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Implementation of the Federal Bilingual Education Mandate: The *Keyes* Case as a Paradigm

By Peter D. Roos*

In August 1984, a United States District Court in Colorado approved a consent decree providing for the educational needs of Limited English Proficient (LEP) students in the Denver Public Schools.¹ The decree culminated ten years of litigation in the case of *Keyes v. School District No. 1*² by advocates seeking a strong language rights program in the Denver schools. The history of this effort mirrors the evolutionary nature of the battle to establish federal language rights for LEP students. The consent decree, for the most part, reflects the current pedagogical and social science response to the legal obligation of school districts. Additionally, the agreement represented a triumph of reasoned accommodation over the rhetoric and polarization which all too often infects discussions of this all-important issue.

The *Keyes* case is one that is as instructive to the layman as it is to the lawyer. This article will attempt to explain *Keyes* in a way that will first serve as guidance to school officials and community leaders who wish to know their respective rights and obligations. This article is also addressed to those lawyers who may ultimately be charged with the protection and enforcement of those rights and obligations. Our story begins with the legal history of the language rights phase of the *Keyes* case, for without the history one cannot understand the outcome. The story necessarily ends with a projection into the future, for the approval of a consent decree merely begins the critical implementation phase of a case.

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* The author is co-director of the Multi-Cultural Education, Training and Advocacy Project. He also serves as regional counsel for the California Rural Legal Assistance public interest organization in San Francisco, California. Mr. Roos was lead counsel for the plaintiff-intervenors in the *Keyes* bilingual litigation.


In between, the article will discuss the trial evidence as a response to the legal obligations of the school district, the mechanics of overcoming barriers to successful discussion, and the content of the consent decree itself.

I.

THE HISTORY OF THE LANGUAGE CLAIM

The Keyes case is most often cited as a desegregation decision. Filed in 1969, the complaint charged the Denver Public Schools with deliberately segregating black students from white students.\(^3\) When ultimately decided by the United States Supreme Court in 1973, the case became the first in which the Court ruled that the intentional, but not legally mandated, segregatory practices found in the North were as unconstitutional as the more formalized practices of the South.\(^4\) A significant part of the ruling was that a finding of intentional segregation by a school district in one geographical area or against one minority group created a prima facie case that other segregation in the district was intentionally caused.\(^5\)

Our story really begins with this latter finding. The Court observed that the Hispanic population of Denver, which was segregated, although there was no finding of intentional segregation, nevertheless, was of a class that traditionally suffered discrimination.\(^6\) The Court noted, "though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students."\(^7\)

When the case was remanded to the district court in 1973, several Hispanic parents, along with the Congress of Hispanic Education (CHE), moved to intervene on behalf of the Hispanic community of Denver. Previously, there had not been specific Hispanic representation in the suit. This motion was granted, and thereafter, CHE and the parents became parties for all purposes.\(^8\) The intervenors were primarily concerned that they be treated equitably in any desegregation plan, that historical patterns of employment discrimination be remedied, and that bilingual programs be protected and enhanced by any desegregation order.\(^9\)

\(^3\) 303 F. Supp. 279 (D. Colo. 1969).
\(^4\) 413 U.S. 189, 203.
\(^5\) Id. at 208.
\(^6\) Id. at 197.
\(^7\) Id. at 198. The Court directed the district court on remand to determine whether the conduct of the Denver Public Schools in deliberately segregating one geographical area, constituted a finding that the entire school system was a dual system. If such a finding was made, the Court directed the district court to order the school system to desegregate the entire system "root and branch." Id. at 213.
\(^9\) These concerns were similar to the concerns that prompted intervention in a number of
During the remand hearing, CHE submitted to the court a desegregation remedy that incorporated a plan authored by Dr. Jose Cardenas, a Chicano educator noted in the area of bilingual education. The Cardenas plan specifically addressed the cultural incompatibilities between Chicano children and an Anglocentric curriculum. The plan proposed that several Hispanic schools be allowed to remain segregated and that these schools have a curriculum designed to rectify these problems. Bilingual-bicultural instruction was a part of the proposal. The desegregation plan adopted by the district court included the Cardenas plan or "something similar to it." 10

On appeal, the Tenth Circuit Court of Appeals reversed that part of the lower court's order adopting the Cardenas proposal. 11 The court ruled:

[T]he court's adoption of the Cardenas plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far. 12

The court remanded the case for "a determination of the relief, if any, necessary to ensure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." 13

The present significance of these early Keyes rulings can best be appreciated through an understanding of several other cases emanating from Texas and Detroit. 14

United States v. Texas (San Felipe Del Rio) 15 was one of several decisions spawned by court action brought by the federal government in 1970 to force Texas to desegregate contiguous school districts that had been created to separate black and white children. 16 The San Felipe Del Rio case involved two school districts, one predominantly Anglo and one overwhelmingly Chicano. In ordering the consolidation of the these two districts, District Court Judge William W. Justice found that English-language and cultural barriers precluded the successful integregation of

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11. Keyes, 521 F.2d at 482.
12. Id.
13. Id. at 483.
Chicano students. Judge Justice also found that in the context of the San Felipe Del Rio border area, it was an appropriate desegregation device to address the language limitations of both Anglo and Chicano students. He thus ordered bilingual education for all students in the newly consolidated district. His order was sustained on appeal.

While this was occurring, the Detroit desegregation case was weaving its way toward two rulings by the United States Supreme Court. In the first of these cases, *Milliken v. Bradley (Milliken I)*, the high Court reversed a district court decision which ordered, as a desegregation remedy, the consolidation of urban Detroit school districts with a number of predominantly white suburban school systems. The principle announced in *Milliken I* was that a court's remedial powers are limited by the extent of the constitutional or legal violation. In *Milliken I*, this meant that a desegregation plan could not be extended to suburban districts unless its creation intentionally contributed to the segregation of the inner-city schools.

Following remand, the district court grappled with a remedy in Detroit, an area in which the demographics precluded significant desegregation. The court settled, in part, on a remedial plan which included establishing comprehensive reading programs and training of faculty to prepare for the changes incident to desegregation. On the second trip to the Supreme Court, the Court held that both *Milliken I* and prior rulings that unlawful segregation must be eliminated "root and branch," supported the propriety of remedial programs as part of a desegregation package as long as the programs had some nexus to the harm occasioned by the segregation.

A final decision, coming somewhat later, brings us full circle. In another of the *United States v. Texas* cases, Judge Justice ruled that patterns of de jure segregation in several school districts warranted an order requiring statewide bilingual education. This order was reversed by the Fifth Circuit Court of Appeals on the grounds that evidence of unlawful segregation in relatively few Texas school districts did not support a

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17. 342 F. Supp. at 28.
18. Id.
19. 466 F.2d 518.
20. 418 U.S. 717.
21. The district court imposed the consolidation upon the suburban school systems without evidence of constitutional violation or de jure segregation on the part of these systems. *Milliken I*, 345 F. Supp. 914 (E.D. Mich. 1971), aff'd, 484 F.2d 215 (6th Cir. 1971).
statewide bilingual decree.\textsuperscript{26}

The Tenth Circuit \textit{Keyes} ruling\textsuperscript{27} anticipated these legal developments. At the earlier district court trial in \textit{Keyes},\textsuperscript{28} no effort was made to match the conditions of segregation of Hispanic students with the need for the broad-based language and cultural plan proposed by Dr. Cardeñas. What \textit{Keyes} and these subsequent decisions disclose is that if a Hispanic community wishes to link a language remedy onto a desegregation order, it must establish that English-language deficiencies of students are products of unlawful segregation. It is also noteworthy that the Cardeñas plan went well beyond a bilingual education plan and sought dramatic changes in the school district to deal with the cultural incompatibilities between the district and Hispanic students. \textit{Keyes}, \textit{Milliken I} and \textit{II} tell us that courts are going to be wary of thrusts that dramatically cut into the pedagogical discretion of school officials. To be successful, such a thrust must be well grounded in a constitutional or legal violation and be supported as a necessary remedy for such a violation.

A second lesson of the Tenth Circuit \textit{Keyes} ruling is that entire schools cannot be maintained as segregated in the name of bilingual education—at least, not in a system ordered to desegregate. The impact of this holding is minimized by other rulings which allow, indeed compel, some degree of clustering to maintain administratively viable language programs.\textsuperscript{29} In fact, the negotiated consent decree later agreed upon in \textit{Keyes} allows for the clustering of secondary school students in an effort to provide bilingual programming.\textsuperscript{30}

\section*{II.
THE TRIAL: MATCHING EVIDENCE WITH THE LAW}

The Supreme Court declined to review the Tenth Circuit \textit{Keyes} ruling, and the case was remanded to the district court.\textsuperscript{31} In 1980, by means of a supplemental complaint, the Hispanic intervenors sought to squarely face the language rights issues in the case by alleging violations of Title VI of the Civil Rights Act of 1964\textsuperscript{32} and the Equal Educational Opportunity Act of 1974.\textsuperscript{33} It was this latter act that CHE ultimately emphasized and upon which the district court relied in issuing its language rights

\begin{footnotes}
\item\textsuperscript{26} 680 F.2d at 371.
\item\textsuperscript{27} 521 F.2d 465.
\item\textsuperscript{28} 380 F. Supp. 673.
\item\textsuperscript{30} See infra text accompanying notes 78-80.
\item\textsuperscript{31} 423 U.S. 1066 (1976).
\end{footnotes}
ruling in 1983.\textsuperscript{34}

\textit{A. The Casteneda Holding}

The Equal Educational Opportunity Act of 1974 was, ironically, an anti-busing measure.\textsuperscript{35} Nevertheless, as part of the compromise to get the legislation passed, it contained a litany of activities declared to be unlawful practices\textsuperscript{36} and gave individuals the right to sue under the Act.\textsuperscript{37} One unlawful practice listed is "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by the students in its instructional program."\textsuperscript{38} This terse language was converted into a meaningful standard by the Fifth Circuit Court of Appeals in \textit{Casteneda v. Pickard}.\textsuperscript{39} The searching analysis by the court and its common sense conclusions as to a court's duty when confronted with a section 1703(f) challenge to a school district's program give the opinion great weight and dictated the evidentiary presentation of \textit{Keyes}.

The \textit{Casteneda} court set forth a three-pronged test for analyzing the lawfulness of a school district's program. First, the court held that the school district must adopt a program in accordance with accepted pedagogical theory.\textsuperscript{40} \textit{Casteneda} admonishes, however, that it is not for a district court, in determining liability, to substitute its judgment for that of school officials but merely to ensure that some acceptable theory grounds the school district's program.\textsuperscript{41} Second, the court is to assure itself that the school district has taken steps reasonably calculated to implement its theory.\textsuperscript{42} Finally, the school district must be responsive whenever an evaluation shows that success of the program is not being achieved.\textsuperscript{43}

Another ruling in \textit{Casteneda} deserves mention. The court found that a school district has a dual obligation under section 1703(f).\textsuperscript{44} The school district must first develop a program to teach students English. More importantly, the school district must have a program that assures that English-language deficiencies do not constitute barriers to the acqui-

\begin{footnotesize}
\textsuperscript{34} \textit{Keyes}, 576 F. Supp. 1503, 1508.
\textsuperscript{36} 20 U.S.C. §§ 1703-1705.
\textsuperscript{37} 20 U.S.C. § 1706.
\textsuperscript{38} 20 U.S.C. § 1703(f).
\textsuperscript{39} 648 F.2d 989 (5th Cir. 1981).
\textsuperscript{40} \textit{Id.} at 1009.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Id}.
\textsuperscript{43} \textit{Id.} \textit{See also} United States v. Texas, 680 F.2d 356, 371 (5th Cir. 1982).
\textsuperscript{44} \textit{Casteneda}, 648 F.2d at 1011.
\end{footnotesize}
sition of substantive knowledge conveyed through the school curriculum. While holding that these dual obligations need not be executed simultaneously through a bilingual education program, the court ruled that the schools must design programs which enable students to "attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system."

The evidentiary presentation was geared to meet the conditions established in Casteneda. Though viewing each condition as important, the school district, like most, seemed most vulnerable to the charge that it failed to meet prong two—the requirement of meaningful implementation. We also sought to establish that the Denver schools had failed to ensure that Hispanic students could acquire the substantive knowledge contained in the curriculum through a program which, in major part, was based solely on an English-as-a-Second-Language (ESL) program.

B. Presentation of the Evidence and the 1983 District Court's Rulings

1. Identification

The first area of inquiry in a language rights case is whether the school district has in place a procedure to identify all students who are in need of and entitled to help under section 1703(f). Those students who have to overcome language barriers in order to compete equally in the classroom are known as Limited-English-Proficient (LEP) students.

The Denver schools had a system that is common in states without a complete bilingual education act. Specifically, students were identified through a questionnaire that was filled out by the student's parents and the classroom teacher. The questionnaire sought to determine through a subjective evaluation whether the student had a barrier to learning in English.

Expert testimony established flaws in this method of identification. Witnesses testified that the determination that a student is unable to fully compete with his English-speaking peers due to a non-English home-language background, involves complicated linguistic analysis. At a minimum, the persons making such determinations needed training in linguistic and language assessment. The testimony further reflected that parents who have limited English skills understandably tend to overstate the English skills of their children. Finally, expert testimony stated:

45. Id.
46. Id.
47. While frequently the child is capable of assisting the parent at a market or with a doctor, the ability to carry out these simple social activities does not, as the experts testified, necessarily predict the ability to negotiate an English-only school curriculum.
that often subtle pressure exists in school systems for a teacher to overstate the English skills of the child. A determination that a child is a LEP student triggers an obligation on the part of a school district to address the student's needs. Often there is pressure to minimize this obligation, especially when it is perceived as difficult to meet. In addition, teachers sometimes reflect a philosophical enmity towards language assistance programs which imply that they cannot reach these children without further training. In short, all of these factors make questionable primary reliance upon the subjective judgment of parents and teachers.

Based on this testimony, the district court found the school district had failed to develop a satisfactory identification and assessment procedure to determine if a child was a LEP student.48

2. The Lau "C" Student

Integrally tied to the identification issue, and central to an understanding of much of the debate about language rights programs and entitlements, is what became known as the Lau "C" issue.49 Stated simply, there were, and still are, a number of students in Denver who come from a home-language background other than English and have attained English comprehension and speaking skills, but who test poorly on reading and writing assessments. The first question was whether the school district had an obligation to provide these students with special language assistance. The school district took the position that these students were simply low achievers who should be provided the same programs as other low-achieving students.

The plaintiffs presented expert testimony which showed that it was entirely possible for a student to achieve minimal oral proficiency while at the same time suffer a reading and writing impediment, owing to a non-English home-language background. The testimony reflected that


a student who comprehends and speaks English and one or more languages and whose dominant language is difficult to determine, if the student's English language development and comprehension is:

(I) At or below the district mean or below the mean or equivalent on a nationally standardized test; or

(II) Below the acceptable proficiency level on an English language proficiency test developed by the department.
the basic elements of language includes oral production, aural comprehension, reading and writing. The failure to recognize and address the reading and writing barrier, it was argued, denied the student equal opportunity to succeed in the classroom in which those skills are essential.

In a significant ruling, the court agreed and held that the Lau "C" student is protected under section 1703(f).\textsuperscript{50}


The trial presentation, as previously articulated, largely followed the model set forth in \textit{Casteneda}, which held that a school district has the right to choose any sound pedagogical approach it wishes, but must implement it in a manner which assures that \textit{all} barriers to equal education are overcome.\textsuperscript{51}

The school district itself was somewhat contradictory about what approach it had adopted. On the one hand, the school district's Director of Bilingual Education testified that it was the school district's policy to have a transitional bilingual program. On the other hand, a quick perusal of the program reflected only a relatively small percentage of identified LEP students were being served with anything that resembled a bilingual program. Most, including many Spanish-speaking students, were being provided with an ESL program.\textsuperscript{52}

This presented an interesting dilemma—one that is not unknown in language rights litigation. \textit{Casteneda} had not mandated bilingual education, yet the Fifth Circuit held that a school district must affirmatively address both the English learning problems of the students as well as any barriers to learning substantive content that such problems might occasion.\textsuperscript{53} The plaintiffs believed that bilingual education which simultaneously addresses these two areas was the most promising approach. There were two lines of testimony and argument presented which sought to achieve an affirmative bilingual mandate.\textsuperscript{54}

First, the plaintiffs argued that the school district's bilingual educa-

\textsuperscript{50} \textit{Keyes}, 576 F. Supp. at 1518.
\textsuperscript{51} 648 F.2d at 1009.
\textsuperscript{52} An ESL program emphasizes the use of English-intensive training so that LEP students may compete with their English-speaking peers as soon as possible. ESL programs deprive students of any native language instruction in the core curriculum classes such as math, science, reading and writing. By contrast, bilingual education uses native language instruction in the teaching of the substantive curriculum to LEP students. Most programs also include lessons in the history and culture of the student as well as instruction in American history and culture. A bilingual program also contains an ESL component; the converse is not true. See generally Haft, supra note 35 at 248-58.
\textsuperscript{53} \textit{Casteneda}, 648 F.2d at 1010.
\textsuperscript{54} As it turned out, the following evidence and arguments proved to be most persuasive when we moved on to the development of a remedy.
tion director should be taken at his word: Bilingual education was the chosen pedagogical approach. Since it had been obviously implemented in only a limited way, the second implementation prong of *Casteneda* had been violated. The second approach of the plaintiffs was to present expert testimony that threw doubt on the possibility that a non-bilingual approach could remove the English-language barrier and the substantive content deficit. Specifically, testimony established that a delay in effectively addressing the substantive content deficiency was a delay that in most instances precluded success. The experts stated that for most children the effective removal of the English-language barrier would take a year or longer even if the child's education was exclusively focused on the problem. Such a delay, the experts testified, would be difficult if not impossible to overcome in keeping up with the substantive content of the curriculum.

The district court chose to disregard this argument and testimony in making its liability finding. Rather, it chose to find other independent testimony that reflected the failure of the implementation of both the bilingual and the ESL programs. The court did, however, intimate that these concerns were appropriate in devising a remedy.

4. Implementation: The Bilingual Program

In addition to the evidence on bilingual education in general, the plaintiffs presented evidence that was more narrowly focused. Again, the problems identified as well as the utility of the proof goes well beyond Denver.

The testimony reflected that a teacher who can communicate with the student is essential to a bilingual program. This testimony mirrored a similar finding in *Casteneda* in which the Fifth Circuit observed:

>[A] bilingual education program, however sound in theory, is clearly unlikely to have a significant impact on the language barriers confronting limited English speaking school children if teachers charged with day-to-day responsibility for educating these children are termed 'qualified' despite the fact that they operate in the classroom under their own unremediated language disability.

Matched against the expert testimony supporting the above axiom was testimony about the teachers in Denver. First, the testimony showed that none of the teachers had ever been formally assessed to determine their second-language proficiency; an informal oral interview was the only effort to assess language proficiency. Second, the testimony estab-

56. *Id.* at 1520.
57. *Casteneda*, 648 F.2d at 1013.
lished there was no requirement that a bilingual teacher have any familiarity with second-language acquisition and methodology principles.

Finally, any claim that qualified bilingual teachers were not available was undercut by several practices. Hiring was left to school principals who, the testimony reflected, often hired "bilingual teachers" using criteria that had little or nothing to do with language qualifications. The testimony reflected that the personnel office did little to match qualified teachers with need. The testimony also emphasized that there were teachers in the district who had the skills to work in bilingual classrooms. Testimony further established that since the program had such a low level of support from the school district, teaching positions in bilingual programs were not valued, thus diminishing the opportunity to attract and hold qualified bilingual teachers.

Based on this testimony, the court found that the program implementation prong of Casteneda had been violated in the school district's bilingual program. 58

5. Implementation: The ESL Component

The majority of LEP students in the Denver school system were not in the "bilingual" program; rather, what help they did receive was through an ESL component. Indeed, only Spanish-speaking LEP students in eleven designated elementary schools had access to a bilingual program. 59 Thus, Spanish-speaking LEP elementary students at non-bilingual schools, non-Spanish-speaking LEP pupils and all secondary students were dependent upon an ESL program to assure them equal educational opportunity. Unfortunately, the evidence reflected that the ESL program, as implemented, also had little chance of appreciably improving the English language skills of the students. Furthermore, the ESL program was not supplemented, as Casteneda requires, 60 with a program designed to redress the loss of substantive content instruction.

As with the bilingual component, the plaintiffs focused their attention on the qualifications of the persons instructing in the ESL program. Additionally, testimony was presented about the likelihood of success given the paucity of time and training allocated to ESL instruction. Expert testimony confirmed that being a qualified ESL teacher required training in ESL methodology and second-language acquisition. This training was necessarily over and above that ordinarily provided to a teacher. Matched against this was evidence that aides, often with no more than a high school education, were providing the ESL instruction.

59. During the 1981-82 school year, there were 88 elementary schools in the Denver school system.
60. 648 F.2d at 1011.
Some of these aides, though not all, had gone through a one- or two-day course. The experts testified that an ESL program thus conceived and implemented could provide little more than rote memorization of language—insufficient for ultimate equality of participation in English-only classrooms.

Time-on-task was also evaluated at the trial. The testimony reflected that the ESL tutors typically served a small group for one school period a day. Periods were formally forty minutes though all conceded that actual time spent on instruction was somewhat less. For each of these reasons, the court found that the ESL program was not reasonably designed to succeed and thus violated section 1703(f).

6. Outcomes

The measure of an instructional program for LEP students is whether those students are ultimately able to compete with their English-speaking peers. While section 1703(f), as construed by Casteneda, does not require a fail-safe guarantee, it does require the school system to evaluate outcomes and, where there are indications that the program falls short, to adjust it to address the inadequacies.

The school district’s first line of defense in this area was that merely providing something to everybody was legally sufficient. When this was rejected, the school district attempted to show that students in their program were progressing in developing English-language skills. The plaintiffs maintained that more must be shown. It was argued that post reclassification monitoring was essential since the true test of a program was competitiveness with children from an English-language home background.

The court ruled that it need not evaluate outcomes because there had been such a clear failure of the implementation prong of Casteneda. Nevertheless, in addressing the remedial obligation of the school district, the court made clear that there had to be included in any remedial plan a provision to test effects and results of the plan on the students.

III. THE DEVELOPMENT OF THE CONSENT DECREES

The trial of a language rights case, like most other complex civil rights litigation, is properly viewed in two phases. The first phase is the

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62. Casteneda, 648 F.2d at 1010.
64. As will be discussed later, the adopted plan includes a provision for regular assessment while a student is in the program as well as a provision to monitor the student’s progress following reclassification.
"liability" phase in which the plaintiffs have the burden of establishing that the practices of the educational authority violate their rights under law. Once that is established, and the court so rules, a "remedial" phase is entered. Drawing upon the practice that has evolved in desegregation litigation, the second phase typically involves the presentation of a remedial plan by the school district, followed by an opportunity for the plaintiffs to question its adequacy and to present their own plan should the school district proposal fail.

It is appropriate at the remedial phase to include matters in a plan whose absence might not trigger liability in the first instance. This may be necessary to make the plaintiffs whole, and to remove "root and branch" barriers to educational success that have evolved through the unlawful practice. The one limitation is that the remedy must bear some reasonable relationship to the wrong found at the liability phase.65

As we approached this second phase of the case, we were confronted with a decision that is common to this litigation: Do you continue with a formal litigation posture or do you attempt to reach an agreement on the remedy? We made the determination that an agreed-upon plan was a preferable solution and that a return to court should occur only if the negotiations failed. At the heart of this decision was the belief that the school district would be more likely to faithfully implement a plan for which they felt some ownership. Conversely, it was felt that a court-imposed plan might be followed to the letter but without the spirit to make it truly work. We thus approached the school district and the court with the proposal that we work toward such a plan with certain fairly demanding time frames. If negotiations did not bear fruit within these time frames, it was understood that we would feel compelled to invoke the court's processes. The school district and the court agreed.

A. Some Observations About Negotiations

Studies and theories about the art of negotiations abound. It is not the purpose of this article to add to that voluminous literature. However, several factors emerged in these negotiations which contributed to their success and which may have some degree of transferability in similar negotiations between school authorities and language rights advocates.

First, we considered it essential that the principals be involved in the negotiation process from the beginning. Our experience had been that two things, both bad, can happen when the negotiations are primarily among attorneys. On one hand, attorneys, because of their training or because of the nature of agent representation, often get bogged down in the traditional negotiation game of "I'll give you something if you give

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me something." This is rarely a satisfactory way to devise an educational program. On the other hand, we all had experience in which attorneys reached agreement, and it turned out to be unacceptable to the parties. If the principals were involved from the outset, and regularly had to reach agreement, then it was possible to determine if progress was being made.

Second, we approached the negotiations as a problem-solving enterprise rather than as a bartering effort. Several elements went into this. We stayed away from rhetoric and sought instead to find and build upon principles that everyone could agree upon. For example, rather than demand "bilingual education," a concept that carried some negative baggage for some members of the school board, we started from the position that students with special needs ought to have those needs met. We found that we could agree that students learned best if they could understand the language of instruction. From there it was a fairly simple leap to agreement that teachers with special language abilities ought to be matched with students with special needs. Soon we found ourselves discussing non-language needs of these teachers as well as the importance of relevant resources to carry out their task.

Another aspect to our problem-solving approach was to provide some distance from the court order. The idea was that we were developing the plan of our own volition and that it was not being imposed. This was a more comfortable posture for the school board. It was also more conducive to the development of a thorough program. A court order usually provides a listing of wrongs that must be corrected, and unless the corrections can be woven together into a comprehensive attack on the problems of the children, it will often offer limited prospects for success.66

B. The Content of the Decree

At the outset of the negotiations, the parties identified five discrete areas to be addressed. These included the identification of eligible participants, personnel, elementary school programming, secondary school programming and Asian concerns.67

1. The Identification, Assessment and Reclassification of LEP Students

The district court found that the parent-teacher survey as a means

66. Having made the above observations, one should not underestimate the leverage of a court order. Frequently, such an order is a necessary prerequisite for a serious effort at problem-solving. Such was the case in Keyes.

67. This latter concern was dictated by the fact that a large number of Indo-Chinese LEP students attend the Denver schools, that those students have unique linguistic and cultural needs, and that scarce teacher and material resources compel some different approaches to their needs. As the decree evolved, the Asian concerns were incorporated into several other areas that dealt with substantive issues. See infra discussion in subsection 5.
of identifying LEP students was insufficient. The initial task of the plan was to develop a logical approach for identifying those students who needed special assistance. The specifics can be quickly described. The policy choices need further amplification.

The approach adopted is one that follows many other models. A home-language survey is utilized as a screening device. This survey asks the parent if there is a language in the home other than English. If the answer is "yes", then the student is referred for further assessment. Building upon the testimony presented, the further assessment seeks to determine if there is a barrier to learning in any of the four language domains: speaking, understanding, reading or writing. An oral proficiency test was designated to measure speaking and understanding skills. A score below the cut-off for full English proficiency results in a determination that the student is LEP and thus entitled to services under the plan. Should the score indicate proficiency on the oral language examination, the student still must be given an assessment that measures his reading and writing skills. Under the plan, an elementary student who scores below the thirtieth percentile or a secondary student who scores below the fourtieth percentile on the Comprehensive Test of Basic Skills (CTBS) is deemed a LEP student. An elementary school student who scores between the thirtieth and fourtieth percentiles is referred to a language assessment committee of persons trained in second-language acquisition for a further determination.

We made a broad programmatic determination that LEP students should be placed in bilingual classrooms to the maximum extent feasible. A bilingual classroom under the Keyes plan is one that is primarily defined by the skills of the teacher. The teacher is a person who uses both Spanish and English whenever appropriate and has the training both to identify language difficulties owing to home-language background and to assist the student to overcome such difficulties in order to become proficient in English. It is assumed that part of the training in the Spanish language as well as in the second-language acquisition will give the teacher familiarity with and appreciation of the child's culture. Thus, a student identified as LEP and placed in a bilingual classroom had access to a teacher with special bilingual-language skills and language training. The teacher will use her skill and training to determine when and how to use Spanish or English. She may, with respect to a given student, use English exclusively; indeed, another part of the plan requires that the

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69. The Lau Guidelines used the following approach. As a result, more than 500 agreements between the Department of Health, Education and Welfare, now the Department of Education, and school districts incorporated something similar to the following model. See also CAL. EDUC. CODE § 52164.1 (West 1980).
classroom will be integrated with students who are fully proficient in English.

The importance of this definition of a bilingual classroom becomes manifest when one examines the fallibility of the assessment instruments—particularly the CTBS. The dividing point on virtually any test is one that is a judgment call. We chose at such a point to opt the student into a program for it was our belief that only benefit, not detriment, could come from inclusion in a class with a teacher with special skills. Thus, though the CTBS is an imperfect proxy for determining whether a student is LEP, it is the best we have. It was the determination of the negotiators that if a student scored poorly on this test and came from a non-English home-language background, the only principled approach was to give the student access to the classroom where he was most likely to receive special help.

Removal from the protection of the plan or "reclassification" is, for the most part, the converse of the identification standard. A student who is deemed proficient in the oral language assessment and scores above the fourtieth percentile level on the CTBS will be placed in non-program classes. The one exception, in recognition of the weakness of the CTBS, allows for removal of a student after two years if he was included initially only because of his CTBS scores. This removal must be preceded by a review of the student's language proficiency by a team of persons trained in second-language assessment.

2. Personnel

The personnel provisions of the decree set standards for bilingual teachers and those teachers in the ESL programs. They further establish procedures to deal with the expected shortfall of fully qualified bilingual teachers. They mandate the district to take certain steps to train teachers; finally, they contain programs dealing with the unique personnel needs of Asian and other minority students.70

During the trial, the court found that the past standards for both bilingual and ESL teachers failed to meet minimal standard of acceptability.71 In devising standards through the negotiations, we concluded that essentially the same skills were needed for each class of teacher, with one exception: Second-language skills are essential for the bilingual teacher and merely desirable for the ESL teacher. We thus mandated that both have a basic teaching credential,72 that both have completed twenty course hours, which is required for state endorsement of an ESL

70. See infra discussion in subsection 5.
72. ESL "tutors" had not been required to be certified.
teacher,73 and that the bilingual teacher establish competent language skills through a formal assessment device.74 A key provision is our preference system for bilingual teachers. In recognition of the fact that at least in the short run there would be insufficient numbers of fully qualified bilingual teachers, we established a preference order for hiring whenever a position became available. An opening must be filled by a teacher with the better bilingual qualifications. A teacher who is hired under the preference system, but is not fully qualified, has two years to become so qualified.

Several points in this system are worthy of note. First, the teacher must show steady progress toward becoming fully qualified or she loses her position. Second, if the teacher has the lowest preference, thus reflecting a lack of oral proficiency in the second language, she must be transferred at the end of any semester in which a person with this skill becomes available. Finally, a teacher who does not achieve full qualification within two years loses her position even if a fully qualified teacher is unavailable to replace her. We made a concerted decision that we needed a strong incentive to accomplish full qualification, and we did not want to create a system in which underqualified persons were accorded a de facto right to remain in the classrooms.75

3. Elementary School Programming

The elementary school program basically requires bilingual instruction for Spanish-proficient students when sufficient numbers are present in a school. For other languages, and where the numbers do not justify a bilingual program, a meaningful English-language development program is prescribed.

Several unique features are worthy of mention. First, unlike the rule in California and many other entities, school rather than class numbers trigger a program. In keeping with this approach, any school that has sufficient numbers to require a program76 must establish a minimum of one bilingual classroom at each grade level. The reasons for utilizing this approach were two fold. It was believed that a student should be entitled to coherent coordinated instruction throughout his participation in the bilingual program. A program that altered the entitlement based upon

73. State endorsement is purely voluntary under Colorado law.
74. We built in one exception to the university-based course work requirement. The school district committed itself to a summer in-service program which could substitute for this provision. It requires attendance by the ESL and bilingual teachers at a concentrated five-week program, given over two summers.
75. The school district is committed under the decree to make available opportunities for underqualified teachers to obtain their qualifications. In addition to the summer in-service program, an on-going Spanish language program is to be offered to teachers.
76. Approximately ten per grade level.
numbers at a given grade level does not meet this standard. The other reason why this approach made sense was that our definition of a bilingual program envisions a two-language integrated approach. Thus, the reduction in the number of students in a given year merely means a greater number of English-proficient students served by the bilingual teacher.

A second unique feature is our insistence on a rigorous curriculum that matches and may exceed the curriculum offered students in other classrooms. In addition to the requirement that the curriculum be written to accomplish this, a series of regularized assessments of student progress are to be made. Whenever a given percentage of students fail to grasp the curriculum, the teacher comes under scrutiny.

Those LEP students not in a bilingual classroom are to be given intensive English-language help. A student who is LEP by reason of a failing score on an oral proficiency test is to be given a minimum of two hours a day of ESL. The student who is LEP solely by reason of a low CTBS reading and writing score\(^77\) should receive one hour of instruction a day. This distinction was made in the belief that the student who could not understand the language of instruction was better served by an intensive ESL program, while the student whose sole problem was in the reading and writing sphere, but who could comprehend classroom instruction, should not be pulled out of class for such a lengthy period of time.

Additional provisions require the establishment of parent advisory committees at each school and at the district level, and the expansion of bilingual early childhood instruction.

4. Secondary Programming

The testimony at trial indicated that secondary level bilingual programming might be more important than at the elementary level. This seems to defy the conventional wisdom. The rationale of the experts who testified was that the curriculum is so much more difficult at this level that it defies rationality to believe that it can be negotiated in a language that is not comprehensible.\(^78\)

The agreed upon program calls for the clustering of all LEP middle school Spanish-speaking students into three schools. These schools will

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77. The *Lau* "C" student under the 1981 Colorado English Language Proficiency Act. See *supra* note 49.

78. The logistical problems of establishing a worthy program at the secondary level are great. The program is much more diverse, and the range of student proficiency is much greater. Additionally, most planning has gone into devising elementary school programming. Thus, models are few and far between.
offer bilingual instruction in the "core" curriculum. The class sizes will be small. All other LEP middle school students will be provided the core curriculum through a trained ESL teacher.

At the high school level, any school with forty or more Spanish-language students who are deemed LEP by reason of their scores on an oral proficiency test must establish Spanish-language courses in each of the core curriculum. All students not served through this approach are entitled to approximately the same access to ESL as is provided at the elementary school level.

5. Non-Spanish-Speaking Students

In Denver, there are significant numbers of Indo-Chinese students as well as a smattering of students from other language groups who are LEP. It was apparent from the outset that it would be impossible in the foreseeable future to obtain the trained teachers needed to create an educationally sound bilingual program.

Instead of an illusory bilingual program, we adopted a three-pronged approach for addressing the needs of these students. First, the students are entitled to, and must be provided, the intensive ESL program. This meant two hours a day of small group instruction by trained teachers for those who fail the oral proficiency assessment and one hour a day for those who are LEP solely by reason of a low CTBS score. Second, one aide is provided for approximately every fifteen students. The purpose is twofold. The student needs translation help which an aide, proficient in the child's language and English, can provide. Additionally, the aide can help break down the massive cultural barriers that often exist between the Indo-Chinese student and his parents, on the one hand, and the school, on the other. The third thrust was to establish a continuing voice for the Asian student within the Denver Public Schools. Thus, an advisory committee with a full-time district-paid staff person is created to assure that Asian concerns are articulated.

Several other provisions are worthy of note. The school district is committed to a special effort to recruit Asian language teachers. Additionally, in recognition of the fact that few in the Asian community have the English proficiency necessary to be fully effective as aides, the school district commits itself in the decree to provide English-language training for aides.

CONCLUSION

The signing of a consent decree, like the passage of a law, is not the
end of a process, but merely the beginning. Continuing court jurisdiction as well as reporting mechanisms are essential to assure that even the best-intentioned agreement is fully implemented.

Arguments over bilingual education invariably turn into debates about "success" as reflected in research findings. Putting aside the inherent weaknesses in much educational research, an additional factor ought to be weighed in such discussions. It is important to understand that a bilingual education program merely seeks to provide LEP students with what others take for granted, namely, comprehensible instruction and English proficiency. While it is correct to hold bilingual education programs to high degrees of rigor and scrutiny, it should not obscure the fact that the adoption of such a program merely is the first step in assuring educational success for LEP students. "Success" will not be achieved unless those additional components of any effective school instructional program are made part of bilingual programs. That is the task of the Denver Public School under the consent decree and the task of all systems sincere in assuring that LEP students individually, and as a group, achieve their maximum potential.