

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LULAC,	§	
	§	
Plaintiff	§	
	§	
v.	§	Civil Action No. 6:14-CV-138
	§	
STATE OF TEXAS,	§	
MICHAEL WILLIAMS, in his official	§	
capacity as the COMMISSIONER OF	§	
EDUCATION, TEXAS EDUCATION	§	
AGENCY,	§	
	§	
SOUTHWEST INDEPENDENT SCHOOL	§	
DISTRICT, LLOYD VERSTUYFT in his	§	
official capacity as SUPERINTENDENT	§	
OF SOUTHWEST INDEPENDENT	§	
SCHOOL DISTRICT, SOUTHWEST	§	
INDEPENDENT SCHOOL DISTRICT	§	
BOARD OF TRUSTEES,	§	
	§	
NORTH EAST INDEPENDENT SCHOOL	§	
DISTRICT, BRIAN G. GOTTARDY in his	§	
official capacity as SUPERINTENDENT	§	
OF NORTH EAST INDEPENDENT	§	
SCHOOL DISTRICT, NORTH EAST	§	
INDEPENDENT SCHOOL DISTRICT	§	
BOARD OF TRUSTEES,	§	
	§	
Defendants	§	

AMENDED COMPLAINT

NOW COMES the League of United Latin American Citizens (“LULAC”), Plaintiff and designated class representative in the above-entitled matter, and respectfully urges the Court for declaratory and injunctive relief to require that the State of Texas, *et al.*, “State Defendants,” effectively monitor, enforce and supervise programs for English language learner (hereafter

“ELL”) students in the Texas public schools, and that Defendants Southwest Independent School District and North East Independent School District effectively implement, monitor and supervise locally their language programs so as to ensure that their ELL students receive appropriate educational programs and equal educational opportunities. ELL secondary students, particularly, in the named school districts and across Texas, continue to perform abysmally due to the grossly deficient language programs, such as English as a Second Language (“ESL”) pullout programs, at the local level and State Defendants’ failure to monitor and intervene effectively into those failing programs. Consequently, tens of thousands of ELL students across Texas are not acquiring English proficiency as required under the Equal Educational Opportunities Act, 20 U.S.C. § 1703(f), and little is being done about it. In support, LULAC shows as follows:

PARTIES

1. Plaintiff LULAC is a Latino organization with members and chapters located in many cities, towns, and public school districts throughout the State of Texas. Plaintiff LULAC files this action individually as a distinguished Latino civil rights organization and on behalf of its members. One of LULAC’s primary functions and purposes is the improvement and advancement of educational opportunities for persons of Latino and Mexican-American descent or nationality and the protection and defense of the civil rights of this major ethnic and national origin group. As an organization and on behalf of its members, LULAC has fought for decades in the courts, the legislature, and the local school districts to protect and enforce the rights of Latino ELL students to acquire proficiency in the English language.

2. Plaintiff LULAC's members include individuals who are ELL students and/or parents and guardians of ELL students attending public schools in Texas, including the defendant school districts identified below.

3. Plaintiff LULAC has been certified "for all purposes as representative of all persons of Mexican-American descent or nationality in the State of Texas" pursuant to the Order of this Court of July 10, 1972. Plaintiff LULAC asks the Court to modify and certify its class in this severed action to that of "for all purposes as representative of all Latino English Language Learner students attending public secondary schools in Texas." Plaintiff LULAC further asks the court to certify it as class representative for the following subclasses: "for all purposes of all Latino English Language Learner students attending public secondary schools in Southwest Independent School District" and "for all purposes of all Latino English Language Learner students attending public secondary schools in North East Independent School District."

4. The modified classes and subclasses of persons LULAC seeks to represent number from hundreds of secondary ELL students in Southwest ISD to thousands in North East ISD to tens of thousands of ELL students in Texas public secondary schools, making joinder of all members impracticable. The claims described below involve common questions of law and fact for the proposed classes and are typical of the claims of the class. Plaintiff and class counsel have fairly and adequately served to protect the interests of the class for over four decades and continue to advocate actively for the equal educational rights and opportunities of ELL students in Texas.

5. "State Defendants" are the State of Texas, Michael Williams in his official capacity as the Commissioner of Education for the State of Texas, and the Texas Education Agency (hereinafter referred to as "TEA"). Defendant Commissioner Williams is sued in his official capacity as the Commissioner of Education and serves as the educational leader of the State of

Texas and as executive officer of TEA. He is responsible for carrying out the duties imposed on the commissioner by the State Board of Education or the Texas Legislature, including establishing regulations necessary to carry out the provisions for bilingual education and ESL programs set out in Subchapter B of Chapter 29 of the Texas Education Code, among other duties and responsibilities identified in Tex. Educ. Code § 7.021 and other sections of the Texas Education Code. Defendant TEA is responsible for administering and monitoring compliance with education programs required by federal or state law, including compliance with the Equal Educational Opportunities Act, among other duties and responsibilities identified in Tex. Educ. Code § 7.021(b)(1) and other sections of the Texas Education Code and its implementing regulations.

6. Defendant Southwest Independent School District (“Southwest ISD”) is a school district located in Bexar County, Texas, and established pursuant to the Constitution of the State of Texas and the Texas Education Code. Southwest ISD is responsible for the operation of all the public schools within its boundaries and for implementing the state’s system of public education and ensuring student performance in accordance with the Texas Education Code, in its implementing regulations. Defendants Southwest ISD can be served with a copy of this complaint through its chief executive officer and superintendent, Lloyd Verstuyft, whose place of business is located at Southwest ISD, 11914 Dragon Lane, San Antonio, Texas 78252.

7. Defendant Lloyd Verstuyft is sued in his official capacity as Superintendent of Southwest ISD and serves as the educational leader and the chief executive officer of the school district. He is responsible for the planning, operation, supervision, and evaluation of the education programs and services of Southwest ISD, and managing the day-to-day operations of the district, including implementing and monitoring plans, procedures, programs, and systems to achieve clearly

defined and desired results in major areas of district operations, including the district's language programs. Defendant Verstuyft can be served with a copy of this complaint at his place of business located at Southwest ISD, 11914 Dragon Lane, San Antonio, Texas 78252.

8. Defendant Southwest ISD Board of Trustees ("Southwest ISD Board") includes as members: Mike Frazier, President, Sylvester Vasquez, Jr., Ida Sodalcan, James Sullivan, Jr., Florinda Bernal, Keith Byrom, and Yolanda Garza-Lopez. The Southwest ISD Board is the governing body for Southwest ISD and is responsible for developing policies for the district, overseeing management of the district, and ensuring the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations. Defendant Southwest ISD Board can be served with a copy of this complaint through its Board President, Mike Frazier, at his place of business located at Southwest ISD, 11914 Dragon Lane, San Antonio, Texas 78252.

9. Defendant North East Independent School District ("North East ISD") is a school district located in Bexar County, Texas, and established pursuant to the Constitution of the State of Texas and the Texas Education Code. North East ISD is responsible for the operation of all the public schools within its boundaries and for implementing the state's system of public education and ensuring student performance in accordance with the Texas Education Code and its implementing regulations. Defendant NEISD can be served with a copy of this complaint through its chief executive officer and superintendent, Brian Gottardy, whose place of business is located at 8961 Tesoro Drive, Ste. 600, San Antonio, Texas 78217.

10. Defendant Brian Gottardy is sued in his official capacity as Superintendent of North East ISD and serves as the educational leader and the chief executive officer of the school district. He is responsible for the planning, operation, supervision, and evaluation of the education programs

and services of North East ISD, and managing the day-to-day operations of the district, including implementing and monitoring plans, procedures, programs, and systems. Defendant Gottardy can be served with a copy of this complaint at his place of business is located at 8961 Tesoro Drive, Ste. 600, San Antonio, Texas 78217.

11. Defendant North East ISD Board of Trustees (“North East ISD Board”) includes as members: Letti Bresnahan, President, Shannon Grona, Sandy Hughey, Brigitte Perkins, Jim Wheat, Edd White, Sandi Wolff. The North East ISD Board is the governing body for North East ISD and is responsible for developing policies for the district, overseeing management of the district, and ensuring the superintendent implements and monitors plans, procedures, programs, and systems. Defendant North East ISD Board can be served with a copy of this complaint through its Board President, Letti Bresnahan, at her place of business located at 8961 Tesoro Drive, Ste. 602, San Antonio, Texas 78217.

12. During all times mentioned in this complaint, Defendant Superintendents and Board of Trustee members (collectively, “Defendant ISD officials”) were acting under color of law: under color of the statutes, rules, regulations, customs and usages of the State of Texas and the respective school districts.

13. At all relevant times herein, Defendant ISD officials acted under the scope of their duties and functioned as agents, employees and officers of the Defendant ISDs in engaging in the conduct described herein. At all relevant times herein, said Defendants acted for and on behalf of the Defendant ISDs, respectively, in the pursuit of their duties as employees, officers and agents of Southwest ISD and North East ISD (collectively, “Defendant ISDs”).

14. At all relevant times herein, Defendant ISD officials violated clearly-established standards concerning Plaintiff’s rights under the Equal Educational Opportunities Act of 1974.

Jurisdiction and Venue

15. This Court has jurisdiction over this matter pursuant to 20 U.S.C. §§ 1706 and 1708, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343(3) and (4).

16. Venue is proper in this court under 28 U.S.C. §§ 1331 and 1391.

General Allegations

The Equal Educational Opportunities Act of 1974

17. The Congress of the United States enacted the following provision of the Equal Educational Opportunities Act (“EEOA”):

“No State shall deny equal educational opportunity on account of his or her race, color, sex or national origin by . . . the failure by an education agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.”

20 U.S.C. § 1703(f).

18. The Act recognizes the ultimate responsibility of Defendants for the implementation and monitoring of educational programs for ELL students since, by its own terms, it is addressed to the states, and the term “education agency” is statutorily defined to include both local and state education agencies. 20 U.S.C. § 1720(a).

19. Under Section 1703(f) of the EEOA, state and local education agencies must satisfy three different tests as to whether they are taking appropriate action in response to ELL students’ language barriers. First, the language programs selected must be based on “a sound educational theory.” Second, the language program must be “implemented effectively” and monitored with adequate resources and personnel. Third, after a reasonable trial period, the language program must be successful in helping ELL students overcome their language barriers. *See United States v. Texas*, 601 F.3d 354, 366 (5th Cir. 2010) (“LULAC II”) (citing *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981).

Background of EEOA Litigation in this Case

20. On June 3, 1975, GI Forum and LULAC filed a Motion to Enforce Decree and for Supplemental Relief in *U.S. v. Texas*, Civil Action No. 5281, to address denials of equal educational opportunity to Mexican-American students in Texas public schools. That motion was predicated upon alleged violations of Section G of the Court's Modified Order of July 13, 1971, Title VI of the 1964 Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and the Equal Education Opportunities Act of 1974, 20 U.S.C. § 1703(f). In essence, the motion, in part, challenged the scope and implementation of the Texas Bilingual Education Act of 1973 as insufficient to secure the rights of Mexican-American ELL students. Subsequently, the United States also moved for supplemental relief.

21. Following an extensive trial, the Court issued its opinion on January 12, 1981. *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981) *rev'd*, 680 F.2d 356 (5th Cir. 1982) ("LULAC I). In its Memorandum Opinion, the Court found that State Defendants had violated the federal constitutional and statutory rights of then-Plaintiff-Intervenors GI Forum and LULAC but had not violated Section G. *See id.*

22. Among the numerous factual findings of the Court most relevant to this amended complaint against State Defendants, the Court found that the inadequacies of the State's ELL programs were "compounded by the Defendants' failure to monitor and enforce local compliance with state regulations" regarding ELL students.¹ *Id.* at 427.

23. On appeal, the Fifth Circuit acknowledged the "abundant testimony" supporting the district court's findings but vacated the injunctive remedy in light of the potential of the Texas

¹ Plaintiffs use the term "ELL," which connotes the same meaning as limited-English proficient (or "LEP") under Tex. Educ. Code § 29.052 (1): "Student of limited English proficiency" means a student whose primary language is other than English and whose English language skills are such that the student has difficulty performing ordinary classwork in English.

Legislature's newly enacted Senate Bill 477 ("S.B. 477) to address the problems found by the district court, stating that the law "must be given a chance to work before it can be evaluated as a success or failure." *LULAC I*, 680 F.2d at 372.

24. S.B. 477 provided, in part, that each school district with an enrollment of 20 or more ELL students in any language classification in the same grade must offer a bilingual education program in elementary school; English as a second language or other transitional language instruction in post-elementary school through grade 8; and instruction in English as a second language in grades 9-12. TEX. EDUC. CODE ANN. § 21.451 (1981). The statute further provided for the adoption, by the State Board of Education, of standardized criteria for the identification, assessment, and classification of ELL students for eligibility into the program and criteria to exit from the program.

25. With regard to monitoring and enforcement, S.B. 477 stated that compliance with the program's provisions was "an imperative public necessity." *Id.* at § 21.461. These statutes remain in place today, codified in subchapter B of Chapter 29 of the Texas Education Code.

26. In 2006, Plaintiff LULAC filed a Motion for Further Relief, arguing that State Defendants failed to monitor effectively ELL programs and that the State's secondary programs for ELL students failed to help those students overcome their language barriers under the EEOA.

27. Plaintiff prevailed in this Court but this Court's injunctive relief was stayed pending appeal. *See United States v. Texas*, 572 F. Supp. 2d 726, 782 (E.D. Tex. 2008), *rev'd and remanded*, 601 F.3d 354 (5th Cir. 2010).

28. On appeal, the Fifth Circuit reversed the district court's decision. However, recognizing the "alarming" performance of ELL students statewide and the fact that the State Defendants' language monitoring system, the Performance Based Monitoring Analysis System ("PBMAS"),

was in effect for only two years at the time of trial, the Fifth Circuit remanded the case to the district court for further proceedings, stating: “We do not suggest that state defendants cannot be held liable under the EEOA. Instead, we merely hold that an appropriate analysis of an EEOA claim should be conducted with regard to a particular district or districts, with state educational agencies serving as additional parties.” *LULAC II*, 601 F.3d at 373.

29. State Defendants next moved to strike Plaintiff’s intervention but, instead, this Court appropriately severed the EEOA claims into the present action, ordering Plaintiff to add school districts as defendants if it wished to proceed and to amend its complaint. *See* Dkt. Nos. 1-2.

Present State of ELL Students in Texas

30. Today, Texas public schools continue to experience rapid growth of ELL students. In the 2004-05 school year, TEA reported a total enrollment of 4,400,644 public school students, of whom 684,007 (15.5%) were ELL students. In the latest data published, for the 2012-13 school year, TEA reported a total enrollment of 5,058,939 students, of whom 863,536 (17.1%) were ELL students—*an increase of nearly 180,000 ELL students* alone over the last eight school years. Today, ELL students comprise *more than one out of every six* public school students in Texas.

31. Latino students comprise approximately 90% of all ELL students in Texas.

32. In 2012-13, Southwest ISD reported an enrollment of 12,991 students, of whom 1,709 (13.2%) were ELL students, a growth of over 400 ELL students over the last eight years.

33. In 2012-13, North East ISD reported an enrollment of 67,701, of whom 6,064 (9%) were ELL students, more than doubling the number of ELL students enrolled eight years ago.

34. Although a majority of ELL students are enrolled in the primary schools, a substantial number of secondary schools enroll ELL students. In the State’s preliminary 2014 TELPAS

reports, approximately 217,000 ELL students, or 27% of all ELL students, were tested in grades 6-12. This gives a rough approximation of the total number of ELL students enrolled in secondary schools.

35. Just nine years earlier, only 165,000 ELL students were tested in the same grade levels. On information and belief, the number of secondary ELL students has also risen in the Defendants ISDs.

36. Contrary to popular belief, a majority of ELL students in secondary schools are not classified as recent immigrants and have been in U.S. schools for at least three years.

37. Many ELL students in secondary schools in Texas are “long-term” ELL students, having been enrolled in U.S. schools for at least five years. These students’ chances of succeeding in the mainstream programs and exiting the ELL programs diminish as they progress in grade level. Of approximately 217,000 ELLs tested in grades 6-12, an estimated 152,000, or 70%, were “long-term” ELLs. This represents an increase in the long-term ELL secondary school population from 2006, when long-term ELLs constituted approximately 60% of secondary ELL students.

38. The challenges long-term ELL students face with more rigorous curriculum and more advanced English in the upper grades make it all the more important to provide them with appropriate action under the EEOA. Unfortunately, school districts, including the Defendant ISDs, often do not meet their ELL secondary students’ needs and State Defendants’ monitoring and intervention efforts do not help fill the void in the students’ acquisition of the English language.

39. On information and belief, the Defendant ISDs do not have well-trained ESL certified teachers in the secondary schools. On information and belief, the Defendants ISDs do not

provide essential materials and textbooks for their secondary language programs, and they do not supply their teachers with the appropriate and necessary resources to implement effective secondary language programs. On information and belief, Defendant ISDs do not effectively monitor their secondary language programs and do not effectively remedy their programs when their programs are proving unsuccessful.

Failure of English as a Second Language Pullout Programs: State and District

40. On information and belief, the Defendant ISDs subject some, if not all, of their secondary ELL students to ineffective ESL pullout programs with little to no support.

41. Under state law, school districts like the Defendant ISDs are required to offer ELL students bilingual education, instruction in English as a second language, or other transitional language instruction approved by the agency in post-elementary grades through grade 8; and instruction in English as a second language in grades 9 through 12. § 29.053(2)-(3).

42. An ESL instructional program is described in statute as “a program of intensive instruction in English from teachers trained in recognizing and dealing with language differences.” Tex. Educ. Code § 29.055(a). The ESL program is required to “be designed to consider the students’ learning experiences and shall incorporate the cultural aspects of the students’ backgrounds.” *Id.* § 29.055(b).

43. On information and belief, the ESL pullout programs of the Defendant ISDs are not programs of intensive instruction and many of their teachers are not adequately trained in recognizing and addressing language differences. Indeed, State Defendants pay little regard to ensuring that teachers of ELL students in secondary schools are “trained in recognizing and dealing with language differences” by continually approving waivers to the ESL teacher

certification requirement and by watering down the standards to become an ESL-certified teacher as further described below.

44. On information and belief, the ESL programs are also not designed to consider the students' learning experiences and do not incorporate the cultural aspects of the students' backgrounds.

45. Defendant TEA has identified two approved ESL instructional programs, including ESL pullout programs, and requires school districts to select one of these programs.

46. On information and belief, Defendant ISDs pull out their ELL secondary students for one period a day for abbreviated ESL instruction, which is wholly insufficient given their need to acquire English proficiency. In addition, the ESL instruction provided is of poor quality, not the intensive instruction noted in statute. Nor is it designed to consider the students' learning experiences and cultural backgrounds of the students.

47. On information and belief, when ELL students are placed back into the "mainstream," their teachers often are unfamiliar with their language needs (and many do not even know which students are classified as ELL) and simply immerse the students in the general instructional program with little-to-no modification of instruction. The "mainstream" teachers often have not received the necessary professional development or training needed to acquire the skills to educate effectively their ELL students.

48. On information and belief, other than subjecting school districts to data monitoring under PBMAS, State Defendants do nothing to avoid these deprivations of equal educational opportunities.

49. The ineffectiveness of the ESL pullout program is further compounded by the State's relaxed ESL teacher certification process, which does not ensure that the teachers are trained and prepared to instruct appropriately and effectively ELL students.

50. Without a doubt, a qualified, well-trained teacher is an essential component of an appropriate language program under the EEOA.

51. Under state law, ESL teachers must be appropriately certified for ESL by the State Board for Educator Certification. Tex. Educ. Code § 29.061.

52. To obtain ESL certification, teachers must hold a teaching certificate in the first instance. The State of Texas identifies three different ESL certifications in Tex. Admin. Code 233.7. Of relevance to this action is the "English as a Second Language Supplemental" certificate ("ESL Supplemental Certificate"). That certificate allows teachers to teach ESL at the same grade level and in the same content areas of the holder's base certificate. *Id.* at 233.7(c).

53. To obtain an ESL Supplemental Certificate, applicants must pass a test administered by the State Board for Educator Certification. On information and belief, passing the ESL Supplemental Certificate exam requires little test preparation and no training or education related to the educational needs of ELL students and does not ensure that ESL teachers have the skills necessary to educate effectively and appropriately ELL students.

54. On information and belief, the bar set for obtaining the ESL Supplemental Certificate allows ill-prepared and underqualified ESL-certified teachers to enter the classrooms of ELL students and negatively impact their students' acquisition of the English language.

Failure of Defendants' Secondary Program for ELL Students

55. Defendant ISDs' poor quality secondary language programs are compounded by TEA's failures in the areas of monitoring and enforcement. The failings on both ends of the system are

of particular concern given the difficulties faced by ELL secondary students who continue to perform miserably on both English language proficiency tests and state standardized tests.

56. TELPAS. The Texas English Language Proficiency Assessment System (TELPAS) measures the English proficiency of ELL students in the State. TELPAS scores are reported at four levels of English proficiency: “beginning,” “intermediate,” “advanced” and “advanced high.” The State’s expectation is that ELL students will progress at least one proficiency level for each year of bilingual or ESL instruction. TELPAS scores are also used to inform program exit decisions for individual students.

57. TELPAS data for long-term ELL students, particularly, demonstrate that both statewide and in the defendant school districts, schools are failing to advance longitudinally the English proficiency of their ELL students. In Southwest ISD, a large percentage of ELL students who are reported to have attended U.S. schools for six or more years² did not progress even one proficiency level on the TELPAS from 2012 to 2013. According to the 2013 TELPAS Summary Reports, nearly two out of every five ELL students (38%) in grades three through twelve failed to progress at least one proficiency level.

58. The failure to gain English proficiency is apparent at the high school level in Southwest ISD. For example, 65% of tenth grade ELL students and 71% of twelfth grade ELL students who are reported to have attended U.S. schools for six or more years failed to progress at least one proficiency level from 2012 to 2013.

59. In North East ISD, the percentage of ELL students who are reported to have attended U.S. schools for six or more years who did not progress even one proficiency level on the TELPAS from 2012 to 2013 was just as significant. According to the 2013 TELPAS Summary

² On information and belief, the State’s TELPAS reporting of students who have attended U.S. schools for six or more years does not include counting kindergarten. Therefore, many of these students likely have attended U.S. schools for at least seven years.

Reports, more than one out of every three ELL students (34%) in grades three through twelve failed to advance at least one proficiency level.

60. Like in Southwest ISD, the problem is also apparent at the high school level in North East ISD. For example, 43% of eleventh grade ELL students and 48% of twelfth grade ELL students who are reported to have attended U.S. schools for six or more years failed to progress at least one proficiency level from 2012 to 2013.

61. The pervasiveness of long-term ELL students not progressing in their English proficiency is not limited to the defendant school districts. Statewide, a large percentage of ELL students who are reported to have attended U.S. schools for six or more years did not progress at least one proficiency level on the TELPAS from 2013 to 2014. According to the 2014 TELPAS Statewide Preliminary Summary Report, more than one out of every two ELL students (56%) in grades three through twelve failed to advance at least one proficiency level.

62. The failure to learn English is especially pronounced at the secondary school level in the State. Out of the total 97,822 ELL students tested in grades seven through twelve, between 49% and 59% of students who are reported to have attended U.S. schools for six or more years failed to progress even one proficiency level from 2013 to 2014.

63. Secondary ELL students not only struggle to improve their proficiency from one year to the next, but they also struggle to achieve the “advanced high” level that is reflective, though not conclusive, of their acquisition of the English language.

64. For example, in grades 6 and 12, only 31% of ELL students statewide achieved a composite score at the advanced high level. In grade 9, only 27% achieved a composite score at the advanced high level. In the Southwest ISD Spring 2013 TELPAS, only 35% of grade 9 and 36% of grade 12 ELL students achieved a composite score at the advanced high level. In the

Northeast ISD Spring 2013 TELPAS, only 45% of grade 9 and 50% of grade 11 ELL students achieved the composite score at the advanced high level.

65. As a result of the poor quality secondary ESL programs of Defendant ISDs and State Defendants' failure to monitor and intervene effectively into those programs, ELL student performance in secondary schools on the state standardized curriculum tests—the STAAR tests in middle school and the End-of-Course (“EOC”) exams in high school—continue to show dismal results. In addition, the results of non-ELL students in the Defendant ISDs and across the State show that students can achieve those standards at much higher rates when presented with successful learning opportunities compared to their ELL student peers languishing in poor quality programs.

66. For example, in 2012-13, the statewide percentages of all students³ meeting the STAAR Grade 6 reading and math STAAR exams at the present standard were 72% and 74%, respectively. However, less than two out of every five ELL students (37%) passed the 6th grade reading exams and only 53% of ELL students passed the 6th grade math STAAR. In Grade 8, 83% of all students passed the STAAR reading compared to only 47% of ELL students; 76% of students passed STAAR math compared to 54% of ELL students; 75% passed STAAR science compared to 44% of ELL students; and 64% passed STAAR social studies while more than two of every three ELL students *failed*. Preliminary results for the 2013-14 STAAR exams administered in grades 6-8 show similar, dismal outcomes with some results worsening.

67. In Southwest ISD and North East ISD, significant achievement gaps and poor overall performance of their ESL students on the Grade 6-8 STAAR exams persisted.

³ It should be noted that the “all student” category is not reflective of the actual gaps between ELL students and their non-ELL peers because, by definition, the “all student” category includes ELL students, who tend to weigh down the performance data.

68. Wide achievement gaps between ELL students and their counterparts persist at the high school level as well. In 2012-13, the statewide percentages of all students passing the STAAR Reading 1 and 2 EOCs at the Phase-in 1 Level II standard were 69% and 79%, respectively, compared with just 29% and 36% of ELL students. Similarly, 55% of all students passed both the Writing 1 and 2 EOCs, but only 18% of ELL students passed the Writing I and 15% passed the Writing 2 exams. Differences in performance were also stark in subjects beyond English Language Arts.

69. Both Southwest ISD and North East ISD similarly struggled with their ELL students in their respective high schools. In Southwest ISD, for example, ELL students passed the various EOCs at rates approximated between 8% and 35% in 2012-13. The gaps between the district's ELL and all students ranged from a low of approximately thirty-one percentage points to a high of fifty-one percentage points.

70. North East ISD's ELL students met the minimum passing standards at rates approximated between 18% and 55% in 2012-13. The gaps between their ELL and all students ranged from a low of approximately thirty-one percentage points to a high of fifty-four percentage points.

71. On information and belief, perhaps most importantly related to the performance of ELL secondary students on the State subject area exams is that ELL secondary students are not performing well longitudinally.

72. The failure to implement, monitor, and intervene effectively into secondary language programs is further reflective in the number of ELL students across Texas and in the Defendant ISDs continuing to drop out of school at much higher rates than their peers. For the Class of 2012, ELL students in bilingual or ESL programs dropped out of schools statewide more than three times the rate of "all students."

73. The results are similar or worse for Defendants Southwest ISD and Northeast ISD. In Defendant Southwest ISD, for the class of 2012, more than one out of every four ELL students (27.1%) dropped out of school, nearly four times the rate for all students in the district. In Defendant Northeast ISD, for the class of 2012, the dropout rate for ELL students was 21.1%, more than four times the dropout rate for all students in the district (5%).

74. Not surprisingly, due to the poor secondary ESL programs and the State Defendants' failure to monitor and intervene effectively into those programs, ELL students graduate at far lower rates, with approximately four out of every ten ELL students in the Class of 2012 failing to graduate compared to only about one out of every ten in the "all students" category. (*Id.*)

75. In Defendant Southwest ISD, for the Class of 2012, just over one-half of all ELL students (54.5%) graduated compared to 88.5% in the "all students" category. In Defendant Northeast ISD, approximately three out of every ten ELL students in the Class of 2012 failed to graduate compared to only about one out of every ten of "all students."

Continuing Failure of State Defendants' Monitoring of ELL Student Programs: PBMAS

76. Despite the continuing, "alarming" performance of ELL secondary students across Texas, State Defendants proceed to engage in their poor monitoring and intervention system.

77. Under both state and federal law, State Defendants are responsible for monitoring the effectiveness of language programs and intervening into unsuccessful programs. Under Tex. Educ. Code § 29.062, State Defendants are required to monitor the following areas: (1) program content and design; (2) program coverage; (3) identification procedures; (4) classification procedures; (5) staffing; (6) learning materials; (7) testing materials; (8) reclassification of students for either entry into regular classes conducted exclusively in English or reentry into a

bilingual education or special education program; and (9) activities of the language proficiency assessment committees.

78. During the 2004-2005 school year, TEA instituted the Performance Based Monitoring Analysis System (PBMAS) under the Performance Based Monitoring (PBM) Division. PBMAS is an automated, district-level monitoring system that annually reports on the performance of school districts and charter schools in specific program areas, including ESL and bilingual education.

79. PBMAS sets standards for student performance and then measures school districts' according to those metrics. The PBM Division oversees largely paper interventions, which are set based on district PBMAS performance levels among other criteria.

80. As of 2013-14, on information and belief, the TEA continues to staff the Division of Bilingual Education and ESL with only two staff members. These staff members also work with federal Title III and migrant programs. On information and belief, the staffing is not sufficient to provide the necessary assistance for the approximately 900 school districts serving ELL students statewide.

81. As of the 2004-2005 school year, when TEA instituted the new PBMAS under the Performance Based Monitoring Division, PBMAS has been virtually entirely reliant on computer analysis of certain test scores and upon district self-assessment in order to determine compliance by school districts with Section 1703(f) and with the program provisions of the state bilingual education laws.

82. Under the PBMAS, the performance of LEP students in a bilingual or ESL program in a school district on the state standardized exam (STAAR) is compared to the PBMAS Standard or state passing rate. Per TEA's description, PBMAS standards are designed to be aligned with

certain STAAR performance indicators. In the 2013-14 school year, the standards by subject for an acceptable passing rate in grades 3-8 are as follows: 70% for mathematics, reading, writing, and social studies, and 65% for science.

83. On information and belief, under the PBMAS system, LEP students' STAAR Grades 3-8 scores are analyzed only at the district level. The data collected by PBMAS does not accurately reflect defects at the school level.

84. Under PBMAS, TEA sums across grade levels so that: the score for mathematics and reading are the sum of the STAAR scores at grade levels 3-8; the score for science is the combined scores at grades 5 and 8; and for writing, the combined scores at grades 4 and 7. This means that low performance by LEP students at grades 6, 7 and 8 can be masked by higher scores at the lower grades where a greater number of ELL students are enrolled, yielding a district summed score which meets the state's passing rates.

85. TEA's inadequate response to problems that *are* detected by PBMAS contributes to the denial of equal educational opportunities for ELL students.

86. The passing standards set by State Defendants for the EOCs are far lower, with passage rates authorized to be as low as 35% (for reading and writing) before a district is picked up by PBMAS. On information and belief, these standards are set to avoid intervention, rather than ensure and protect the rights of ELL students to equal educational opportunity.

87. On information and belief, under the PBMAS system, ELL students' EOC scores are analyzed only at the district level. Consequently, in districts like Defendant Northeast ISD with multiple high schools, low performance by ELL students in some high schools can be masked by higher scores at the district's other high schools, yielding a district summed score that meets the State's passing rates.

88. As STAAR data is analyzed by the PBM Division only at the district level, the lack of equal educational opportunity, the noncompliance with bilingual/ESL program requirements, and the failing performance by ELL students at any given school are not recognized by TEA unless the overall district STAAR scores by ELL students rises to the TEA's trigger levels. As a result, many ELL students attend failing schools not subject to modest analysis and strictures of the new TEA monitoring system.

89. On information and belief, under the PBMAS, the dropout rate among ELL students is analyzed in such a manner that ELL dropouts at the high school level are not subject to separate monitoring scrutiny but instead are combined with grades 7 and 8, which tend to enroll larger numbers of ELL students. Because students are more likely to drop out of school after grade 8, this practice has the effect of obscuring or diminishing high school ELL dropout rates.

90. On information and belief, the PBMAS system is dependent upon the accuracy of ELL information submitted by local school districts. TEA does not, as a routine matter, question whether ELL students are accurately identified and reported by local school districts.

91. On information and belief, some parents of ELL students are forced to opt out their children from unsuccessful language programs in the Defendant ISDs and across the State, depriving them of those needed educational opportunities altogether. State Defendants do not have a system in place to monitor, in real time, school districts that report higher than expected numbers of parent denials of bilingual and ESL program services, to determine the accuracy of the reported parent denials, the circumstances of the reported parent denials, and where appropriate, to require additional supplementary and compensatory services for ELL students where reported parent denials are inaccurate or do not reflect the informed desires of parents.

92. As described above, State Defendants' failure to monitor, supervise, or enforce appropriately the requirements of the bilingual and ESL programs violates 20 U.S.C. §1703(f) and the orders of this Court, individually and collectively with the Defendant ISDs.

CAUSES OF ACTION:

EQUAL EDUCATIONAL OPPORTUNITY UNDER 20 U.S.C. § 1703(f)

93. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

94. State Defendants, Southwest ISD Defendants, and North East ISD Defendants have denied Latino ELL students their right to equal educational opportunity by failing individually and collectively to take appropriate action to overcome language barriers that impede equal participation by ELL students in the instructional programs.

95. More specifically, State Defendants' monitoring of language programs, including TEA's PBMAS, has proven incapable of effectively monitoring the ELL programs and the monitoring deficiencies of Defendants (together with any others so found) and their failure to intervene appropriately into failing schools and school districts amount to a failure to take appropriate action under Section 1703(f), which causes a denial of the rights of Latino ELL students thereunder.

96. More specifically, State Defendants' ESL Supplemental Certification test and procedures allow untrained and underqualified teachers to teach Latino ELL students in a manner that negatively impacts the students' ability to overcome their language barriers, amounting to a failure to take appropriate action under Section 1703(f), and denying the rights of Latino ELL students under 1703(f).

97. More specifically, State Defendants allow school districts, including Defendants Southwest ISD and North East ISD, to offer ineffective ESL secondary programs, including ESL

pullout programs with little to no support. These programs are neither implemented effectively at the local level by Defendants Southwest ISD and North East ISD nor are they monitored appropriately by Defendant ISDs and State Defendants. These programs have also proven, after a reasonable trial period, to be ineffective in helping Latino ELL students overcome their language barriers, amounting to a failure to take appropriate action under Section 1703(f), and denying the rights of Latino ELL students under 1703(f).

PRAYER FOR RELIEF

98. Wherefore, Plaintiff prays that this Court:

a) Enforce and secure compliance with 20 U.S.C. Section 1703 (f) and the orders of this Court;

b) Declare State Defendants' monitoring of language programs, including the PBMAS, insufficient and in violation of their duties owed to ELL students under the EEOA;

c) Declare State Defendants' ESL teacher certification insufficient and in violation of its duties owed to ELL students under the EEOA;

d) Declare Defendant ISDs' secondary language programs, including the ESL pullout program, insufficient and in violation of their duties owed to ELL students under the EEOA;

e) Issue an order for injunctive relief requiring State Defendants to design, sufficiently staff, and promptly implement a program that effectively monitors language programs for ELL students in all schools, ensures State Defendants monitor compliance with state and federal law, and ensures that TEA intervenes effectively into school districts and schools that fail to assist ELL students with overcoming their language barriers;

f) Issue an order for injunctive relief requiring State Defendants to design and promptly implement an ESL-teacher certification program and process that ensures teachers develop and acquire the knowledge and skills necessary to educate appropriately and effectively ELL students and ensure compliance with the EEOA and to ensure that presently-certified teachers with an ESL Supplemental Certificate develop that same knowledge and skill;

g) Issue an order for injunctive relief requiring State Defendants to revise their recommended and approved secondary language program process and examinations as necessary to ensure that programs such as those of Defendant ISDs in this case are not implemented in the same manner;

h) Issue an order for injunctive relief requiring the State Defendants to propose comprehensive changes in the program for ELL students attending secondary schools including, but not limited to, supplementary compensatory services for all ELL students in the subject matter curriculum;

i) Award Plaintiff its costs, including reasonable attorneys' fees, under 42 U.S.C. § 1988 and other applicable laws;

j) Retain jurisdiction of this cause until an adequate remedy is in place; and

k) Grant such further relief as may be equitable, reasonable, and fitting to correct the violations of federal law found by this Court;

DATED: June 10, 2014

Respectfully submitted,

/s/
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*Application for admission pending

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2014, a true copy of the foregoing document was sent to the following counsel of record by electronic service:

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