeal to the commissioner of education if a school district fails to comply with state law regarding bilingual education or special language programs. See Tex. Educ. Code § 29.064 (Vernon 2006). See 19 Tex. Admin. Code § 89.1240(c) (2009).

Third, TEA plays a large role in designing the substantive content and method of instruction of LEP programs. State law mandates standards for bilingual-ESL program content and instructional methods, including requiring "a bilingual education program established by a school district" to be "a full-time program of dual-language instruction," and ESL programs to involve "intensive instruction in English from teachers trained in recognizing and dealing with language differences." Tex. Educ. Code § 29.055(a) (Vernon 2006). Section 29.055(f) (Vernon 2006) provides that "[i]f money is appropriated for the purpose, the agency shall establish a limited number of pilot programs for the purpose of examining alternative methods of instruction in bilingual education and special language programs." State Defendants argue (Letter Br. 3) that Section 29.055(f) embodies TEA's sole responsibility with respect to program content. This assertion, however, neglects TEA's role in identifying school districts that must provide LEP programs and students that require LEP services.

This argument also overlooks 19 Texas Administrative Code § 89.1210(b) (2009), which requires TEA to "develop program guidelines to ensure that the [bilingual education] programs are developmentally appropriate, that the instruction in each language is appropriate, and that the students are challenged to perform at a level commensurate with their linguistic proficiency and academic potential." Section 89.1210(c) (Program Content and Design) further requires school districts to "use state-adopted English and Spanish instructional materials and supplementary materials as curriculum tools to enhance the learning process" in "bilingual education programs using Spanish and English as languages of instruction." 19 Tex. Admin. Code § 89.1210(c) (2009). Similarly, school districts "shall use state-adopted English as a second language instructional materials and supplementary materials as curriculum tools." Tex. Admin. Code § 89.1210(e) (2009). Furthermore, pursuant to Texas Education Code § 29.063(d) (Vernon 2006), TEA may modify the content of ESL programs by prescribing additional duties for secondary school language proficiency assessment committees, which are empowered to recommend specific content courses under 19 Texas Administrative Code § 89.1210(d) (2009).

Lastly, although the State Board for Educator Certification certifies bilingual education teachers, see Tex. Educ. Code § 29.061 (Vernon 2006), a school district must apply to and obtain TEA's approval for an exception if it is unable to hire a sufficient number of bilingual education or ESL teachers with state-approved teaching certificates. Tex. Educ. Code § 29.054(b) (Vernon 2006); see also Tex. Educ. Code § 29.054(c) (Vernon 2006). TEA shall set the maximum student-teacher ratio for bilingual education and special language classes. Tex. Educ. Code § 29.057 (Vernon 2006). Moreover, state regulation provides that TEA "shall develop, in

collaboration with Education Services Center[,] * * * bilingual education training guides for implementing bilingual education and English as a second language training programs." 19 Tex. Admin. Code § 89.1245(g) (2009).

3. As the district court correctly recognized, "Texas law requires TEA to evaluate and monitor multiple aspects of the state's bilingual and special language programs." *United States* v. *Texas* (*LULAC V*), 572 F. Supp. 2d 726, 735 (E.D. Tex. 2008).

Texas Education Code § 29.062(a) (Vernon 2006) provides: "[TEA] shall evaluate the effectiveness of programs under this subchapter [(Bilingual Education and Special Language Programs)] based on the academic excellence indicators adopted under Section 39.051(a)." "Performance on the [academic excellence] indicators * * * shall be compared to state-established standards * * * and must include:" drop-out rates, graduation rates, and standardized test passing rates. Tex. Educ. Code §§ 39.051(b)(1)-(3) (Vernon Supp. 2008); see also 19 Tex. Admin. Code § 97.3 (2009) (Accountability Criteria). State law further provides that each year the commissioner of education "shall define exemplary, recognized, and unacceptable performance for each academic excellence indicator" and "shall project the standards for each of those levels of performance for succeeding years." Tex. Educ. Code § 39.051(d) (Vernon Supp. 2008); see also 19 Tex. Admin. Code § 97.1001 (2009) (Accountability Rating System). In addition, the commissioner "shall adopt accountability measures to be used in assessing the progress of students who have failed to perform satisfactorily in the preceding school year on an assessment instrument required under Section 39.023(a), (c), or (l)." Tex. Educ. Code § 39.051(g) (Vernon Supp. 2008). The commissioner of education shall also define accreditation standards, Tex. Educ. Code § 39.071 (Vernon Supp. 2008); determine how the indicators may be used to determine accountability ratings, Tex. Educ. Code § 39.073 (Vernon Supp. 2008); and take action against a school district based on its performance, including ordering on-site investigations or any other measure necessary to improve any area of a district's performance. Tex. Educ. Code §§ 39.072(c), 39.074, 39.075 (Vernon Supp. 2008). The commissioner may impose sanctions if a school district fails to meet accreditation criteria or is deemed "an academically unacceptable campus." Tex. Educ. Code § 39.132 (Vernon Supp. 2008); see also Tex. Educ. Code § 39.131 (Vernon Supp. 2008).

Furthermore, Texas Education Code §§ 29.062(b)(1)-(9) (Vernon 2006) requires TEA to monitor bilingual education and special language programs in the areas of "program content and design," "program coverage," "identification procedures," "classification procedures," "staffing," "learning materials," "testing materials," "reclassification of students," and "activities of the language proficiency assessment committees." Texas Education Code § 39.027(e) (Vernon Supp. 2008) also requires the commissioner to "develop an assessment system that shall be used for evaluating the academic progress, including the reading proficiency in English, of all students of limited English proficiency." Currently, TEA collects information about the State's LEP programs through its Performance-Based Monitoring Analysis System. See 19 Tex. Admin. Code § 97.1005 (2009). Texas Education Code § 29.066 (Vernon Supp. 2008) mandates the type of information that school districts offering bilingual education or special language programs must include in the district's Public Education Information Management System

(PEIMS) report. The commissioner of education establishes the "data standards * * * used by school districts and charter schools to submit information required for the legislature and the TEA to perform their legally authorized functions." 19 Tex. Admin. Code § 61.1025 (2009). "If a school district * * * fails to satisfy appropriate standards[, including the academic excellence indicators,] * * * [TEA] shall apply sanctions." Tex. Educ. Code § 29.062(e) (Vernon 2006).

State Defendants argue (Letter Br. 6) that TEA cannot monitor the content and design of LEP programs offered by school districts, as required by Texas Education Code § 29.062(b), because "[Section] 7.028(a), in conjunction with [Sections] 7.208(b) and 29.062(a) as amended, bars TEA from monitoring program content and design." This argument (Letter Br. 6) is not only an unreasonable interpretation of the law, but also contradicts "the plain language of the statute."

Texas Education Code § 7.028(a) (Vernon 2006) provides, *inter alia*, that TEA "may monitor compliance with requirements applicable to a process or program provided by a school district * * * only as necessary to ensure * * * compliance with federal law and regulations," and Texas Education Code § 7.028(b) (Vernon 2006) states that "the board of trustees of a school district * * * has primary responsibility for ensuring that the district * * * complies with all applicable requirements of state educational programs." As noted above, Texas Education Code § 29.062(a) (Vernon 2006) provides that TEA "shall evaluate the effectiveness of programs under this subchapter based on the academic excellence indicators adopted under Section 39.051(a), including the results of assessment instruments." Section 29.062(a) also states that TEA "may combine evaluations under this section with federal accountability measures concerning students of limited English proficiency." On their face, these provisions do not limit TEA's monitoring activities to preclude TEA from doing more than what these sections provide. For instance, none of these provisions restrict TEA to using *only* the academic excellence indicators as the means of monitoring LEP programs. Indeed, as the district court correctly noted, the state legislature amended Section 7.028(a) only to omit the requirement that TEA perform on-site inspections of each school district's bilingual education and special language programs. *LULAC V*, 572 F. Supp. 2d at 735. The legislature left unmodified Section 29.062(b)'s requirement that TEA monitor the nine areas listed in that section, including content and design, in determining the effectiveness of LEP programs. *Ibid.*

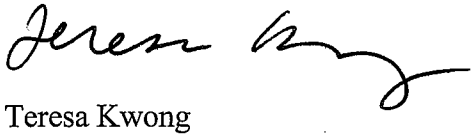
4. At bottom, it is unclear what changes the district court will order State Defendants to make with respect to the content and monitoring of the State's LEP programs because State Defendants chose to appeal the district court's order instead of submitting a proposed plan, as ordered by the court in its judgment order. See R.E. 11. To the extent that state law "contemplat[es] a more limited role for TEA," as State Defendants argue (Letter Br. 7), the State is nonetheless obligated to comply with federal law, and state law does not bar State Defendants from making the requisite changes to the State's LEP programs for secondary students and TEA's monitoring of such programs in order to comply with the EEOA.

Please provide a copy of this letter to each member of the panel (Judges King, Davis, and Garwood). Please feel free to contact me at the telephone number listed below if you have any

questions about this submission.

Sincerely,

Dennis J. Dimsey
Deputy Chief



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Enclosure

cc: Counsel of Record