



Arizona State Senate Issue Paper

August 27, 2008

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FLORES v. ARIZONA

INTRODUCTION

In 1992, *Flores v. State of Arizona* was filed in federal district court. The lawsuit was brought forth by parents of children enrolled in the Nogales Unified School District (NUSD). The plaintiffs alleged that the civil rights of Limited English Proficient (LEP) students were violated because the state failed to provide a program of instruction that included adequate language acquisition, academic instructional programs and funding for at-risk, low-income, minority students.

Plaintiffs argued that the state's failure regarding LEP programs was a violation of the federal Equal Educational Opportunities Act (EEOA). The EEOA requires all public schools to provide LEP children with a program of instruction designed to make them competent in speaking, understanding, reading and writing English, while enabling them to learn the standard curriculum taught to all students in the school district. The plaintiffs claimed that the state allowed school districts to administer LEP programs that did not meet EEOA standards and failed to monitor school district compliance with those standards. Among other items, the plaintiffs alleged that public school districts allowed students to exit LEP programs and enter mainstream classrooms when those students still lacked necessary English language and reading comprehension skills.

DISTRICT COURT JUDGMENT

In January 2000, the District Court ruled in favor of the plaintiffs and declared Arizona's LEP programs in violation of the EEOA because the funding level as it related to LEP students was "arbitrary and capricious." While the District Court agreed that Arizona's standards were based on sound educational theory, it did not agree that the existing programs served to appropriately advance the standards. The ruling stated that there were: 1) too many students in a classroom; 2) not enough classrooms; 3) not enough qualified teachers; 4) not enough teacher aids; 5) inadequate tutoring programs; and 6) insufficient teaching materials. The District Court further ruled that these deficiencies were a result of inadequate funding. The state did not appeal this decision.

CONSENT ORDER

In August 2000, then Arizona Superintendent Lisa Graham Keegan entered into a consent decree with plaintiffs that resolved the District Court's concern regarding program adequacy, monitoring and nonresource issues. The consent decree required that the State Board of Education and the Arizona Department of Education (ADE) adopt official rules and policies that put in place: 1) standardized methods of identifying LEP students; 2) uniform performance standards for determining and reassessing English proficiency, including but not limited to opportunities for compensatory instruction; 3) alignment of curriculum with academic standards and instructional strategies appropriate for English learners student achievement; 4) criteria on individual education plans for English learners; and 5) monitoring and compliance responsibilities by the ADE.

While the state resolved the issue of program adequacy through a consent decree, the issue of funding was not addressed.

PROPOSITION 203

The voters approved Proposition 203 in November 2000. Proposition 203 repealed existing bilingual education laws and enacted new law to require that all classes be taught in English, except that pupils who are classified as English Language Learners (ELL), previously LEP, would be educated separately through Structured English Immersion (SEI) for a period not to exceed a year.

English immersion programs provide nearly all classroom instruction and materials in English but may use a minimal amount of the pupil's native language when necessary. Students could be exempted from this requirement if the school district or charter school grants a bilingual education waiver upon request by the pupil's parent.

INITIAL COST STUDY

Since no action had been taken in the 2000 legislative session regarding funding for ELL programs, in October 2000, the District Court

ordered the state to conduct a cost study to determine how much additional funding would be required to address the deficiencies in the ELL programs noted in the January 2000 ruling. The District Court set the completion deadline date by January 2001 so that the Legislature would have sufficient time to review the results of the cost study and take appropriate action to fund the deficiencies.

In May of 2001, the ADE released an "English Acquisition Program Cost Study" that identified per-pupil costs in the sampled immersion programs. However, the cost study did not contain any specific conclusions or recommendations, only an estimated price range of \$0 to \$4,600 per ELL student.

In June 2001, the District Court ordered the state to comply with the January 2000 ruling by the "end of any special session convened by the State Legislature" prior to January 31, 2002. The District Court stated in its order that the state should adjust the minimum level of funding per ELL student to an amount that reflects actual funding needed for a nonfluent English-speaking pupil to successfully achieve proficiency in English.

DECEMBER 2001 SPECIAL SESSION

In December 2001, during a special session, the Legislature approved HB 2010, which increased the ELL Group B weight to reflect an increase from approximately \$179 per pupil to \$340 and provided additional monies for teacher training, compensatory instruction, instructional materials, monitoring, teacher bonuses, a K-3 Literacy Program and another cost study. The deadline set for the cost study was August 1, 2004.

In April 2002, the plaintiffs challenged the per-pupil funding levels in HB 2010 and argued that the \$340 per-pupil amount was also arbitrary and capricious. The District Court ordered the state to complete another cost study by January 1, 2003. In addition, the District Court set a compliance deadline of June 30, 2003, for the state to create a funding plan commensurate with the findings of the cost study. The state immediately filed a motion for reconsideration to prove to the District Court

that HB 2010 satisfied the January 2000 order. In June 2002, the District Court reconsidered its earlier ruling and recognized the cost study deadline set during the special session.

NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL) COST STUDY

In August 2004, the NCSL consultants selected by the Legislature to conduct the cost study published an executive summary of the study. A final study was released in February 2005. The recommendations ranged from \$670 to \$2,571 per pupil, depending on grade level and various at-risk factors.

2005 LEGISLATIVE SESSION

In December 2004, the plaintiffs filed a motion with the District Court asking that it establish a deadline at the end of the 2005 legislative session for the state to comply with the judgment. In January 2005, the District Court ordered that the state comply with the judgment and adequately fund ELL programs by the end of the legislative session.

In response, the Legislature passed HB 2718 that included revisions to the assessment, classification, reassessment and monitoring of ELL pupils, created a taskforce, codified the consent decree and provided funding for an ELL Group B weight increase for FY 2005-2006. HB 2718 was vetoed by the Governor in May 2005.

In December 2005, the District Court ordered financial penalties imposed against the state in the form of progressive daily fines until the state complied with the judgment. In addition, the District Court excluded ELL pupils from the Arizona's Instrument to Measure Standards (AIMS) graduation requirement.

2006 LEGISLATIVE SESSION

In January 2006, the Legislature passed SB 1198 to address the *Flores* order. Similar to HB 2718, the bill also established new individual and corporate income tax credits for contributions made to student tuition organizations to provide private school scholarship and tuition grants to ELL pupils. The Governor vetoed this bill primarily due to

the "uncapped" nature of the tax credits and called the Legislature into special session.

The next day, the Legislature passed HB 2002, which was identical to SB 1198, except for a \$50 million cap for the corporate income tax credits. The Governor again vetoed this bill citing that the provisions in the bill did not satisfy the court order and that the tax credits were outside of the call of the special session.

On March 2, 2006, the Legislature passed HB 2064, which included provisions similar to those in SB 1198 and HB 2002 excluding the individual and corporate tax credits for ELL pupils. Additionally, the bill contained a conditional enactment to increase the Group B ELL weight, increasing per-pupil funding to \$432, contingent upon the District Court's acceptance that HB 2064 fulfills the 2000 order. The Governor allowed the legislation to become law without her signature. At that time, daily fines ordered by the District Court had accumulated to \$21 million.

On March 13, 2006, the District Court ruled that the \$21 million in daily fines that had accumulated should be distributed to school districts and again ruled that ELL pupils should not be subject to the AIMS graduation requirement until an appropriate funding scheme could be implemented. On April 27, 2006, the District Court ruled that HB 2064 did not satisfy the 2000 District Court order. The Superintendent of Public Instruction (Superintendent) and the Legislature, as intervenors in the matter, appealed the ruling to the Ninth Circuit Court of Appeals.

The provisions of HB 2064 became effective September 21, 2006, with the exception of the Group B weight increase.

NINTH CIRCUIT COURT OF APPEALS

On August 24, 2006, the Ninth Circuit Court of Appeals vacated the District Court's assessment of fines, removal of the AIMS graduation requirement for ELL pupils and rejection of HB 2064. Instead, the Circuit Court of Appeals remanded the case to District Court for an evidentiary hearing. The appellate court noted that since "the landscape of educational

funding has changed significantly” since the 2000 court order, an evidentiary hearing should be held regarding whether “changed circumstances” would require modification of the 2000 order.

ELL TASK FORCE

Authorized by HB 2064, the Arizona English Language Learners Task Force (Task Force) was charged with developing, adopting and continually reviewing research-based SEI models for use by school districts and charter schools. The SEI models developed by the Task Force must take into consideration specific characteristics of the schools, including size, location, grade levels and the number and percentage of ELL students. The SEI models must also include a minimum of four hours of English language development for each first-year ELL student. A school district or charter school may use an alternative model only if approved by the Task Force.

Additionally, the Task Force was assigned to establish procedures for public schools to determine the incremental costs of the SEI models and the creation of a budget form to request additional SEI funding (above and beyond the Group B weight). The maximum amount of funding provided was set at the total amount of incremental costs determined by the school offset by Group B funding, federal Title I, II, III and impact aid, as well as any desegregation monies received by the school in an amount equal to the number of ELL students as a percentage of the total student population.

In September 2007, the Task Force formally adopted SEI models. Key points of the models are as follows:

- Four hours of English language development daily for the first year, including vocabulary, reading, writing and grammar.
- Entry/exit and classification into an SEI program only through annual administration of the Arizona English Language Learner Task Force Assessment (AZELLA).
- Classroom/student grouping determined by overall proficiency level within grade.

- Class size targets of 20-28 students dependent on the student’s proficiency level.

2008 LEGISLATIVE SESSION

In November 2007, the Task Force adopted the budget form developed by ADE to fund the SEI models. The online budget request process was activated from January 24, 2008, through February 8, 2008. On March 4, 2008, the ADE reported that public schools had submitted \$274.6 million in funding requests, of which approximately \$90 million were approved. The ADE subtracted from the \$90 million in approved requests only the state funding offsets required in HB 2064, resulting in approved funding to the schools of approximately \$40.7 million. The federal offsets were not deducted due to the Ninth Circuit Court of Appeals ruling in February 2008 (*see Ongoing Litigation below*).

On April 9, 2008, the Legislature passed SB 1096, which appropriated \$40.7 million in FY 2008-2009 to fund the Task Force adopted models. On April 14, 2008, the Governor allowed SB 1096 to go into law without her signature.

ONGOING LITIGATION

In January 2007, the District Court held an eight-day evidentiary hearing in which all parties to the lawsuit offered testimony and evidence related to funding and programmatic changes to statewide ELL programs. The attorneys for the Superintendent and the Legislature argued that funding for ELL programs had increased from \$365 to \$444 per pupil and pointed to improved efforts by the NUSD in teaching English to its ELL students.

In March 2007, the District Court again ruled that HB 2064 did not satisfy the January 2000 court order. The District Court held that HB 2064 violated federal law in two ways: 1) supplanting of federal dollars and 2) a two-year maximum funding limitation. Additionally, the District Court rejected the assertion by the attorneys of the Superintendent and the Legislature that new funding provided by the state contributed to the NUSD success factors and assigned credit to local school district

administrators. Finally, the District Court set the end of the 2007 legislative session as the deadline date for a new plan to comply with the January 2000 order. The Superintendent and the Legislature appealed the lower court ruling.

In October 2007, after the plaintiffs filed for sanctions due to the Legislature's failure to meet the end of session deadline, the District Court ordered the Legislature to appropriate funds for the SEI models adopted by the Task Force by March 4, 2008. In March 2008, the District Court extended this date to April 15, 2008 (*see 2008 Legislative Session above*).

In February 2008, the Ninth Circuit Court of Appeals upheld the models prescribed in HB 2064, except for the two-year limitation on funding and the federal offsets applied to the ELL incremental cost funding. The Legislature is currently appealing this case to the United States Supreme Court.

On April 30, 2008, the District Court ordered that no fines would be imposed and clarified that the Court's order on the matter of fines did not indicate that SB 1096 satisfied any of the Court's previous orders.

The plaintiffs filed for relief in May 2008, asserting that funding levels in SB 1096 failed to comply with the District Court's order, and further requested a deadline for the state to fund the SEI models. The plaintiffs' motion also requested that school districts not be required to implement the Task Force models until the state fully funds the SEI models.

In July 2008, the District Court set a ten-day trial to be held in November 2008 to determine if the funding levels in SB 1096 fulfill the Court's order. Additionally, the District Court left intact the requirement that public schools implement the Task Force SEI models during the 2008-2009 school year.

• **ADDITIONAL RESOURCES** •

- *Flores v. Arizona*, 48 F.Supp.2d 937 (D.Ariz. 1999)
- *Flores v. Arizona*, 172 F.Supp.2d 1225 (D.Ariz. 2000)
- *Flores v. Arizona*, 160 F.Supp.2d 1043 (D.Ariz. 2000)
- *Flores v. Arizona*, (not reported) F.Supp.2d (D.Ariz. 2001)
- *Flores v. Arizona*, 405 F.Supp.2d 1112 (D.Ariz. 2005)
- *Flores v. Rzeslawski*, Slip Copy, 2006 WL 2460741 (C.A.9.Ariz. 2006) – Westlaw Citation only
- Equal Educational Opportunities Act, 20 United States Code Section 1703
- Arizona Revised Statutes, Title 15, Chapter 7, Article 3.1 and A.R.S. § 15-943
- Proposition 203 Publicity Pamphlet for November 7, 2000 General Election, prepared by the Arizona Secretary of State
<http://www.azsos.gov/election/2000/info/PubPamphlet/english/prop203.htm>
- Arizona English Language Learners Task Force
<http://www.ade.az.gov/ELLTaskForce>