Berkeley La Raza Law Journal

Volume 1 *Number 3 (1986)* Article 4

1986

Bilingual Education Litigation in Denver: The School District's Perspective

Michael Jackson

Bilingual Education Litigation in Denver: The School District's Perspective

By Michael Jackson*

The fifteen years of desegregation and language rights litigation in *Keyes v. School District No. 1* began in 1969.[1] The plaintiffs charged that the Denver public school system was segregated and sought an order directing the school district to develop a plan dismantling its dual school system. After a decision by the United States Supreme Court on the desegregation issue,[2] the trial court entered both a memorandum opinion finding that the school district operated a dual system,[3] and a subsequent order calling for a system-wide remedy designed to remove the vestiges of the segregated schools.[4] The order eventually led to a court-ordered language rights remedy[5] and the negotiation of a consent decree providing for the educational needs of limited-English-proficient students in the Denver schools. To help better understand bilingual rights litigation, I will briefly describe the legal posture and strategy undertaken by the Denver Public Schools in the language rights phase of the case.

Hearings concerning the proper desegregation remedy for the school district were held in 1974. The plaintiff-intervenors, the Congress of Hispanic Educators (CHE), sought an order requiring the school district to implement a broad desegregation plan. As part of the remedy for dismantling the dual school system, CHE offered a bilingual/bicultural instructional plan authored by their language rights expert, Dr. Jose A. Cardenas. In fashioning the desegregation remedy, the district court or-

---

* The author is a founding partner of the law firm Semple & Jackson in Denver, Colorado. Mr. Jackson was chief litigator for the Denver Public Schools in *Keyes*. LA RAZA LAW JOURNAL wishes to acknowledge Dwight Pringle, an associate at Semple & Jackson, for his assistance.

1. The Keyes case was initially tried as a desegregation suit. 313 F. Supp. 61 (D. Colo. 1970) (finding that segregation existed), 313 F. Supp. 90 (D. Colo. 1970) (ordering desegregation plan), *modified,* 445 F.2d 990 (10th Cir. 1971), *modified and remanded,* 413 U.S. 189 (1973). This article is devoted to the language rights issues of the case. The principal decisions in this area can be found at 368 F. Supp. 207 (D. Colo. 1973) (establishing that the school system was a dual system), 380 F. Supp. 673 (D. Colo. 1974) (adopting a desegregation plan), *modified,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976), *on remand,* 576 F. Supp. 1503 (D. Colo. 1983) (decision leading to the negotiation of the consent decree).

2. 413 U.S. 189.

3. 368 F. Supp. 207, 210, *modified on other grounds,* 521 F.2d 465.

4. Keyes, 380 F. Supp. 673 (D. Colo. 1974), *modified,* 521 F.2d 465.

5. 576 F. Supp. 1503.

dered the school district to implement the Cardenas Plan or something substantially similar to it.[6]

On appeal, the Court of Appeals for the Tenth Circuit reversed the trial court's use of the Cardenas Plan and remanded the case for hearings to determine whether the school district's curriculum was sufficient to ensure that Hispanic and other minority children had an opportunity to gain proficiency in the English language.[7] The appellate court determined that the record could not support a violation of Section 601 of the Civil Rights Act,[8] or of the Fourteenth Amendment, upon which Judge William E. Doyle's order granting language relief was predicated.[9]

I.
THE LANGUAGE RIGHTS ISSUE

The language rights issue was not formally reached until 1980 when CHE filed a supplemental complaint in intervention. The complaint included language claims under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act,[10] and an additional claim under a provision of the Equal Educational Opportunity Act of 1974.[11] Among the problems presented by the supplemental complaint, and its later amendment, were the propriety of the class certification sought, and the ability of the putative class representatives to properly represent the interests of language groups other than Spanish. One of the reasons for this concern was the seeming inability on the part of CHE to determine whether they truly wanted to represent language groups other than Spanish, and also, whether they intended to proceed under the Fourteenth Amendment or alternatively premise their claims of entitlement on the Civil Rights Act or on the Equal Educational Opportunity Act.[12]

---

6. *Id.* at 696.
7. Keyes, 521 F.2d at 482.
8. 42 U.S.C. §§ 2000d-2000d-6.
9. 521 F.2d at 483, n. 22.
10. 42 U.S.C. §§ 2000d-2000d-6.
11. 20 U.S.C. §§ 1701-1721. The operative provision of this statute for purposes of this article is section 1703, which provides, in part:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . .
>
> . . . .
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

12. The confusion we faced with respect to the class issue was reflected in the pleadings. The supplemental complaint sought relief on behalf of all limited-English-proficient (LEP) students. The amended supplemental complaint, filed 10 days after the commencement of the trial, defined the class as "all Hispano LEP children who attend or will attend in the future the Denver Public Schools." The district court, in its memorandum opinion and order on the language issues, certified a class consisting of "all children with limited English proficiency who now attend, and who will in the future attend schools operated by the defendant district." 576 F. Supp. at 1507. The court

In preparing to defend against the claims brought by CHE, it became apparent that the school district would be faced with different legal requirements depending on the basis upon which the intervenors thought themselves entitled to relief. If relief were to be granted under the Fourteenth Amendment's Equal Protection Clause, it appeared to us that it would be necessary for CHE to show that the school district acted with a purpose or intent to discriminate.[13] At that time, we felt that the same standard would be applied to any discussion of a violation of Title VI of the Civil Rights Act of 1964.[14] But an examination of the specific statutory language, the legislative history of the Equal Educational Opportunity Act of 1974, and the cases which had been decided construing the Act gave the school district concern because of the seeming lack of clear authority with respect to exactly what was required of a school district under Section 1703(f) of the Civil Rights Act of 1964.[15]

We were also concerned that this matter had previously been brought before the court as part of a desegregation case. We feared the earlier finding that the school district violated the Constitution would weigh heavily in the court's consideration of the evidence. Our strategy centered on impressing upon the court the need to consider the language rights issue independently from any prior history of segregation. Ultimately, this proved to be the most crucial and least successful tactic.[16]

Yet, as we reviewed the cases and, indeed, as we reviewed the program then in place in the Denver Public Schools for children of limited English proficiency (LEP),[17] we felt comfortable going into trial because of the good faith manner in which the school district programs were carried out. Specific programs for LEP students had been in place in the Denver schools for a number of years. Our hope was to show the court that the school district had in fact recognized its responsibility to provide for the educational needs of LEP students and was proceeding in good faith to implement a program designed to meet those needs, thereby defeating any claim by the intervenors that we had violated either the Four-

recognized that although CHE had been closely identified with "the Hispanic population group" since early in the litigation, it had successfully established each of the prerequisites of FED. R. CIV. PROC. 23(a) for certification of a class consisting of all language groups. *Id.* at 1507-08.

13. Washington v. Davis, 426 U.S. 229, 244-45 (1976).

14. We believed that under the Supreme Court's various holdings in Regents of Univ. of Cal. v. Bakke, 438 U.S. 264 (1978), proof of discriminatory intent was a necessary element of a Title VI claim. This view ultimately proved correct in Guardians Ass. v. Civil Ser. Comm. of the City of N.Y., 463 U.S. 582, 608 n. 1 (1983) (Powell, J. concurring).

15. *See* Guadalupe Org. Inc. v. Temple Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978); Heavy Runner v. Bremmer, 522 F. Supp. 162 (D. Mont. 1981); Deerfield Hutterian Association v. Ipswich Board of Education, 468 F. Supp. 1219 (D.S.D. 1979).

16. Keyes, 576 F. Supp. at 1504.

17. LEP students are those children who suffer from a language barrier that impedes their equal participation in an instructional program.

teenth Amendment or Title VI of the Civil Rights Act. Our pre-trial posture was predicated upon our belief that CHE was required to prove the school district had acted with a purpose or intent to discriminate against these children.[18] In addition, we felt we could satisfy the requirements of the Equal Educational Opportunity Act that a school district take "appropriate action,"[19] through the use of witnesses and exhibits which would describe the existence of the school district's program then in place for LEP students in Denver. We believed the description of the school district's various tutorial and English as a Second Language programs, and evidence of their good-faith implementation, would also satisfy the holding of *Casteneda v. Pickard,*[20] which was then recognized as being the most authoritative case construing the Act.

Our interpretation of the Fifth Circuit's ruling in *Casteneda* was that a school district implementing a program based on sound educational theory, with adequate staff and resources dedicated to the program, and given sufficient time to determine whether the program is appropriate, will thereby have fulfilled its obligation to take "appropriate action" to overcome language barriers that impede educational participation by students in instructional programs.[21]

Additionally, we relied upon cases from the Tenth Circuit Court of Appeals and the United States District Court for the District of Colorado which we thought would be equally, if not more, persuasive to the trial court. For example, in *Serna v. Portales Municipal Schools,* the trial court found that the defendant school district's failure to provide a bilingual education program violated the Fourteenth Amendment equal protection guarantee and Title VI of the Civil Rights Act.[22] On appeal, the Tenth Ciruit, following the Supreme Court's approach in *Lau v. Nichols,*[23] refused to reach the constitutional claim and based its affirmance solely on the Title VI violation.[24] The appellate court based its conclusion upon a finding that "no affirmative steps were taken by the Portales School District to rectify these language deficiencies."[25]

However, in the Colorado case of *Otero v. Mesa County Valley School District No. 51,*[26] the plaintiffs brought a class action alleging a violation of the Fourteenth Amendment, the Equal Educational Oppor-

18. *See* Washington, 426 U.S. at 244-45; Guardians, 463 U.S. at 608 n.1 (Powell, J. concurring).

19. 20 U.S.C. § 1703(f).

20. 648 F.2d 989 (5th Cir. 1981).

21. *Id.* at 1009-10.

22. 351 F. Supp. 1279 (D. N.M. 1972), *aff'd,* 499 F.2d 1147 (10th Cir. 1974).

23. 414 U.S. 563 (1974).

24. 499 F.2d at 1153.

25. *Id.*

26. 408 F. Supp. 162 (D. Colo. 1975), *vacated on other grounds,* 568 F.2d 1312 (10th Cir. 1977), *on remand,* 470 F.Supp. 326 (D. Colo. 1979).

tunity Act, and Title VI. The plaintiffs sought implementation of a bilingual/bicultural program along the lines of the Cardenas Plan. The district court distinguished *Lau* and *Serna* by noting that the case before it involved "very few, if any, students who have a real language deficiency. . ." and a school district "making a real effort, an all out effort, which in no circumstances can be said to be a mere token effort."[27] On this basis, the court found no failure on the part of the school district to comply with any federal statute or regulation.[28] The plaintiffs did not appeal these findings.[29]

We read these cases as providing controlling precedent for the proposition that a violation of any applicable legal standard would only be found upon a showing of the absence of any bona fide effort to remedy language deficiencies. Again, we believed the description of the LEP programs in place and evidence of their good-faith implementation in the Denver public schools would prove our defense of undertaking "appropriate action" to solve student language barriers.

II.
STRATEGIES

Our goal at the trial was, first, to show the soundness of the educational program then in place in the Denver schools. Since the decision in *Lau v. Nichols*,[30] legislators, government officials, teachers, administrators, school boards, and others have struggled to develop not only definitions for classifications of language dominance or language barriers, but also to develop alternative types of programs that might be utilized to address the needs of students. As testified to at the trial by Dr. Beatrice Arias and others, there is no one way to address these problems; educators, legislators and others must recognize that school districts are in their infancy in learning how best to remedy language deficiencies and in choosing from many alternatives designed to address the problem. As the trial progressed, it became clear that there did not seem to be any genuine disagreement about the educational validity or theoretical basis of the Denver program.

In keeping with *Casteneda*, we next sought to emphasize our good-faith implementation of the various LEP programs in the Denver schools and demonstrate that these programs addressed the problems plaintiffs had identified. We felt it important to direct the court's attention to the fact that over forty separate language groups were represented in the Denver schools. Any suggestion that a pure bilingual program was re-

27. 408 F. Supp. at 171.
28. *Id.* at 170.
29. 568 F.2d at 1314.
30. 414 U.S. 563.

quired either under the Constitution, the Civil Rights Act, or the Equal Educational Opportunity Act would have to fall of its own weight because it would be impossible to provide native language instruction for the more than forty separate language groups. At the same time, we felt it incumbent upon ourselves to show the court that the school district was in fact providing some form of service, albeit in some cases simply tutorial assistance, to all LEP children. This was important both as it would address the questions of discriminatory purpose or intent as well as the implementation of an appropriate program.

In 1981, following the filing of the supplemental complaint, the Colorado General Assembly adopted the English Language Proficiency Act,[31] which provided funding to local school districts for students whose dominant language was not English. The state did not, however, mandate or direct the use of any particular type of language program by individual school districts.[32] The school district clearly felt its programs were in compliance with the state act and felt that because of its good-faith implementation of the programs which had been designed, it could show compliance with the Equal Educational Opportunity Act as well. Because the program had been expanded so much in recent years, we thought a careful historical presentation of the development and growth of the program would strengthen the school district's position.

Our strategy finally centered on showing the court that the school district was in compliance with the last of the *Casteneda* requirements by evaluating the success of the programs then in place.[33] We offered testimony and test scores showing that LEP students were progressing in developing English language skills through the school district's programs. The district court did not address this evidence because of its findings on the implementation of the school district's programs.[34]

As we now look back upon the district court's memorandum opinion of December 30, 1983,[35] it seems that the major goals we had, with respect to our legal strategies and theories, were essentially met. Indeed, the court determined that the school district had proceedeed in good faith and found there was no evidence of any purpose or intent to discriminate on the part of the school district.[36] Our specific concern over the intent issue was answered by the court in very clear language: "The

31. COLO. REV. STAT. §§ 22-24-101-106 (1981).

32. The statute was primarily a funding measure. COLO. REV. STAT. § 22-24-104. The only direction with respect to program implementation provides: "It is the duty of each district to . . . [a]dminister and provide programs for students whose dominant language is not English." COLO. REV. STAT. § 22-24-105 (1)(d).

33. 648 F.2d at 1010.

34. Keyes 576 F. Supp. at 1518.

35. *Id.* at 1503.

36. *Id.* at 1519.

evidence in the record in this case does not support a finding of such an intent [that is, an intent to discriminate] with respect to Hispanic or any other language group."[37]

The court, however, went on to rule that the inquiry was not necessary in the case because it was clear from the plain language of the Equal Educational Opportunity Act and the Fifth Circuit's opinion in *Casteneda* that a school district's affirmative obligation to take appropriate action to remove language barriers is neither dependent upon a finding of discriminatory intent nor satisfied by any good-faith effort.[38] Thus, although we were successful in proving the good-faith efforts of the school district, and showing that the school district's program extended to all students, we did not satisfy the court's understanding of our obligation to take "appropriate action" under Section 1703(f).[39]

In retrospect, we would have to say that the legal theory and strategy of trying to disassociate the language issue from the desegregation case was both the most crucial and the least successful. The very language of the court in announcing its opinion in this case supports this conclusion:

> 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 one in which race and ethnicity are not limitations on access to the educational benefits provided . . . . While the following discourse is directed towards 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 that a decade.[40]

We cannot speculate on the results that may have been achieved on the basis of the record made in this case if it had not been a part of the desegregation case. No appeal was taken from the December 30, 1983 order. The Board of Education determined to work with the plaintiff-intervenors in an effort to settle the language issues of the case. On August 17, 1984, Judge Richard P. Matsch approved the Consent Decree as submitted by the parties.

37. *Id.*
38. *Id.*
39. *Id.* at 1519-20.
40. *Id.* at 1504.