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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MIRIAM FLORES, individually and as a parent of)
MIRIAM FLORES, a minor child, et. al.,)

Plaintiffs,)
v.)
STATE OF ARIZONA, et. al.,)

Defendants.)

CIV 92-596 TUC ACM

ORDER

Background

August 20, 1992, Plaintiffs filed this action seeking declaratory relief against the Defendants for failing to provide limited English proficient (LEP) children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students. See Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese decent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. § 2000d). Plaintiffs further challenge the Defendants' funding, administration and oversight of the public school system in districts enrolling predominantly low-income minority children because Defendants allow these schools to provide less educational benefits and opportunities than those available to students who attend predominantly anglo-schools.

(168)

1 Plaintiffs allege that the Defendants violate the Equal Education Act of 1974 (EEOA),
2 (Title 20 U.S.C. § 1703(f)),¹ and the implementing regulations,(34 C.F.R. Part 100), for Title VI of
3 the Civil Rights Act of 1964 (Title VI), (42 U.S.C. § 2000d).² Plaintiffs seek relief against all the
4 Defendants, except the State of Arizona, under 42 U.S.C. § 1983 which provides "every person who,
5 under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects,
6 or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights,
7 privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured
8 in an action at law, suit in equity, or other proper proceeding for redress . . ."

9 The Eleventh Amendment of the Constitution shields the State with immunity from § 1983
10 actions. A suit against a state official, in his official capacity, is tantamount to a suit against the state
11 itself and is likewise barred except as recognized in Ex parte Young, 209 U.S. 123 (1908), where the
12 Supreme Court held that a state official who acts unconstitutionally can be sued in his official
13 capacity for prospective injunctive relief. Such a suit does not affect the State in its sovereign or
14 governmental capacity because the official who commits an unconstitutional act is deemed "stripped
15 of his official or representative character . . ." Id. at 159-60.

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18 ¹The EEOA provides as follows:

19 No state shall deny equal educational opportunity to an individual on
20 account of his or her race, color, sex, or national origin, by--

21 (f) the failure by an educational agency to take appropriate action to
22 overcome language barriers that impede equal participation by its
23 students in its instructional programs.

24 20 U.S.C. § 1703.

25 ²Title VI provides as follows:

26 No person in the United States shall, on the ground of race, color, or
27 national origin, be excluded from participation in, be denied the
28 benefits of, or be subjected to discrimination under any program or
activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

1 Section 1706 permits an "individual denied an equal educational opportunity, as defined by this
2 subchapter, [to] institute a civil action in an appropriate district court of the United States against such
3 parties, and for such relief as may be appropriate." Id.

4 There is an implied private right of action to enforce Title VI, 42 U.S.C. § 2000d. Cannon
5 v. University of Chicago, 441 U.S. 677, 696-703 (1979) (Congress intended to create Title IX
6 remedies comparable to those available under Title VI and it understood that Title VI authorizes an
7 implied private cause of action for victims of prohibited discrimination); see also Clark, 123 F.3d at
8 1270 (42 U.S.C. § 2000d-7(a)(1) expresses clear intent of Congress to condition grant of federal funds
9 on State's consent to waive its constitutional immunity). To prevail solely under Title VI, however,
10 Plaintiffs must prove discriminatory intent. See Regents of the Univ. of California v. Bakke, 438
11 U.S. 265, 287 (1978) (discriminatory animus essential element of a claim based on Title VI alone;
12 overturning Lau's contrary holding); see also Guardians Ass'n. v. Civil Service Comm'n., 463 U.S.
13 582, 610-612 (1983) (Lau's contrary holding did not survive Bakke) (Powell, J., concurring in the
14 judgment), id., at 612 (O'Connor. J. Concurring in the judgment), id., 639-42 (Stevens dissenting).

15 Here, Plaintiffs do not allege discriminatory intent. Instead they proceed under Title VI
16 regulatory provisions, 34 C.F.R. Part 100. Plaintiffs seek this path because the regulations, unlike
17 the statute, reach disparate impact claims. See Ass'n of Mexican-American Educators, 836 F. Supp.
18 at 1540-1543 (Title VI regulations prohibit the use of federal funds for programs that are
19 discriminatory in effect, though not in purpose). The Supreme Court has concluded that Title VI
20 regulations are valid, and that a disparate impact claim may be brought for declaratory and limited
21 injunctive relief. See Alexander v. Choate, 469 U.S. 287, 293 (1985) (majority of the Court in
22 Guardians, 463 U.S. 582 (1983), concluded that actions having an unjustifiable disparate impact on
23 minorities could be redressed through agency regulations designed to implement purposes of Title
24 VI). The Court has not, however, specifically ruled that there is a private right of action to enforce
25 the regulations.

1 "The Ninth Circuit applies a two-part test to determine whether agency regulations give rise
2 to a private right of action: '(1) whether Congress delegated authority to establish rules implying a
3 private right of action; and (2) whether the rule in question was drafted such that [a] private right of
4 action may legitimately be implied.'" Ass'n of Mexican-American Educators, 836 F. Supp. at 1547
5 (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)). In the case of
6 Title VI, the authority for the implementing regulations appears on the face of the statute: "Each
7 Federal department and agency which is empowered to extend Federal financial assistance to any
8 program or activity . . . is authorized and directed to effectuate the provisions of [Title VI] by issuing
9 rules, regulations, or orders of general applicability" Id. (citing 42 U.S.C. § 2000d-1).

10 The second-prong of the test requires this Court to make the following sequential findings:

11 [I]f the rule in question is valid and [if it] furthers the substantive purposes
12 of the enabling statute, and [if] the statute provides a private right of action
13 as a matter of congressional intent, [the court] will imply the private right of
14 action into the rule as well, regardless of agency intent.

15 Id. (citing Robertson, 749 F.2d at 536, accord Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3rd Cir.
16 1988)). As the court in Ass'n of Mexican-American Educators concluded, "all three of these
17 requirements are satisfied:" the Supreme Court has held that the Title VI regulations are valid and that
18 they further the congressional purpose of withholding federal funds from discriminatory practices,
19 id. (citing Guardians, 463 U.S. at 591-93 (opinion of White, J.)), and the majority of the Court has
20 concluded that there is a private right of action under Title VI, id. (citing Guardians, 463 U.S. at 594).

21 Accordingly, this Court finds that Plaintiffs may proceed against all Defendants, including
22 the State, for violations of the EEOA and Title VI's implementing regulations, 34 C.F.R. Part 100.
23 This conclusion is important because the law governing Plaintiffs' claims has changed since Plaintiffs
24 filed their Complaint, primarily relying on 42 U.S.C. § 1983. In 1997, the Supreme Court ruled in
25 Blessing v. Freestone, 117 S. Ct. 1353 (1997), that Plaintiffs must articulate with particularity the
26 rights they seek to enforce under 42 U.S.C. § 1983. Courts cannot paint with too broad a brush or
27 take a blanket approach when determining whether a statute like Title VI gives rise to a private,
28 enforceable right. Id. at 1360-61. Blessing forces Plaintiffs to break down their claims into

1 "manageable analytic bites" so that the Court can "ascertain whether each separate claim satisfies the
2 various criteria [the Supreme Court has] set forth for determining whether a federal statute creates
3 rights." Id. at 1360. For example, Plaintiffs in Blessing charged that the staffing levels at Arizona's
4 child support agency were inadequate to recover unpaid child support payments as required under
5 Title IV-D; according to the Supreme Court, neither the statutory nor regulatory provisions requiring
6 the agency to have "sufficient staff to fulfill specified functions" gave rise to federal rights. Id. at
7 1361-62. The link between staffing levels and the services provided to any particular individual is
8 too tenuous to support the notion that Congress meant to give each and every Arizonan who is
9 eligible for Title IV-D benefits, the right to have the agency staffed at a "sufficient" level, especially
10 when neither statute nor regulation provides any guidance as to how large a staff would be
11 "sufficient." Id.

12 Here, Plaintiffs' Second Amended Complaint fails to identify with any specificity the
13 statutory or regulatory provisions which Plaintiffs seek to enforce, but charges broadly that Plaintiffs'
14 rights under the EEOA and Title VI regulations, 34 C.F.R. part 100, have been violated. See
15 Blessing, 117 S. Ct. at 1362 (rejecting Title IV-D claim seeking declaration that their rights were
16 violated and an injunction forcing Arizona's child support agency to substantially comply with all
17 provisions of Title IV-D). Thereafter, the Court applies the following traditional three factors for
18 determining whether any proffered provision gives rise to a federal right:

19 First, Congress must have intended that the provision in question benefit the
20 plaintiff. (citation omitted) Second, the plaintiff must demonstrate that the
21 right assertedly protected by the statute is not so "vague and amorphous" that
22 its enforcement would strain judicial competence. (citation omitted) Third,
the statute must unambiguously impose a binding obligation on the States.
In other words, the provision giving rise to the asserted right must be
couched in mandatory rather than precatory terms.

23 Blessing, 117 S. Ct. at 1359-60 (citations omitted).

24 If Plaintiffs demonstrate that a provision creates an individual right, there is only a rebuttable
25 presumption that the right is enforceable under § 1983. Id. "Because our inquiry focuses on
26 congressional intent, dismissal is proper if Congress "specifically foreclosed a remedy under § 1983."
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1 Id. (citation omitted). "Congress may do so expressly, by forbidding recourse to § 1983 in the statute
2 itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with
3 individual enforcement under § 1983." Id. (citation omitted).

4 The Court finds no purpose in further delaying this case to require Plaintiffs to once again
5 amend the Complaint to better state the § 1983 claim. Plaintiffs' Lau claim can be brought under the
6 EEOA and under 34 C.F.R. Part 100 of the Title VI regulations. Plaintiffs' disparate impact claim
7 that the State's school system affords children attending schools in predominantly minority districts
8 less educational benefits and opportunities than students who attend predominantly anglo-schools is
9 also actionable under Title VI. The old-age of this case factors into this Court's decision to dismiss
10 the § 1983 claim, without leave to amend.

11 Furthermore, unless the parties proceed without any further delays in the adjudication of this
12 case, the Court shall dismiss the entire action based on its dilatory procedural history. Initially when
13 Plaintiffs filed the Complaint in August 20, 1992, Defendants sought dismissal under Fed. R. Civ.
14 P. 8(a). The Court granted the motion because the pleading failed to contain a short and plain
15 statement showing that the pleader was entitled to relief, and on May 26, 1993, the Court dismissed
16 the Complaint with leave to Amend. Plaintiffs filed the Amended Complaint on June 23, 1993.

17 Shortly thereafter, Defendants filed a Motion to Dismiss arguing as follows: 1) they had
18 fulfilled all statutory obligations under 20 U.S.C. § 1703(f) and, therefore, Plaintiffs failed to state
19 a claim under 42 U.S.C. § 1983; 2) the State's financing system cannot be a basis for finding
20 discriminatory intent if it is fair on its face; 3) Plaintiffs failed to show that there was any exclusion
21 from participation in or discrimination under any program or activity and, therefore, failed to state
22 a claim under 42 U.S.C. § 2000(d), and 4) Plaintiffs' claims were properly being litigated in the state
23 forum by Roosevelt Elementary School District No. 66, et al. v. C. Diane Bishop, (Roosevelt I) 877
24 P.2d 806 (1994) (en banc); Roosevelt Elementary School District No. 66, et al. v. C. Diane Bishop,
25 (Roosevelt I) 877 P.2d 806 (1994) (en banc), appeal after remand, Hull v. Albrecht, (Roosevelt II)
26 950 P.2d 1141 (1997), appeal after remand, (Roosevelt III) 960 P.2d 634 (1998).

1 On January 8, 1997, Plaintiffs filed a Second Amended Complaint naming new party
2 representatives, all within the Nogales School district. The proposed class definition no longer
3 included "children now or hereafter enrolled in DUSD (Douglas Unified School District)." (Amended
4 Complaint filed June 22, 1993.) Over renewed objections from Defendants, the Court certified the
5 class, defined as follows: "all minority 'at risk" and limited English proficient (LEP) children now
6 or hereafter enrolled in Nogales Unified School as well as their parents and guardians." (Order filed
7 August 28, 1997). The parties had still not completed discovery, so the Court ordered that within 30
8 days the parties were to complete discovery and that no further discovery extensions would be
9 granted.

10 Nevertheless, on September 16, 1997, the parties filed a motion asking that the Court extend
11 the deadlines by 120 days because they had not conducted discovery pending disposition of the class
12 certification issue, but "barring any further delays," within 120 days they should conclude discovery
13 and have the case fully prepared for adjudication by the Court. The Court granted the extension. On
14 November 17, 1997, Defendants' attorney requested another small, approximately 30-day, extension
15 for health reasons. The Court granted the extension. Discovery closed without incident, but the
16 parties failed to comply with the deadline for filing the pretrial order and instead asked that the Court
17 vacate the pretrial conference. The Court refused.

18 At what should have been the pretrial conference, the Court reset the deadline for filing the
19 pretrial order to May 1, 1998, and reset the date for the pretrial conference to May 4, 1998. The Court
20 formally closed all discovery with the exception of two depositions. The Court set a trial date of May
21 26, 1998. Plaintiffs' attorney asked for and was granted leave to file dispositive motions, which he
22 asserted would not delay the trial and would narrow the issues for trial. The motions were not
23 forthcoming, instead the parties filed a joint Motion for Reconsideration asking the Court to continue
24 the trial date to sometime in July to accommodate for the school year because many of the witnesses
25 are teachers or employees of the Arizona State Board of Education or the Arizona Department of
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1 Education. Many of the witnesses were also involved with the 1998 legislative review of the State's
2 school financing system resulting from Roosevelt.

3 Again, the trial date was reset: July 27, 1998. Within 30 days of the trial date, on April 28,
4 1998, Plaintiffs filed their dispositive motions. Plaintiffs filed the following motions for partial
5 summary judgment, all greatly in excess of the 15-page limit for motions: Motion for Partial
6 Summary Judgment Re: Defendants' Authorization of Methods of Administering Lau Programs,
7 Contrary to Federal Standards and Failure to Monitor Compliance with Such Standards as Required
8 by Federal Law (MPSJ: Lau Oversight); Motion for Partial Summary Judgment Re: Failure to
9 Adequately Underwrite District Lau Programs, as Required by Federal Law (MPSJ: Lau Funding),
10 and Motion for Partial Summary Judgment on Non-Lau Claim Arising Under 34 C.F.R. Part 100
11 (MPSJ: 34 C.F.R. Part 100). While the Court was inclined to strike the motions as untimely,
12 Plaintiffs asserted that the case would most likely be disposed of by these motions, so the Court
13 granted Defendants an extended period of time to respond to the lengthy motions. Defendants only
14 filed responses to two of the motions. After being contacted by this Court, Defendants requested and
15 were granted leave to file the third Response, late.

16 This Court is highly critical of the manner in which both parties have proceeded in this case.
17 The Complaint was filed in 1992 and this case has crawled towards adjudication. Plaintiffs' last
18 minute partial motions for summary judgment are untimely, and the sheer volume of the statement
19 of facts, attendant expert-witness depositions, and other technical exhibits, strongly suggest material
20 facts are in dispute. Defendants, however, do not similarly respond. They do not file controverting
21 statement of facts nor expert witness opinions contrary to those submitted by Plaintiffs. Instead,
22 Defendants argue that Plaintiffs fail to present any evidence connecting the alleged federal law
23 violations to students in the Nogales school district. Alternatively, Defendants argue that the case is
24 moot because of recent legislative changes in Arizona.

25 The Court considered granting Plaintiffs' motions for partial summary judgment because
26 Defendants, the parties opposing the motion, cannot simply rest on allegation and denial but must
27

1 present significant probative evidence contrary to the movants' assertions. Celotex Corp. V. Catrett,
2 477 U.S. 317, 324 (1986). Plaintiffs, however, as the moving parties bear the initial burden of
3 demonstrating by admissible evidence the absence of genuine issues of material fact. Id. The
4 summary judgment inquiry mirrors the standard for a directed verdict: whether the party with the
5 burden of proof has presented sufficient evidence that a jury could properly proceed to return a verdict
6 for the burdened party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Federal Rule
7 of Civil Procedure 56(c) provides that summary judgment shall be rendered if the pleadings,
8 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
9 show that there is no genuine issue of material fact and that the moving party is entitled to judgment
10 as a matter of law. Consequently, Defendants can survive Plaintiffs' motions for partial summary
11 judgment, if Plaintiffs failed to meet their initial burden of demonstrating the absence of genuine
12 issues of material fact.

13 The Court is disappointed in this defense because the decision to allow the late filed
14 dispositive motions in excess of the page limit **and to grant Defendants' request for an extension**
15 **of time to respond** was based on the representation that the motions would most likely dispose of
16 the case, or at the very least significantly narrow the issues for trial. Due in large part to Defendants'
17 limited approach, the record is still inadequate for this Court to rule on the substantive issues of
18 whether Defendants fail to provide adequately for the instruction of LEP students and other "at risk"
19 students attending public school systems in districts like Nogales. Consequently, what might have
20 moved the case dramatically forward has once again only resulted to severely delay adjudication of
21 the case.

22 The Court's criticism is not reserved solely for Defendants. The charge that Plaintiffs fail
23 to meet their initial burden is not wholly frivolous. Defendants complain that Plaintiffs fail to allege
24 that the following asserted federal law violations "exist as to, or impact on, NUSD." (Response to
25 MPSJ: Lau Oversight at 3):

26 1) Exit Criteria (Defendants allow school districts to determine LEP student
27 proficiency based on criteria that exit students from Lau programs when

1 scores on standardized tests show a significant lack of reading
2 comprehension skills);

3 2) Performance Standards (Defendants fail to prescribe standards of
4 academic performance to enable consistent judgments to be made regarding
5 exited LEP students' functioning in regular classes);

6 3) 30-minutes of English Instruction (State guidelines allow Lau programs
7 which provide as little as 30-minute per day English language skills
8 instruction);

9 4) IEPS (Defendants do not require school districts to have Individual
10 Education Plan (IEPS) prepared by district personnel with professional
11 training and skills necessary to devise and implement such plans);

12 5) Monitoring and Remedial Failures (Defendants fail to monitor district
13 compliance with federal law and fail to develop and implement effective
14 mechanisms for remedying program deficiencies).

15 Defendants are correct that Plaintiffs dispositive motions primarily rely on expert witness
16 testimony which does not assert that these conditions exist in NUSD, but it is unnecessary for
17 Plaintiffs to present evidence that State standards which apply to all of Arizona's schools, also apply
18 in NUSD. Still, Defendants make a point when they complain that Plaintiffs rely primarily on expert
19 witnesses, who have no knowledge regarding actual conditions in NUSD. For example, Plaintiffs'
20 experts have not reviewed student performance in NUSD and compared it to student performance
21 statewide, nor is there comparative curriculum evidence offered. Plaintiffs do not link their experts'
22 assertions to existing conditions in Arizona's schools, such as NUSD. Consequently, there is an
23 evidentiary void surrounding the issue of whether or not LEP students are attaining the minimum
24 academic standards established by Defendants. Therefore, the Court cannot grant summary judgment
25 for Plaintiffs.

26 The Court accepts responsibility for poor case management. This case should have been
27 dismissed or tried years ago. Accordingly, the case shall be set for trial as soon as possible. This
28 Order addresses each of Plaintiffs' Motions for Partial Summary Judgment and Defendants' assertion
that almost nothing remains as it was when the case was filed back in 1992 and whether or not these
changes make this case moot, in whole or in part. Amazingly, relevant case law, especially for the
disparate impact analysis under Title VI, has never been argued nor presented to this Court.

1 Therefore, this Order also serves as a blue print for trial to set out the issues and the law the Court will
2 apply.

3
4 The Law

5 Roosevelt Elementary School v. C. Diane Bishop:

6 In Roosevelt, the same school financing scheme challenged here came under scrutiny by the
7 Arizona Supreme Court and was found to violate Article XI of the Arizona Constitution. Roosevelt
8 I.³ On July 20, 1998, the Arizona legislature adopted "Students FIRST" which, according to
9 Defendants, completely revamped Arizona's school financing scheme, and, pursuant to a stipulation
10 by the parties, the Arizona Supreme Court ordered it constitutional. (Response to MPSJ: Lau
11 Funding at Ex. 2.)

12 While the Roosevelt case primarily involved the State's school budget for capital
13 improvements, the court found that capital disparities were caused by the entire financing system, not
14 just the capital side of the equation. The Court explained the relationship as follows:

15 The public school financing system is separated into two categories: the
16 capital financing scheme and the maintenance and operations financing
17 scheme. . . . Because districts have the power to use budgeted capital funds
18 for maintenance and operations, the two sides are interrelated. Moreover, the
19 districts must rely, to some extent, on property tax based funding for both
20 capital and maintenance and operations. We find that the capital disparities
here are simply the first symptoms of a system-wide problem. It would
therefore be both artificial and ineffective for us to limit our review to capital
financing.

21 Roosevelt I, 877 P.2d at 810 n. 3.

22 Specifically, however, the Arizona Supreme Court in Roosevelt did not address the quality
23 of education being provided in Arizona. The limited nature of the Court's holding is clear from the
24 following excerpt:

25 _____
26 ³Roosevelt Elementary School District No. 66, et al. v. C. Diane Bishop, (Roosevelt I) 877
27 P.2d 806 (1994) (en banc), appeal after remand, Hull v. Albrecht, (Roosevelt II) 950 P.2d 1141
(1997), appeal after remand, (Roosevelt III) 960 P.2d 634 (1998).

1 Although it seems intuitive that there is a relationship between the adequacy
2 of education and the adequacy of capital facilities, the districts chose not to
3 plead or prove such a relationship. The state claimed that this omission was
4 fatal to the districts' case, but the districts argued that such a relationship,
5 although intuitive, was not relevant to or essential to their claim. We agree
6 with the districts. Even if every student in every district were getting an
adequate education, gross facility disparities caused by the state's chosen
financing scheme would violate the uniformity clause. Satisfaction of the
substantive education requirement does not necessarily satisfy the uniformity
requirement, just as satisfaction of the uniformity requirement does not
necessarily satisfy the substantive education requirement.

7 Roosevelt I, 877 P.2d at 815 n. 7. Roosevelt did not answer the substantive education question posed
8 here. Roosevelt did not determine whether the State's financing scheme has a disparate impact on
9 the quality of the education being provided to children in Arizona's schools which are in
10 predominantly minority districts which have large numbers of LEP and "at risk" students. Roosevelt
11 was based on the mandates of the Arizona Constitution.⁴ Roosevelt did not determine that Arizona's
12 newly adopted school financing scheme, Students FIRST, satisfies the mandates of Title VI or the
13 EEOA. Consequently, the adoption of Students FIRST does not render moot the Plaintiffs' claim that
14 Arizona fails to adequately underwrite district Lau Programs as required by federal law.

15 Although Roosevelt doesn't resolve the issues before this Court, it is still important. Within
16 the context of testing the adequacy of capital facilities, the Arizona Supreme Court said that the State
17 must establish minimum adequate standards and provide funding to ensure that no district falls below
18 them. Roosevelt forced the State to set minimum facility standards for Arizona's schools, estimate
19 the actual cost of these facilities, and provide funding mechanisms to ensure that all schools meet the
20 minimum facility requirements. Here, the State has established minimum academic standards, and
21 so the Court is only concerned with the later part of the Roosevelt analysis: whether the State's
22 financing scheme is arbitrary and bears no relation to actual need. Guided by Roosevelt, this Court
23

24
25 ⁴San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) foreclosed arguments based
26 on the federal equal protection clause. The Court held that because education was nowhere to be
27 found in the United States Constitution, it was not a fundamental right. Thus, the Court applied the
rational basis test and not the compelling state interest test to judge the constitutionality of a state
property tax based educational scheme.

1 will scrutinize evidence estimating actual costs for operating the programs required by Title VI and
2 the EEOA. Without such evidence, there is little point in discussing the adequacy of the State's
3 financing scheme, Students FIRST, or Defendants' contention that Students First makes "more"
4 money available to minority-dense school districts for "at risk" student programs or Lau programs.

5
6 The Equal Education Act of 1974 (EEOA), 20 U.S.C. § 1703(f):

7 The EEOA provides as follows:

8 No state shall deny equal educational opportunity to an individual on
9 account of his or her race, color, sex, or national origin, by--

10 (f) the failure by an educational agency to take appropriate action to
11 overcome language barriers that impede equal participation by its students
12 in its instructional programs.

13 20 U.S.C. § 1703.

14 In a case such as this one in which the appropriateness of a particular school system's
15 language remediation program is challenged under § 1703(f), the Court's responsibility is threefold.

16 First, the court must examine carefully the evidence the record contains
17 concerning the soundness of the educational theory or principles upon which
18 the challenged program is based. This, of course, is not to be done with an
19 eye toward discerning the relative merits of sound but competing bodies of
20 expert educational opinion, for choosing between sound but competing
21 theories is properly left to the educators and public officials charged with
22 responsibility for directing the educational policy of a school system. The
23 state of the art in the area of language remediation may well be such that
24 respected authorities legitimately differ as to the best type of educational
25 program for limited English speaking students and we do not believe that
26 Congress in enacting § 1703(f) intended to make the resolution of these
27 differences the province of federal courts. The court's responsibility, insofar
28 as educational theory is concerned, is only to ascertain that a school system
is pursuing a program informed by an educational theory recognized as sound
by some experts in the field or, at least, deemed a legitimate experimental
strategy.

The court's second inquiry would be whether the programs and
practices actually used by a school system are reasonably calculated to
implement effectively the educational theory adopted by the school. We do
not believe that it may fairly be said that a school system is taking
appropriate action to remedy language barriers if, despite the adoption of a
promising theory, the system fails to follow through with practices, resources
and personnel necessary to transform the theory into reality.

1 Finally, a determination that a school system has adopted a sound
2 program for alleviating the language barriers impeding the educational
3 progress of some of its students and made bona fide efforts to make the
4 program work does not necessarily end the court's inquiry into the
5 appropriateness of the system's actions. If a school's program, although
6 premised on a legitimate educational theory and implemented through the
7 use of adequate techniques, fails, after being employed for a period of time
8 sufficient to give the plan a legitimate trial, to produce results indicating that
the language barriers confronting students are actually being overcome, that
program may, at that point, no longer constitute appropriate action as far as
that school is concerned. We do not believe Congress intended that under
§ 1703(f) a school would be free to persist in a policy which, although it may
have been "appropriate" when adopted, in the sense that there were sound
expectations for success and bona fide efforts to make the program work,
has, in practice, proved a failure.

9 Castaneda v. Pickard, 648 F.2d 989, 1009-1010 (5th Cir. 1981). Within this framework, the Court will
10 analyze whether Arizona's LEP programs, specifically those operating in school districts like
11 Nogales, are appropriate action within the meaning of § 1703.

12 As noted by the court in Castaneda, Congress has provided us with almost no guidance, in
13 the form of text or legislative history, to assist us in determining the standard to apply when
14 considering whether a language remediation program is "appropriate." This is the type of task which
15 federal courts are ill-equipped to perform. We are often criticized for undertaking to prescribe
16 substantive standards and policies for institutions whose governance is properly reserved to other
17 levels and branches of our government (i.e., state and local educational agencies) which are better
18 able to assimilate and assess the knowledge of professionals in the field. Confronted, reluctantly,
19 with this type of task in this case, this Court will fulfill the responsibility Congress has assigned to
20 it without unduly substituting its educational values and theories for the educational and political
21 decisions reserved to state or local school authorities or the expert knowledge of educators.

22
23 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d:

24 Title VI provides as follows:

25 No person in the United States shall, on the ground of race, color, or national
26 origin, be excluded from participation in, be denied the benefits of, or be
27 subjected to discrimination under any program or activity receiving Federal
28 financial assistance.

1 42 U.S.C. § 2000d. Plaintiffs allege a violation of Title VI's implementing regulations which prohibit
2 any recipient of federal funding from the following:

3 utiliz[ing] criteria or methods of administration which have the effect of
4 subjecting individuals to discrimination because of their race, color, or
5 national origin, or have the effect of defeating or substantially impairing
6 accomplishment of the objectives of the program as respect individuals of a
7 particular race, color, or national origin.

8 34 C.F.R. § 100.3(b)(2). Under Title VI's implementing regulations, proof of discriminatory intent
9 is not a prerequisite to a private cause of action against governmental recipients of federal funds.
10 Proof of discriminatory effect suffices to establish liability under the regulations. Larry P. by Lucille
11 P. v. Riles, 793 F.2d 969, 981-82 (1984) (en banc).

12 The Ninth Circuit in Larry P. applied the analysis used for Title VII disparate impact claims
13 to Title VI. See Larry P., 793 F.2d at 982 n. 9 (courts generally apply the standards applicable to
14 disparate impact cases under Title VII to disparate impact cases arising under Title VI); Ass'n of
15 Mexican-American Educators v. California, 937 F. Supp. 1397, 1399 n. 42 (N.D. Cal. 1996); accord:
16 New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2nd Cir. 1995); Elston v. Talladega
17 County Bd. of Educ., 997 F.2d 1394, 1407 & n. 14 (11th Cir. 1993); Sandoval v. Hagan, 7 F. Supp.2d
18 1234, 1279 (M.D. Ala. 1998); Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (M.D.
19 Ala. 1991). In Larry P., the court held that a prima facie case is demonstrated by showing the
20 challenged policy or practice has a discriminatory impact on minority children. Larry P., 793 F.2d
21 at 982 (citing Board of Education of New York v. Harris, 444 U.S. 130, 151 (1979)). "Once a
22 plaintiff has established a prima facie case, the burden then shifts to the defendant to demonstrate that
23 the requirement which caused the disproportionate impact was required by an educational necessity."
24 Id. (citations omitted).

25 Larry P. was decided prior to the Title VII case Wards Cove Packing Co. v. Antonio, 490
26 U.S. 642 (1989). In Wards Cove, the Supreme Court held that a prima facie case is made by: 1)
27 establishing that the employer's practice has a disparate impact on a protected group; 2)
28 demonstrating that the practice in question caused the disparity, and 3) demonstrating that the practice

1 has a significantly disparate impact on employment opportunities. In Wards Cove, the Supreme
2 Court repudiated the widespread assumption that the burden of proof shifts entirely to the defendant
3 during the second phase of a disparate impact case. The Court held that "the employer carries the
4 burden of producing evidence of a business justification for his employment practice, but the burden
5 of persuasion remains with the disparate-impact plaintiff." Wards Cove, 490 U.S. at 659. In addition,
6 the Supreme Court reduced the defendant's burden by requiring only a showing of "business
7 justification," meaning that "a challenged practice serves, in a significant way, the legitimate
8 employment goals of the employer," rather than showing of business necessity. Wards Cove, 490
9 U.S. at 658-59.

10 In response to Wards Cove, Congress passed the Civil Rights Act of 1991 (1991 CRA),
11 effective November 21, 1991, which codified the prima facie standards of Wards Cove, but restored
12 the burden of proof standards as they existed prior to Wards Cove. 42 U.S.C. § 2000e-2(k); Ass'n
13 of Mexican-American Educators, 937 F. Supp. at 1405; Stender v. Lucky Stores, 1992 WL 295957
14 *2 (N.D. Cal. 1992) (citing 137 Cong. Rec. § 15276 (daily ed. Oct. 25, 1991); passage of the 1991
15 CRA returned the disparate impact analysis to the standards articulated in Griggs v. Duke Power Co.,
16 401 U.S. 424 (1971)). The statute provides as follows:

17 An unlawful employment practice based on disparate impact is established
18 . . . only if-

19 (i) a complaining party demonstrates that a respondent uses a
20 particular employment practice that causes a disparate impact on the basis
21 of race, color, religion, sex, or national origin and the respondent fails to
22 demonstrate that the challenged practice is job related for the position in
23 question and consistent with business necessity; or

24 (ii) the complaining party [makes a showing of] an alternative
25 employment practice and the respondent refuses to adopt such alternative
26 employment practice.

27 42 U.S.C. S 2000e-2(k)(1)(A) (1994).

28 Accordingly, Plaintiffs must demonstrate, by a preponderance of the evidence, their prima
facie case of disparate impact. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990)
(citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-988 (1988)). Only then, does the

1 burden shift to the defendant to produce evidence that its disparate practices are based on legitimate
2 business reasons, such as job-relatedness or business necessity. *Id.* In the event, the defendant makes
3 a business necessity defense, Plaintiff can still prevail by showing that there are other alternatives that
4 would serve the business purpose without a similarly undesirable discriminatory effect. *Id.* (citing
5 Albermarle Paper Co. V. Moody, 422 U.S. 405, 425 (1975)).

6 In Ass'n of Mexican-American Educators v. California, 937 F. Supp. 1397 (N.D. Cal. 1996),
7 the district court was looking at whether a test used to determine teacher certification which
8 minorities failed in disproportionately high numbers violated Title VI. The State argued that
9 minorities lacked equal educational opportunities compared to the anglo-population, and, therefore,
10 had a higher failure rate. The court held that the Ninth Circuit rejects the notion that a defendant's
11 challenged practice is "ok" if the disparate impact results from some facially non-discriminatory
12 factor. Ass'n of Mexican-American Educators, 937 F. Supp. at 1410. Instead of addressing
13 causation, the court relied on the "80-percent-rule" prescribed by the Uniform Guidelines of
14 Employee Selection Procedures, 29 C.F.R. pt. 1607 (1978): "a selection rate for any race, sex, or
15 ethnic group which is less than (4/5) four-fifths (or eighty percent) of the rate for the group with the
16 highest selection rate" is a showing of adverse impact. *Id.* at 1406-17. Ultimately, however, the court
17 held that the test, CBEST, did not violate Title VI because it measured job-related characteristics, and
18 there was no other cost-effective alternative.

19 In Teresa v. Berkeley Unified School District, 724 F. Supp. 698 (N.D. Cal. 1989), another
20 court was asked to infer a Title VI violation because Defendants provided the challenged LEP
21 programs to Plaintiffs, who were minority students. The court held that the plaintiffs must offer proof
22 that the challenged action has a discriminatory impact. *Id.* at 716. "A Title VII plaintiff does not
23 make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial
24 imbalance." Wards Cove, 490 U.S. at 657. The Court in Wards Cove explained that plaintiffs have
25 to demonstrate that the disparity they complain of is the result of one or more of the employment
26 practices that they attack. *Id.* "To hold otehrwise would result in employers being potentially liable
27
28

1 for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their
2 work forces.'" Id. (quoting Watson, 487 U.S. at 992).

3 While these two cases seem somewhat incompatible, both fit within the disparate impact
4 frame work of Rose v. Wells Fargo, 902 F.2d 1417 (9th Cir. 1990). After reading a multitude of
5 disparate impact cases, the Court finds that Rose, best articulates the legal standards to apply in a
6 disparate impact case. Rose was an age discrimination case, where the court held that the shifting
7 burden of proof applied to Title VII discrimination claims also applies to claims arising under the Age
8 Discrimination in Employment Act of 1967 (ADEA). The court applied the law, as follows:

9 In order to establish a prima facie case of disparate impact, the plaintiff
10 must: (1) identify the specific employment practices or selection criteria
11 being challenged; (2) show disparate impact; and (3) prove causation;
12 **"that is, the plaintiff must offer statistical evidence of a kind and degree
13 sufficient to show that the practice in question has caused the exclusion
14 of applicants for jobs or promotions because of their membership in a
15 protected group."** See id. [Watson v. Fort Worth Bank & Trust, 487 U.S.
16 977], 108 S. Ct. at 2788-89. **The statistical disparities "must be
17 sufficiently substantial that they raise such an inference of causation."
18 Id. at 2789. The "significance" or "substantiality" of numerical disparities
19 is judged on a case by case basis. Id. at 2789 n. 3.**

20 Rose, 902 F.2d at 1424. Making this prima facie case is especially important because unlike a
21 disparate treatment case, where a plaintiff need only present evidence sufficient to give rise to an
22 inference of discrimination, in a disparate impact case, plaintiffs must do more, -plaintiffs must
23 actually prove the discriminatory impact at issue. Rose, 902 F.2d at 1421; Garcia v. Spun Steak
24 Comp., 998 F.2d 1480, 1486 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994). Only then does the
25 burden shift to the defendant to produce evidence that its disparate employment practices are based
26 on legitimate business reasons, such as job-relatedness or business necessity. Id.

27 In Rose, the court of appeals affirmed the district court's dismissal of the plaintiffs' disparate
28 impact claims on the grounds that they failed to establish a prima facie case because the terminations
were based on the eliminations of plaintiffs' jobs and not because of their age. Rose, 902 F.2d at
1424, 1427. In Ass'n of Mexican-American Educators, the court seemed to consider the 80-percent-
rule as being significant and substantial enough to shift the burden to defendants. Whereas, in Teresa,

1 the court refused to infer, minus any statistical or other evidence, that the challenged LEP program
2 had a discriminatory impact on minority students. Neither of these cases are precedential, but both
3 are examples that the Ninth Circuit requirement that the practice in question disparately impact the
4 plaintiffs because of their membership in a protected group, Rose, 902 F.2d at 1424.

5 The following Title VI cases are most consistent with the Title VII analysis set out in Rose:

6 Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993)
7 Title VI challenge to a school site location because it benefitted the anglo-
8 community to disadvantage of minorities. The court applied the following
9 test: If plaintiff makes prima facie showing, defendant must prove that there
10 exists a substantial legitimate justification for the practice; if defendant
11 carries this rebuttal burden, plaintiff will still prevail by showing that there
12 exists a comparably effective alternative which would result in less
13 disproportionality. Id. at 1407. Plaintiff's duty to show that the practice has
14 disproportionate effect requires plaintiff to demonstrate a causal link
15 between the practice and the disparate impact identified. "Thus the plaintiff
16 cannot make out a prima facie disparate impact claim if the evidence tends
17 to show that even had the defendant not engaged in the challenged practice,
18 the same disparate impact would nonetheless have existed." Id. at 1407
(citing United States v. Lowndes County Board of Education, 878 F.2d
1301, 1305 (11th Cir. 1989) (racial imbalance in public schools amounts to
violation only if it results from some form of state action, not from other
factors such as housing patterns); see also Freeman v. Pitts, 112 S. Ct. 1430
(1992)). The court, assumed that the site location of the new school had a
disparate impact, but held that there was a legitimate reason for the decision.
Plaintiffs had also challenged the school boards' failure to prevent zone-
jumping by anglo-students who avoided minority schools by attending out-
of-district schools. The court recognized that zone-jumping disparately
impacted on minority students, but held there was no Title VI violation
because there was nothing defendant could have done to stop zone-jumping.

19 African-American Legal Defense Fund, Inc. v. New York State Dept., 8 F.
20 Supp. 2d 330 (S.D. N.Y. 1998) Title VI challenge to funding system for
21 public schools where funding was apportioned per student based on
22 attendance rather than enrollment. The court applied the following test:
23 Plaintiff must make prima facie showing that conduct has disparate impact,
24 once such a showing has been made, burden shifts to defendant to
25 demonstrate the existence of a substantial legitimate justification for the
26 allegedly discriminatory practice. If defendant sustains this burden, plaintiff
27 may still prove his case by demonstrating that other less discriminatory
28 means would secure the same objective. Id. at 338 (citing New York Urban
League, Inc. v. New York, 71 F.3d 1031, 1036 (2nd Cir. 1995)). The court
held that plaintiffs failed to make a prima facie case because the funding
system didn't cause the disparate impact. Various societal factors caused
low minority school attendance, which resulted in the funding system having
a disparate impact on minority schools. Id. at 338-39. Title VI requires
federal grantees that produced disparate impacts to take corrective measures.

1 Id. (citing Alexander v. Choate, 469 U.S. 287 (1985)). Defendants didn't
2 produce the disparate impact.

3 Powell v. Ridge, 1998 W.L. 8042727 * 14 (E.D. Penn. 1998) Plaintiffs
4 charged that school financing formula had a disparate impact on inner city
5 minority children because they have greater educational needs than their
6 affluent counterparts. The court considered disparate impact cases
7 adjudicated under the Federal Rehabilitation Act, which requires that
8 handicapped individuals must be provided with meaningful access to the
9 benefits the defendant offers, and the benefit itself cannot be defined in a
10 way that effectively denies otherwise qualified handicapped individuals the
11 meaningful access to which they are entitled, but handicapped individuals do
12 not have a right to more public services than the non-disabled, even if they
13 need them. Id. at 15-16 (citing Alexander v. Choate, 469 U.S. at 287, 301;
14 Cerpac v. Health and Hospitals Corp., 147 F.3d 165, 167 (2nd Cir. 1998). No
15 Title VI violation where factors external to state subsidy program make
16 education more expensive or funding shortfalls greater for inner-city schools
17 than those in outlying areas. Id.

18 To prevail, Plaintiffs must establish that the challenged practice caused an adverse impact.
19 Rose, 902 F.2d at 1424; Wards Cove, 490 U.S. at 657. Again this Court will look to the Roosevelt
20 cases for guidance. Plaintiffs in Roosevelt charged that State's school financing system violated the
21 Arizona Constitution, Article XI, which provides as follows:

22 The Legislature shall enact such laws as shall provide for the establishment
23 and maintenance of a general and uniform public school system, . . .

24 Roosevelt I, 877 P.2d at 812. Under Roosevelt, it is the State's duty to establish and maintain a
25 general and uniform public school system. Id. at 813.

26 In its attempt to define the "general and uniform" requirements of Article XI, the Supreme
27 Court distilled the following two fundamental principles:

28 First, units in "general and uniform" state systems need not be exactly the
same, identical, or equal. Funding mechanisms that provide sufficient funds
to educate children on substantially equal terms tend to satisfy the general
and uniform requirement. School financing systems which themselves
create gross disparities are not general and uniform.

The second principle relates to the tension that exists between the competing
values of local control and statewide standards. As long as the statewide
system provides an adequate [] education, and is not itself the cause of
substantial disparities, local political subdivisions can go above and beyond
the statewide system. Disparities caused by local control do not run afoul of
the state constitution because there is nothing in Article XI that would
prohibit a school district or a county from deciding for itself that it wants an

1 educational system that is even better than the general and uniform system
2 created by the state.

3 Roosevelt I, 877 P.2d at 241.

4 In its application of the second principle, the Arizona court specifically considered the issue
5 now before this Court: whether disparities between school districts were the result of the financing
6 scheme chosen by the state. Id. at 242. Roosevelt spanned three different legislative schemes for
7 financing Arizona's public school system: 1) the system in place at the time Roosevelt and this case
8 were filed; 2) the Assistance to Build Classrooms Fund (ABC legislation), adopted in 1997; and the
9 Students FIRST Act of 1998. In all instances, the Arizona Supreme Court held that these financing
10 schemes caused substantial disparities between Arizona's school districts.

11 Ultimately, pursuant to a stipulation entered into by the parties, the Arizona Supreme Court
12 ordered the financing scheme, Students FIRST, to be facially valid and that no further constitutional
13 challenges remained. (See Response to MPSJ Lau Funding at Exhibit 2.) The Court does not know
14 the specifics of the parties' stipulated agreement regarding the constitutionality of Students FIRST
15 to conclude that the State's school financing scheme, as it exists today, provides adequate funding
16 to school districts such as NUSD, specifically as it pertains to LEP programs. Assuming that the
17 parties in Roosevelt only resolved the disparities in the school financing system as they affected
18 capital improvements, the flaws in Arizona's school financing system might still exist as it pertains
19 to operation and program funds. Consequently, the infirmities described in the Roosevelt cases might
20 still apply, here.

21 As explained by the various Roosevelt decisions, and as the State conceded in Roosevelt I,
22 877 P.2d at 243, and Roosevelt II, 950 P.2d at 1143, the State's school financing system results in
23 disparities in revenue-raising abilities among districts because it relies heavily upon property taxes
24 at the school district level. Roosevelt II, 950 P.2d at 1144. "Because the presence of taxable property
25 within each district bears no relationship to the capital needs of each district, it is difficult to create
26 a general and uniform system with such heavy reliance upon district based property taxation." Id. at
27 1144; see also, Roosevelt III, (again rejecting legislation, Students FIRST, because even though the

1 legislature ensured that all districts would receive adequate funds to meet minimum capital facility
2 needs, the legislature chose a system that caused substantial disparities between the revenues
3 available to the different districts. Specifically, Students FIRST created two local financing options:
4 1) participating districts were limited to receiving the state allotment, whereas 2) opt-out districts had
5 to rely solely on local financing, but had access to various mechanisms, such as bonding, which
6 would enable them to raise funds exceeding what was available to participating districts.)

7 Assuming such disparities continue under the school financing system now in existence, are
8 they actionable under Title VI? Under Rose, the disparate impact must fall on plaintiffs because of
9 their membership in a protected group, Rose, 902 F.2d at 1424, not because they are poor or because
10 they reside in lower-wealth school districts. Only funding related disparities which can be so linked
11 are actionable here. Only in this way can Plaintiffs demonstrate, by a preponderance of the evidence,
12 their prima facie case of disparate impact under Title VI. Rose, 902 F.2d at 1424 (citing Watson, 487
13 U.S. at 985-988). Thereafter, the burden will shift to the Defendant to produce evidence that its
14 disparate practices are based on substantial legitimate reasons related to the business of public
15 education. Id. In the event, the Defendants make a business necessity defense, Plaintiff can still
16 prevail by showing that there are other alternatives that would serve the State's purpose without a
17 similarly undesirable discriminatory effect. Id. (citing Albermarle Paper Co. V. Moody, 422 U.S.
18 at 425)).

19 20 The Issues: Plaintiffs' Motions for Partial Summary Judgment

21 1. Plaintiffs' Motion for Partial Summary Judgment: Defendants allow Arizona's school
22 districts to administer Lau programs which do not meet federal standards and fails to
23 monitor district compliance with federal standards (MPSJ:Lau Oversight).

24 Federal law mandates that public schools provide LEP children with a program of instruction
25 calculated to make them proficient in speaking, understanding, reading, and writing English, while
26 enabling them to master the standard academic curriculum as required of all students. Lau v.
27 Nicholas, 414 U.S. 563 (1974). The Arizona State Board of Education recently decreed in policies

1 and regulations that in order to receive high school degrees, students must demonstrate mastery of
2 the revised Arizona Essential Skills (Essential Skills or AES).⁵ The State-prescribed test for
3 measuring attainment of such skills is the Arizona Instrument to Measure Skills (AIMS). Effective
4 in the school year 2000-2001, a student will have to pass the AIMS test in order to receive a
5 highschool diploma.

6 Plaintiffs submit that the Essential Skills constitute and determine the principal educational
7 benefits provided by the State, under the mandates of 34 C.F.R. Part 100 and 20 U.S.C. § 1703(f)
8 that LEP students have full and equal opportunity to master the Essential Skills, meaning pass the
9 AIMS test and graduate from high school with a diploma.

10 State regulations, in compliance with federal law, provide that all district enrollees with a
11 primary or home language other than English (PHLOTE students) must be promptly evaluated
12 through prescribed testing to determine whether they lack proficiency in speaking, understanding,
13 reading or writing English. A PHLOTE student lacking either proficient oral skills or reading or
14 writing skills must be classified limited English proficient (LEP) and placed in a Lau program. Every
15 two years, schools must reassess LEP students' English proficiency skills to determine the progress
16 of the students toward proficiency in English, to identify necessary improvements to the Lau
17 instruction being provided, and to identify students who can be reclassified English proficient and
18 exited from Lau programs to regular classes.

19 Trial shall be set to determine Plaintiffs' charge that Defendants are violating federal law
20 in their oversight of Lau programs in Arizona's school districts, specifically, as follows:

21 _____
22 ⁵Prior to 1998, A.R.S. § 15-701.1 required the state board of education to prescribe
23 competency requirements for the graduation of pupils from high school incorporating the essential
24 skills in the areas of reading, writing and mathematics. The board prescribed the Arizona
25 Assessment Standards (AAS) and its corresponding testing program, the Arizona Student
26 Assessment Program (ASSAP). In 1998, A.R.S. § 15-701.1 was amended so that in addition to
27 prescribing competency standards, the state board of education is required to develop and adopt
28 competency tests for the graduation of pupils from high school in at least the areas of reading,
writing and mathematics and to establish passing scores for each such test. The state board has
prescribed that the AIMS test shall be used to test Essential Skills.

1 Exit Criteria: Defendants authorize school districts to determine that LEP
2 students have developed sufficiently proficient English literacy skills so that
3 they can be reassigned from Lau programs to regular, English-only
4 instruction, even when their scores on standardized tests signify a lack of
reading comprehension skills necessary for satisfactory performance of
coursework aligned with the revised Arizona Essential Skills (Essential
Skills).

5 Performance Standards: Defendants do not prescribe standards of academic
6 performance to enable consistent judgments to be made as to whether
7 students exited from Lau programs are functioning satisfactorily in regular
classes; therefore, districts fail to identify and provide federally mandated
services necessary to remedy skill and knowledge deficits.

8 30-minutes of English Instruction: Defendants allow Lau programs which
9 provide as little as 30-minute per day English language skills instruction.

10 IEPs: Defendants do not require the districts to have Individual Education
11 Plans (IEPs) prepared by district personnel with the professional training and
skills necessary to devise and implement plans satisfying federal program
requirements.

12 Monitoring and Remedial Failures: Defendants fail to monitor district
13 compliance with federal Lau requirements and develop effective mechanisms
for remedying program deficiencies.

14
15 2. Plaintiffs' Motion for Partial Summary Judgment: Defendants' Failure to Adequately
16 Underwrite District Lau Programs as required by Federal Law.

17 Plaintiffs argue that the Defendants are violating 20 U.S.C. § 1703(f) and 34 C.F.R. Part
18 100 by failing to provide Arizona school districts with financial resources necessary to instruct
19 LEP students "to make them proficient in understanding, speaking, reading and writing English,
20 while enabling them to master the standard academic curriculum as required of all students. See
21 Lau, 414 U.S. 563; Castaneda v. Pickard, 658 F.2d at 1009-1011 (construing 20 U.S.C. §
22 1703(f)); accord Gomez v. Illinois State Board of Education, 811 F.2d at 1041-1045. For
23 example, Plaintiffs complain that districts are unable to hire and/or train qualified LEP teachers
24 and staff, and that districts lack necessary text books and other resources, especially in content-
25 area materials. (Second Amended Complaint at 20(a)-(h).) This Court rejects Defendants'
26 assertion that Plaintiffs' claim is moot because the Arizona legislature adopted Students FIRST;
27 therefore, the issue of whether the State adequately funds district LEP programs shall be decided

1 at trial. As explained in this Order, the Court will look to Roosevelt to guide its assessment of
2 whether the new, Students FIRST, financing scheme enables school districts to implement
3 effective Lau programs.

4
5 3. Non-Lau Claim Arising Under 34 C.F.R. Part 100.

6 When this case was filed, the State School Board had adopted the Arizona Essential
7 Skills which were a compilation of academic skills and content-area knowledge that the State
8 Board had determined all students in Arizona's public school system, except those with certain
9 disabilities, ought to master in the course of their matriculation through the system. The Board
10 approved the Arizona Student Assessment Program (ASAP) to determine whether students were
11 progressing toward proficiency in the Arizona Essential Skills, but did not specify ASAP test
12 scores to be indicative of mastery of the Arizona Essential Skills. The Board allowed districts to
13 determine mastery level scores, which varied substantially across districts. (See Second Amended
14 Complaint at ¶ 37, 38 (districts devise their own criteria for determining mastery of State-
15 prescribed essential skills, which enables districts to report that their students have met minimum
16 competency requirements when students cannot perform comparative to non-minority, English
17 speaking students).

18 In 1994, Congress adopted the Improving America's Schools Act (IASA) (1994). 20
19 U.S.C. §§ 6301 et. Seq., 20 U.S.C. §§ 6311(a), (b)(1)(A)-(D).⁶ State academic achievement

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21 ⁶Declaration of policy and statement of purpose

(a) Statement of policy

(1) In general

22 The Congress declares it to be the policy of the United States that a
23 high-quality education for all individuals and a fair and equal opportunity to obtain
24 that education are a societal good, are a moral imperative, and improve the life of
25 every individual, because the quality of our individual lives ultimately depends on
the quality of the lives of others.

* * *

26 (b) Recognition of need

27 The Congress recognizes that--

1 standards, such as the Essential Skills, together with an assessment protocol, such as the ASAP,
2 are necessary to qualify Arizona for federal grants through IASA. Utilizing IASA terminology,
3 the Essential Skills are now called the Arizona Assessment Standards (AAS) and the testing
4 protocol is called the Arizona Instrument for Measuring Standards (AIMS). The State Board has
5 also determined that in order to receive high school diplomas, all students in the Arizona public
6 school system, except those with certain disabilities, must earn satisfactory AAS/Essential Skills
7 scores on the AIMS tests, effective in 2000-2001. The IASA does not require such graduation
8 competency testing dispositive of entitlement to a highschool diploma. The IASA only calls for
9 State plan provisions that address adequate yearly progress by each school district and school
10 toward achievement of IASA's goal that all children, "particularly economically disadvantaged
11 and limited English proficient children . . .," 20 U.S.C. § 6311(b)(2)(B)(i), meet the State's
12 proficient and advanced levels of performance, as set forth in its academic assessment standards
13 (AAS).

14 The AAS constitute the State's specification of baseline academic attainment that all
15 children ought to realize in the course of their matriculation and comprise the core educational
16 benefits, within the meaning of 34 C.F.R. Part 100. Plaintiffs argue that minority children from

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- 18 (1) although the achievement gap between disadvantaged children and other children
19 has been reduced by half over the past two decades, a sizable gap remains, and many
20 segments of our society lack the opportunity to become well educated;
 - 21 (2) the most urgent need for educational improvement is in schools with high
22 concentrations of children from low-income families and achieving the National
23 Education Goals will not be possible without substantial improvement in such
24 schools;
 - 25 (3) educational needs are particularly great for low-achieving children in our Nation's
26 highest-poverty schools, children with limited English proficiency, children of
27 migrant workers, children with disabilities, Indian children, children who are
28 neglected or delinquent, and young children and their parents who are in need of
family-literacy services;

20 U.S.C. § 6301(a), (b) (1995).

1 low-income households and LEP students are burdened with pronounced disadvantages in
2 learning academic skills and content-area knowledge comprising a curriculum that fulfills the
3 high academic standards States are setting in order to qualify for various kinds of federal financial
4 assistance. Without instructional interventions, such as those designed and funded by Title I,
5 these at-risk children cannot be expected to attain proficiency in academic skills and content
6 areas, as measured by required assessment tests like the AIMS. Equal benefits are not realized if
7 a student fails to demonstrate sufficient attainment of academic skills and content-area
8 knowledge, according to State-mandated achievement testing (AIMS), and fails to attain a high
9 school diploma.

10 Plaintiffs may go forward with this claim to the extent that they establish a link between
11 the disparate impact of the State's educational system and the Plaintiffs' membership in a
12 protected group, such as race, color, or national origin, -not membership in a socio-economic
13 group. This Court rejects any attempt to broaden this action beyond Title VI or the EEOA. While
14 Defendants may be violating IASA or Title XI of the Arizona Constitution, those claims are not
15 before this Court. In fact, those claims didn't even exist in 1992 when Plaintiffs filed this case.
16 The IASA related AIMS test which Plaintiffs allege they will fail in disproportionately large
17 numbers compared to English speaking anglo-students, in part, addresses the complaint that
18 school districts devise their own criteria for determining whether their students have mastered
19 essential skills, (Second Amended Complaint at ¶ 37), and thus report that most of their students
20 have met minimum competency requirements, when in fact, a majority have not acquired State-
21 prescribed essential skills, (Second Amended Complaint at ¶ 38). AIMS testing, implemented
22 state-wide, will remedy this. At trial, this Court will admit evidence regarding Plaintiffs' pass or
23 fail rates on various academic tests, including AIMS, only as it is relevant to establish the success
24 or failure of the Lau programs and to show that students are, or are not, acquiring State-prescribed
25 essential skills.

26 Accordingly,
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IT IS ORDERED that all pending motions are DENIED.

IT IS FURTHER ORDERED that this matter is set for a Pretrial Conference on June 7, 1999, at 10:30 a.m. A trial date shall be set at the Pretrial Conference.

IT IS FURTHER ORDERED that ten days prior to the Pretrial Conference, the parties shall file an Amended Pretrial Order, reflecting the determinations made by the Court as set forth in this Order, to identify the issues to be determined at trial.

IT IS FURTHER ORDERED that ten days prior to the Pretrial Conference, the parties may also file trial briefs setting out any relevant case law, either contrary or supplemental to the law as set out in this Order. All Motions in Limine must also be filed by this date.

IT IS FURTHER ORDERED that no further dispositive motions may be filed. There will be no further extensions granted in this case. Failure to comply with the above dates or to proceed directly to trial once a trial date is set shall result in dismissal of this action.

Dated this 13th day of April, 1998.



ALFREDO C. MARQUEZ
Senior U.S. District Judge