



INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION
MARIA "CUCA" ROBLEDO MONTECEL, PH.D., PRESIDENT & CEO
5815 CALLAGHAN ROAD, SUITE 101
SAN ANTONIO, TEXAS 78228
210.444.1710 • FAX 210.444.1714
CONTACT@IDRA.ORG • WWW.IDRA.ORG

Post-Legislative Session Summary on Proposed Changes to Texas Bilingual Education Monitoring Procedures, Secondary Level ESL Program Reforms, and Related Litigation

By Albert Cortez, Ph.D.

Reforms Proposed

In 2008, Judge William Wayne Justice issued a sweeping ruling in *U.S. vs. Texas 5281** regarding the status of bilingual education and ESL program monitoring in Texas. It included the procedures being used to identify school districts that might be under-identifying their limited-English-proficient (LEP) students, schools with excessive numbers of parent denials of bilingual education or ESL services for their children, and effectiveness of the state's secondary level ESL program. The state was provided a reprieve when the Texas Attorney General requested and the Fifth Circuit Court of Appeals granted a stay of the judge's order so that the state could develop and present a plan for addressing the shortcomings identified in the ruling by January 2009.

Despite the stay, the facts presented in the case provided a compelling argument for the state of Texas to take some action to address the problems identified in the case. In response to these findings, some Texas state policymakers drafted proposals that addressed the issue raised in the court case. State Senator Judith Zaffirini introduced Senate Bill (SB) 548, which addressed the monitoring issues raised in the case. Senator Leticia Van de Putte drafted and introduced SB 1051, which addressed secondary level ESL issues that were noted as needing extensive improvement. Both measures were co-

sponsored by Rep. Jessica Farrar in the Texas House of Representatives.

During the hearings in the Senate, neither measure was publicly opposed. But shortly thereafter, rumors emerged that, in addition to opposition from the state's political leaders, some key education groups had privately voiced "reservations" about the proposed reforms.

Why Were the Reforms Not Adopted?

During development phase, the proposals had benefitted from extensive input from a coalition of bilingual education advocates who helped frame major portions of the plans. Both senators were very effective in securing a hearing for their measures. But progress was eventually stalled as a result of rumored opposition that emerged.

Though opposition was low key and not visible, opponents of expanded monitoring of state-mandated bilingual and ESL programs succeeded in slowing any action on that portion of the reform effort. Some opponents noted that since the court case involving this issue was still under consideration and would not be heard at the Fifth Circuit level until early June, it might be preferable for the state to wait until the appeals court ruling before deciding to take any action. Reform proponents countered by pointing out that state policymakers often complained about being made to make changes as a result of court edicts and that some pro-active effort on the state's part

* *U.S. vs. Texas 5281 – Motion for Further Relief Under Modified Order*

could lead to the elimination for further court hearings on the issue.

Despite ongoing efforts to bring the monitoring plan up for a vote in the Texas Senate, they were stalled until the close of the session. Last minute attempts to append the expanded monitoring measure to other education legislation were resisted by state legislative leaders in both the Texas House and Texas Senate.

The proposal to introduce reforms to the secondary-level ESL program met a similar fate. Despite no early visible opposition, some education groups began to voice serious reservations regarding the plan's requirement that secondary-level content area teachers working with English language learners participate in additional training. Teacher groups were reported to be reluctant to support *any measure* that mandated additional professional development. Compounding matters was the fact that some administrator groups also were opposed to requiring use of any additional school time for staff development.

Proponents of the ESL reform plans noted the fact that dismal performance by secondary-level LEP students and the resulting achievement gaps between LEP and non-LEP students clearly pointed to the need for improved content area instruction. Though the poor performance of Texas secondary LEP students was clearly verified in state Texas Assessment of Academic Skills (TAKS) performance, opponents of the plan offered no alternatives to help address the issue.

As the session wrapped up in late May, proponents of both measures made numerous efforts to find some means to move the plans forward but were thwarted by key political leaders and some education groups that were determined to maintain the status quo on these issues.

Status of the Texas Court Case

Following the close of the session, the Fifth Circuit Court of Appeals convened its hearing to review Judge Justice's district court ruling and hear oral arguments on the case. Presentations were made by the state

attorney general's representatives and by Mexican American Legal Defense and Educational Fund (MALDEF) on behalf of the plaintiffs in the case. The appeals court justices asked a surprising number of questions. While some questions reflected some degree of reluctance to address the key issues, others centered on the Texas Education Agency's authority to require school districts to make changes in what were determined to be ineffective programs.

To inform its deliberations, the court took the unusual step of requesting supplemental briefs on the issues raised at the appeals court hearing. Noting that the case had raised some complex issues, the appeals court also advised the attorneys that they should not expect a quick ruling. Attorneys were given until mid-July to file their additional legal arguments. A ruling may not be forthcoming until some time in the fall of 2009.

As the appeals court weighs the evidence and legal arguments presented, another generation of students served (and many others not served) in the state's bilingual education and ESL programs continue to be educated in less than ideal conditions. Though it is acknowledged that the elementary level bilingual program has produced many positive results, it has done so in a climate where badly-needed state oversight and the funding required to support full implementation has been lacking.

There also are understandable concerns that in some school districts, students who could benefit from specialized instruction are under-identified, and some school districts have a disturbing number of parent denials that are well beyond those at a state-wide level.

A related concern is the fact that the state's current practice of aggregating all LEP TAKS performance data across all grade levels continues to mask serious under-achievement at the secondary level. Higher scores among the larger population of elementary students who are served in bilingual education increase the overall average. This showcases the need for

serious reforms. In analyses conducted by IDRA where elementary and secondary-level TAKS scores were disaggregated by school level, we found that the practice of averaging LEP scores across all grades resulted in having more than 200 low performing schools overlooked in the Performance-Based Monitoring Analysis System (PBMAS) accountability system. No doubt that the absence of any effective accountability for poor performance of secondary-level students served in ESL programs will lead to continuing neglect of those students unless the courts or the state step in.

Implications of the U.S. Supreme Court Decision in the Arizona-ELL Related Case on the Texas Litigation

After the end of the Texas legislative session, the U.S. Supreme Court issued its ruling in *Flores vs. Horne*, a case that involved a challenge to the amount of funding that the state of Arizona was providing to schools to serve their English language learners. In a split 5-4 decision, the court reversed, in part, and remanded the case back to the lower court for further hearings. Because the case centered on funding for ELL education in Arizona schools, it had no direct implication for the Texas case other than upholding the high court's rejection of the idea that the *Equal Educational Opportunity Act* was superseded by the adoption of *No Child Left Behind Act* (NCLB) – an argument that had been presented by the state of Texas in defense of its program. A summary of key questions related to the *Flores* decision is

provided in the links to materials below developed by MALDEF and META Inc., the two legal groups involved in the Texas litigation.

What Happens Next

It is not clear at this point what may happen next. If the Fifth Circuit reverses Judge Justice in all areas, the case is over, and legislative action depends on the state's willingness to address the array of problems that were identified.

If the Fifth Circuit upholds all or part of the Judge's ruling, it may require additional hearings. If Judge Justice's ruling is upheld, it is conceivable that the state of Texas will be required to adopt some reforms that address the issues raised by the plaintiffs.

In the absence of a court mandate, few who have reviewed the evidence presented in the case would disagree that some changes to the existing bilingual education and ESL program monitoring procedures are badly needed or that significant improvements are needed to effectively serve the thousands of LEP students in Texas requiring specialized services at the secondary level.

It is not enough, nor is it acceptable for Texas political and education leaders to sit back and oppose reforms without offering alternatives that can be used as a basis for some workable solutions. As the numbers of language-minority students in Texas continue to grow over the next decade, it will not suffice for those in education leadership roles to bury their heads in the sand and wish the issues will go away.

Resources for Additional Information and Background

[“Federal Judge Rules That Texas’ Services for its LEP Students Are Inadequate,”](#) by Albert Cortez Ph.D.

[“An Analysis of the Supreme Court’s Decision in Horne vs. Flores, the Arizona ELL Funding Case,”](#) Q&A, by META, Inc.

[Fact Sheet on Supreme Court’s Decision in Horne v. Flores,](#) by MALDEF