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21 SUPERIOR COURT OF THE STATE OF CALIFORNIA
22 COUNTY OF LOS ANGELES

23 D.J. by Guardian Ad Litem E.A.; E.A.; S.M.
24 by Guardian Ad Litem A.R.; A.M. by
25 Guardian Ad Litem A.R.; A.R.; WALT
26 DUNLOP,

Case No. BS142775

Assigned to: Hon. James C. Chalfant, Dept. 85

27 Petitioners/Plaintiffs,

**PETITIONERS' AMENDED OPENING
BRIEF**

28 v.

*[Declarations of Bryn McDonough and Jana
Echevarria filed concurrently]*

29 STATE OF CALIFORNIA; CALIFORNIA
30 DEPARTMENT OF EDUCATION; TOM
31 TORLAKSON, STATE
32 SUPERINTENDENT OF PUBLIC
33 INSTRUCTION, in his official capacity;
34 STATE BOARD OF EDUCATION; DOES
35 1-20, INCLUSIVE,

Action Filed: April 24, 2013
Trial Date: July 31, 2014

36 Respondents/Defendants.

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Petitioners—English Learner students, their parents, and a retired educator who
3 participated in reporting to the State the denial of services for English Learners (“ELs”)—seek a
4 writ of mandate to compel the State of California, the California Department of Education
5 (“CDE”), the California State Board of Education (“SBE”), and State Superintendent of Public
6 Instruction (“SPI”) Tom Torlakson (collectively “Respondents”) to take appropriate action in
7 response to widespread reports by school districts that they are failing to provide English
8 Learners with required language instructional services. Respondents have a mandatory duty
9 under the federal Equal Educational Opportunities Act (“EEOA”) and California Constitution to
10 ensure equal access to education such that ELs require language instruction to access classroom
11 curriculum on an equal basis with their non-English Learner peers.

12 The prevailing statewide standard in California, articulated by Respondents as a legal
13 requirement for districts, is that all English Learners must receive instructional services until they
14 are reclassified. Until the 2011-2012 school year, CDE required each school district to complete
15 an annual form, known as the R30 Language Census (“Language Census” or “R30-LC”). CDE
16 then published the data on a CDE-maintained website. For at least sixteen years, Respondents
17 received annual reports from hundreds of districts that they failed to provide required language
18 instructional services to tens of thousands of ELs. Respondents published the data, but took no
19 responsive action. Respondents do not dispute that they never contacted school districts
20 regarding reports of ELs not receiving appropriate English language instruction. (See 1 JA
21 0369¹ [“ . . . [N]either the CDE nor the [State Board of Education] have taken direct action in
22 response to the annual census from California [Local Educational Agencies] . . .”].) Indeed, the
23 CDE official responsible for overseeing this issue testified that she was never “curious about
24 why some districts reported no services.” (Kazanis Depo., 1 JA 0053:24-0054:2.)²

25 _____
26 ¹ The citations in this Amended Opening Brief indicate the page number location of the supporting evidence within
27 the Joint Appendix (“JA”). The number preceding the “JA” notation in the citation identifies the volume of the Joint
28 Appendix in which the cited page number is located.

² McDonough Declaration, Ex. A, Deposition of Cynthia Kazanis, Director of Respondent CDE’s Educational Data
Management Division. (1 JA 0035:15-18.)

1 CDE's first communication with districts regarding their Language Census reports was a
2 voluntary survey distributed in February 2013, only after Petitioners' counsel sent Respondents a
3 Demand Letter. (See 1 JA 0376; 1 JA 0378-0385.) More than half of districts that reported
4 denying instructional services did not respond to the survey. Many districts that did respond
5 confirmed that they did not provide required instructional services to EL students. At that point,
6 CDE shut down its inquiry and undertook no action. (Kazanis Depo., 1 JA 0045:19-0046:7.)
7 Meanwhile, with this lawsuit and an investigation by the United States Department of Justice
8 pending, CDE replaced the Language Census with a new method for districts to report data about
9 EL instruction. This new reporting system withdraws the option for districts to self-report that
10 they are not providing required instructional services. The public thus cannot gauge the impact
11 of that change because for the first time in at least 16 years, CDE declined to publish the
12 reporting results for the 2011-12 year. (Ashley Depo., 3 JA 1877:19-1878:4³; see, e.g., 2 JA
13 1005-1042 [data for Compton Unified School District from the 1995-1996 through 2010-2011
14 school years, publicly available on CDE's website].)

15 Respondents' total inaction and recent decision to frustrate self-reporting of the failure to
16 deliver required instructional services subverts their mandatory duties under the EEOA and our
17 State Constitution to intervene when district conduct or inaction threatens to deny basic equal
18 educational opportunity to students.

19 **II. FACTUAL BACKGROUND**

20 **A. Respondents Require That Districts Provide Instructional Services as a** 21 **Necessary Element of Ensuring Equal Educational Opportunity to English** 22 **Learners until They Are Reclassified.**

23 An "English Learner" (EL) is a "child who does not speak English or whose native
24 language is not English and who is not currently able to perform ordinary classroom work in
25 English" (Educ. Code, § 306, subd. (a).) California school districts are required to "assess the
26 English language development of each pupil in order to determine the [pupil's] level of

27 ³ Declaration of Bryn McDonough in Support of Petitioners' Amended Opening Brief, Ex. A, Deposition of Keric
28 Ashley, Director of CDE's Analysis, Measurement, and Accountability Reporting Division. (3 JA 1857:16-18.)

1 proficiency” (*Id.*, § 313, subd. (a).) The State uses the California English Language
2 Development Test (“CELDT”) to determine the proficiency in English of all students whose
3 primary language is not English. (*Id.*, § 11510.) Students who do not achieve a passing score on
4 the CELDT are designated as ELs. (*Id.*, § 313, subd. (c).) ELs must continue to take the
5 CELDT each year until they achieve a passing score and, based on that score and other indicia of
6 English language proficiency, are “re-designated as English proficient.” (*Id.*)

7 ELs cannot access their classroom curriculum without instructional services. It is
8 important for all properly-designated ELs to receive at least one or some combination of
9 instructional services in order for them to have meaningful access to core instructional content.
10 ELs that do not receive these instructional services are denied equal access to their academic
11 curriculum. (See Echevarria Decl.⁴, 3 JA 1937 at ¶ 46; Gandara Decl.⁵, 1 JA 0319-0320 at ¶¶
12 6(a), 6(b).) Instructional services are necessary for ELs’ mastery of state standards, graduation,
13 promotion, and equality of opportunity with non-EL students. (Echevarria Decl., 3 JA 1937 at ¶
14 46.)

15 Respondents have repeatedly affirmed in public statements and communications with
16 school districts that instructional services are an indispensable and required component of the
17 services that must be provided to all ELs. For example, CDE has repeatedly advised districts
18 that “[a]ll [EL] students must receive [English Language Development (“ELD”)] instruction
19 until they are reclassified. . . . Until reclassified, EL students must receive ELD targeted
20 specifically to their English proficiency level.” (1 JA 0413 [Instructions for the Spring Language
21 Census (Form R30-LC), February 2011].)⁶ This precise statement has been included in

23 ⁴ Expert Declaration of Jana Echevarria, Professor Emerita, California State University Long Beach.

24 ⁵ McDonough Declaration, Ex. O, Expert Declaration of Patricia Gandara, Research Professor, University of
25 California, Los Angeles, submitted in support of Petitioners’ Motion for Preliminary Injunction.

26 ⁶ ELD is defined as English-language development instruction appropriate for the EL’s identified level of language
27 proficiency. Such instruction is designed to promote the effective and efficient acquisition of listening, speaking,
28 reading, and writing skills of ELs. (1 JA 0392.) Specially Designed Academic Instruction in English (SDAIE) is an
“instructional approach in English used to teach academic courses, such as mathematics and social science to ELs,
and is designed to increase the level of comprehensibility of the English-medium instruction.” (1 JA 0397.) “Many

1 instructions for completing the annual language census since at least 2007. (See 1 JA 0428
2 [Instructions for the Spring Language Census Form (Form R30-LC), February 2007]; see also
3 Ashley Depo., 3 JA 1866:21-1867:18 [instruction to provide services until reclassification has
4 been repeated “for a number of years”].) And in its summary of the most recent language census
5 data on its website, CDE confirmed that ELs *must* receive instructional services: “A total of
6 20,318 English learners do not receive any instructional services *required* for English learners.”
7 (1 JA 0443 [italics added].) CDE also stated that ELs not receiving ELD instruction is a
8 common problem. (1 JA 0448.)

9 Until this litigation then, Respondents maintained that all ELs must receive instructional
10 services until reclassified, consistent with the federal Title III program under which Respondents
11 receive funds to educate EL students. The Title III program is designed to promote and support
12 English language acquisition and academic achievement of ELs. (See 20 U.S.C. § 6812(9)
13 [noting that the purpose of the program is “to provide State educational agencies and local
14 educational agencies with the flexibility to implement language instruction education programs,
15 based on scientifically based research on teaching limited English proficient children . . .”].) To
16 receive funds under Title III, Respondents must ensure that ELs receive *instructional* services.
17 (20 U.S.C. § 6823 (b)(6) [states must submit plan to the federal government for how its districts
18 will teach ELs “using a language *instruction* curriculum that is tied to scientifically based
19 research on teaching limited English proficient children and that has been demonstrated to be
20 effective”] [emphasis added].) School districts in turn must submit a plan to CDE “describing
21 how language *instruction* education programs carried out under the subgrant will ensure that
22 limited-English-proficient pupils being served by the programs develop English proficiency.”
23 (Educ. Code, § 443, subd. (b)(6); see also Educ. Code, § 440, subd. (a) [stating that school
24 districts “shall provide *instructional services*” to ELs in conformity with federal Title III
25 requirements; accord 20 U.S.C. § 6801, *et seq.*].)

26
27 students who have achieved a reasonable level of English language proficiency may *also* benefit from SDAIE in the
28 core content areas.” (1 JA 0415.)

1 Finally, the testimony of California educators corroborates that instructional services are
2 necessary to ensure equal educational opportunity. (See Reyes-Castillo Depo., 1 JA 0150:2-12⁷
3 [the instructional services “made them understand the content, and then they were also becoming
4 more confident in themselves and expanding their English”], 1 JA 0150:13-16 [“Then they
5 believe in themselves and they – they are capable.”], 1 JA 0153:9-23 [“to be successful and have
6 options to either go on to the community college, the university, a different type of job, it just
7 opens the options for them.”]; Cordova Depo., 1 JA 0162:21-0163:2⁸ [“Q: If students get the
8 instructional services they need and the support services they need, they can do much better than
9 50 percent dropout rate? A: Yes, I strongly believe that. Q: And you have seen that in
10 practice? A: Yes.”].) Dr. Ramon Zavala, Senior Director of Accountability, Instruction and
11 English Learners in the Compton Unified School District, testified that ELD and SDAIE are
12 necessary to “give[] the students the tools to work in a regular English language arts class and
13 the other classes.” (Zavala Depo., 1 JA 0178:17-22; see generally *id.*, 1 JA 0175:14-0179:12.)

14 ELs who are denied instructional services cannot access the content of core curriculum.
15 (1 JA 0442 [CDE publication stating that ELD instruction is provided to achieve goals of English
16 language proficiency and grade-level achievement for ELs]; Dunlop Depo., 1 JA 0226:9-18⁹
17 [“we didn’t have enough SDAIE sections to allow access to the core for the kids”]; Cordova
18 Depo., 1 JA 0167:4-12 [ELs have struggled in mainstream classes with no SDAIE], 1 JA
19 0164:23-0165:1 [SDAIE “helps students comprehend better”].) Instructional services are
20 necessary for mastery of state academic standards, graduation and equality of opportunity with
21 mainstream, non-EL students. (Calderon Depo., 1 JA 0241:11-16¹⁰ [“Q: And you look at

22 _____
23 ⁷ McDonough Declaration, Ex. C, Deposition of Guadalupe Reyes-Castillo, Director of English Language Learner
and Migrant Program, Oxnard Union High School District. (1 JA 0147:12-16.)

24 ⁸ McDonough Declaration, Ex. D, Deposition of Emigdio Cordova, Counselor Assigned to Special Program
25 Students, Oxnard Union High School District. (1 JA 0160:1-3; 1 JA 0161:8-23.)

26 ⁹ McDonough Declaration, Ex. G, Deposition of Walt Dunlop, Director of Compensatory Education, Oxnard Union
High School District. (1 JA 0219:24-0220:11.)

27 ¹⁰ McDonough Declaration, Ex. H, Deposition of Vanessa Calderon, Learning Design Coach, Oxnard Union High
28 School District. (1 JA 0235:21-0236:1.)

1 success rates of EL students on the CAHSEE exam . . . and you say to yourself these rates can be
2 much higher, too, if students get the instructional services they need, is that right? A: Yes.”], 1
3 JA 0242:22-0243:25 [instructional strategies improve student knowledge and self-esteem];
4 Cordova Depo., 1 JA 0168:12-25 [the students “can’t understand the material or the teacher”].
5 Unsurprisingly, ELs who do not receive instructional services have difficulty maintaining
6 interest in academics and motivation for participation, and many end up dropping out altogether.
7 (Kaplan Depo., 1 JA 0252:20-0253:6¹¹ [dropping out is among the worst outcomes possible for
8 ELs]; Cordova Depo., 1 JA 168:12-25 [when students are in classrooms like that, “they feel like
9 giving up or just quitting. I just had one this year who just dropped out because he felt
10 overwhelmed”]; Calderon Depo., 1 JA 0240:13-21 [“Q: [W]hen you observe . . . an English
11 learning student not receiving instructional services, part of what you say to yourself is I’ve got
12 to make certain that those instructional services are delivered because some of the consequences
13 can be lack of interest, dropping out, other problems down the road, is that right? A: Yes”], 1 JA
14 0238:20-0239:10 [“If they are not given the opportunity to participate, they are just a body in the
15 classroom”]; Reyes-Castillo Depo., 1 JA 0150:2-0151:11 [instructional services gives them
16 confidence, and without the confidence, “[s]ome of them do drop out.”]; Johnson Depo., 1 JA
17 0265:12-18¹²).

18 **B. Respondents Have Received, and Systematically Ignored, Annual Reports**
19 **from Hundreds of Their School Districts That They Fail to Provide Required**
20 **Instructional Services to Tens of Thousands of ELs**

21 For nearly two decades, the State has required its school districts to collect and report
22 district- and school-level information about ELs, including whether instructional services are
23 provided. (See, e.g., 1 JA 0387.) Former state SPI Jack O’Connell described the purpose of this
24 data collection as “provid[ing] local educational agencies and governmental organizations with
25 critical information on which to base their funding, research, program planning, and policy

26 ¹¹ McDonough Declaration, Ex. I, Deposition of Karen Cadiero-Kaplan, Director of English Learner Support
Division, California Department of Education. (1 JA 0251:12-15.)

27 ¹² McDonough Declaration, Ex. J, Deposition of Paul Johnson, Counselor Aligned to Categorical Programs, Oxnard
28 Union High School District. (1 JA 0262:8-14.)

1 decisions” and “giv[ing] the public valuable facts about English learners and instruction in
2 California’s public schools.” (See 1 JA 0466.)

3 Part 2 of the Language Census reports “English Learners’ Instructional Information.” (1
4 JA 0396.) In Section B (“English Learners Receiving Instructional Services”), districts specify
5 the types of mandated instructional services that their ELs receive. (1 JA 0397) The form
6 provides six options for instructional services: English-Language Development (ELD), ELD and
7 Specially Designed Academic Instruction in English (SDAIE), ELD and SDAIE with Primary
8 Language Support, ELD and Academic Subjects Through Primary Language Instruction, and
9 Other Instructional Services. (*Id.*) “Other Instructional Services” should be used only for ELs
10 “receiving some type of instructional service that, while specifically designed for ELs, is an
11 instructional service that does **not** correspond exactly to the program descriptions [for the other
12 four categories of instructional services].” (*Id.* [emphasis in original].) School districts also had
13 the option of reporting ELs in a sixth category: “ELs not Receiving any EL Instructional
14 Services.” CDE instructed school districts to: “count all the remaining ELs who have not been
15 counted previously in rows 4-8. These ELs are not receiving any specialized instructional
16 services” (1 JA 0398) School districts are required to certify that the data submitted are
17 correct.. (Ashley Depo., 3 JA 1863:7-22; see, e.g., 1 JA 0482.)

18 Respondents admit that CDE has collected and published this data from school districts
19 since 1996, reflecting tens of thousands of students not being provided instructional services in
20 any given year. (See 1 JA 0484-2 JA 0975.) For the 2010-2011 school year, the most recent
21 data that CDE has made public, 251 school districts certified over 20,000 ELs as “ELs not
22 Receiving any EL Instructional Services.” (*Id.*) CDE’s description of these data on its website
23 prior to the initiation of this litigation confirms its understanding that these students were not
24 receiving legally mandated services. (See 1 JA 0443. (“A total of 20,318 English learners do not
25 receive any instructional services required for English learners.”) CDE issued a press release in
26 January 2013 in response to a demand letter sent by Petitioners’ counsel, corroborating the data
27 that 2%, or 20,318 of students reported as receiving no instructional services on the Language
28 Census were being denied required services. (2 JA 0977 [“School districts – which are

1 responsible for providing instruction to students and appropriate services to ELs – currently
2 report that more than 98% of the State’s 1.4 million ELs are receiving services”].)

3 Prior to Respondents’ receipt of the demand letter, no state officer or entity had ever
4 undertaken any action, let alone corrective action, in response to information that ELs do not
5 receive language instructional services. Indeed, Cynthia Kazanis, Director of the Educational
6 Data Management Division, testified that she spent all of five minutes reviewing the Language
7 Census prior to this litigation. (Kazanis Depo., 1 JA 0039:19-0040:1.) Ms. Kazanis’s
8 predecessor, Keric Ashley, currently Director of CDE’s Analysis, Measurement and
9 Accountability Reporting Division, does not know whether CDE made any use of data showing
10 that ELs did not receive instructional services during the last ten years. (Ashley Depo., 3 JA
11 1861:12-1862:25.) Kazanis repeatedly testified that she was not even curious about any of the
12 data collected regarding children not receiving instructional services, whether the data was
13 submitted to the federal government, or the amount of federal funds CDE receives for ELs based
14 on the data, and did she know anyone else in CDE who felt otherwise. (Kazanis Depo., 1 JA
15 0049:16-21, 1 JA 0050:1-10.) Ashley confirmed that CDE did not investigate or respond to
16 these reports, even though publishing the data showed that CDE knew that students were not
17 receiving *required* services. (Ashley Depo., 3 JA 1864:7-1865:17.) CDE made no attempt to
18 track how much time EL students attended school without receiving language instruction.
19 (Kazanis Depo., 1 JA 0063:5-15 [does not know whether some students are not placed properly
20 in one or two years], 1 JA 0065:25-0066:9 [no inquiry to find out what student in Adelanto was
21 not receiving services], 1 JA 0067:18-25 [no opinion of whether EL students receiving services
22 every other year is in compliance with requirements], 1 JA 0068:10-20 [does not know and is not
23 curious whether a school district that reported no services made effort to correct and provide
24 appropriate services].) Moreover, until this litigation, neither CDE nor any state entity or officer
25 ever undertook to validate any of the data collected from districts, including of “ELs not
26 receiving any EL instructional service.” (Ashley Depo., 3 JA 1860:12-15.) To the contrary,
27 CDE annually certified to the federal government all the data reported on its language census
28 was accurate. (*Id.*, 3 JA 1858:24-1859:13)

1 **C. In Response to This Litigation, Respondents Sought and Then Ignored**
2 **Responses from Districts Confirming Denial of Instructional Services, and**
3 **Elected Not to Follow Up with Hundreds of Districts That Did Not Respond.**

4 On February 15, 2013, Kazanis sent a letter to school districts, claiming to seek
5 explanations of their most recently published no instructional services reports. (See 1 JA 0376;
6 Kazanis Depo., 1 JA 0044:1-8). Kazanis wrote: “In the 2010-11 school year, your LEA reported
7 one or more EL students as not receiving any EL instructional services. The CDE would like
8 further information regarding this data to assist the agency in responding to an *allegation* that
9 these students did not receive any instructional services.” (1 JA 0376 [italics added].) CDE’s
10 conduct demonstrates that this was not a good faith attempt to determine whether ELs were
11 receiving services or to address issues of non-compliance. The inquiry was “not a mandatory
12 collection” and was seen as “simply an informational piece.” (Kazanis Depo., 1 JA 0044:1-8.)
13 No one at CDE kept notes or a list of districts that did not respond. (*Id.*, 1 JA 0042:23-0043:7, 1
14 JA 0051:13-0052:9.) Respondents had no plan to evaluate the responses they received or to
15 follow up with districts that ignored the request for information. (*Id.*, 1 JA 0045:19-0046:7, 1 JA
16 0059:19-0060:17.)

17 Only about 40 percent of districts responded to the survey. (*Id.*, 1 JA 0044:9-22.)
18 Kazanis was designated to review the responses, but instead she assumed that any district
19 response was sufficient to establish that ELs received instructional services, despite the fact that
20 she lacked the expertise for making any such conclusions.¹³ The only notes she made appear in a
21 chart tracking district responses, introduced as Exhibit 4 at her deposition. Notably, many of the
22 districts that *did* respond to CDE’s request for information confirmed that ELs enrolled in their
23 schools did not receive instructional services.

24 Of the approximately 110 school districts that responded to Kazanis’s letter, 31 school

25 ¹³ Ms. Kazanis has no background as an educator or in data management. (1 JA 0038:23-25.) She does not know
26 what “instructional services” are (1 JA 0038:16-25); does not know what the Crosscultural, Language, and
27 Academic Development (“CLAD”) credential is (1 JA 0039:1-5); does not know whether physical education can
28 substitute for EL instructional services (1 JA 0041:7-14, 1 JA 0073:21-0074:6); does not know what ELD or SDAIE
is (1 JA 0055:4-17); and would not be “very upset” if ELs were not receiving appropriate instruction and services (1
JA 0047:24-0048:4).

1 districts admitted that they failed to provide instructional services to ELs. (See, e.g., Kazanis
2 Depo., 1 JA 0061:15-23 [Newark Unified School District: “[W]e have discovered that, at our
3 secondary level, there are occasionally mistakes in student placements.”], 1 JA 0069:2-4, 1 JA
4 0071:7-13, 1 JA 0071:25-0072:6 [“[I]t was noted that all students that should be receiving [ELD]
5 in the high school were not”]; see 1 JA 0083¹⁴ [in Blochman Union School District, students
6 “were classified as EL students, however, they were performing well enough in the regular
7 classroom so as not to require any additional EL Services”]; 1 JA 0085 [West Sonoma County
8 Union High School District]; 1 JA 0092 [Lompoc Unified School District] [“All of our students
9 who were EL in 2010-2011 had received EL services every other year.”]; 1 JA 0095
10 [Mckinleyville Union School District] [“students identified as not receiving EL services ...
11 despite being identified as EL did not meet the district’s criteria for services”], 1 JA 0098 [Santa
12 Cruz City Schools: “a small but still significant number of the ELs were foreign exchange
13 students ... these were not ‘real’ ELs for whom the typical ELD program was designed to
14 support”], 1 JA 0101 [Lakeport Unified School District], 1 JA 0104 [Santa Monica-Malibu
15 Unified School District: “a few ELs were placed with teachers who did not have an EL
16 authorization”].)

17 Many other districts’ explanations were not denials, but legally invalid excuses for the
18 fact that their ELs did not receive language instruction. Some districts explained that the
19 students reportedly denied services were ELs with special education needs. (See, e.g. 1 JA 0079
20 [Charter Oak School District], 1 JA 0093 [Sierra Sands Unified School District], 1 JA 0099-0100
21 [Central Unified School District].) Some disclaimed responsibility because those students
22 denied services were ELs in alternative or charter settings. (See, e.g., 1 JA 0082 [Torrance
23 Unified School District], 1 JA 0083 [Stockton Unified], 1 JA 0084 [Vallejo City Unified School
24 District].) Neither the EEOA nor the state constitution exempts special education students or
25 students attending charter schools and alternative schools from the right to equal educational
26 opportunity. Other districts were unsure whether children had received services, or had questions

27 ¹⁴ Exhibit 4 to Ms. Kazanis’s deposition transcript is attached to McDonough Declaration, Ex. A. .
28

1 to which CDE never responded. (See 1 JA 0079 [Vallecito Union School District]; Kazanis
2 Depo., 1 JA 0062:17-0064:8.)

3 Multiple school districts asserted that the reports of no instructional services had been in
4 error, arguing that all of the students reported in the “No Services” category had been assigned to
5 classes where the teacher possessed a credential. (See, e.g., 1 JA 0080 [Anderson Union High
6 School District], 1 JA 0087 [Merced Union High School District], 1 JA 0090 [Kern Union High
7 School].) These districts claimed that, because the teacher had the appropriate credential, the
8 students automatically received appropriate instructional services. CDE has consistently and
9 correctly rejected this very assertion, explaining that “[d]istricts often incorrectly report all of
10 their teachers who hold, [*sic*] an authorization listed above on the Language Census, whether or
11 not the teachers provide EL instruction.” (See, e.g., 1 JA 0440 [CDE 2007 Language Census
12 Instructions].) A longtime CDE official testified that possessing the appropriate credential,
13 without more, does not ensure the delivery of instructional services (Ashley Depo., 3 JA
14 1868:17-1869:9.) Also this year, the U.S. Department of Justice advised CDE that “[t]he mere
15 fact that the ELs had teachers who were authorized to teach ELD does not mean the ELs were
16 receiving ELD instruction.” (1 JA 0459.) Numerous educators and administrators have
17 similarly testified that assignment to a classroom taught by a credentialed teacher is insufficient
18 to ensure that ELs receive appropriate instructional services. (See Johnson Depo., 1 JA 0264:5-
19 12 [unclear whether credentialed teachers are actually using differentiated instruction in the
20 classroom]; Mendoza Depo., 1 JA 0279: 2-17, 1 JA 0280:15-18¹⁵.)

21 More than 100 school districts providing CDE responses thus either confirmed that they
22 were denying ELs instructional services or offered baseless excuses for not doing so. CDE
23 ignored these responses, doing nothing to ensure that the ELs identified received language
24 instruction; in fact, it never planned on taking any action to follow up on responses received
25 from the survey, regardless of the information received. (Kazanis Depo., 1 JA 0045:19-0046:7.)

26

27 ¹⁵ Deposition of Lidia Mendoza, Teacher, Whaley Middle School, Compton Unified School District. (1 JA 0275:9-
28 11.)

1 Moreover, CDE was deliberately indifferent as to whether ELs attending the 60 percent of
2 districts that declined to respond, which included many districts that had reported the largest
3 numbers of ELs denied instructional services, actually received services. (Kazanis Depo., 1 JA
4 0043:4-17.) Data Director Kazanis testified, for example, that she was not even aware of
5 responses to her inquiry from Compton or from Oxnard Union High School District. (Kazanis
6 Depo., 1 JA 0058:18-22, 1 JA 0059:19-0060:3.) Rather, she explained that Compton, the district
7 in which Petitioner students attend school, “ha[s] a history of not providing responses to a
8 number of things,” and for that reason she would not be concerned if Compton did not respond at
9 all. (*Id.*, 1 JA 0058:18-22.)

10 **D. The Evidence from School Districts Reporting High Numbers of ELs Not**
11 **Receiving Instructional Services Shows That the Denial of Services is Not a**
12 **Data Reporting Error.**

13 Although CDE took no steps to verify whether ELs in districts that did not respond to the
14 survey were denied instructional services, Petitioners substantiated the census reports for districts
15 where they undertook investigation. For example, depositions of administrators, teachers,
16 students, and parents from the Compton and Oxnard districts confirmed the Language Census
17 reports that ELs were not receiving instructional services.

18 **Oxnard Union High School District.** Oxnard reported having 588 ELs that did not
19 receive any instructional services in the 2010-2011 school year. (See 2 JA 0979-0980.) Oxnard
20 reported to the State that hundreds of students were not receiving services for each of the 15
21 years prior to that time. (2 JA 0979-1003 [Oxnard R30s].) Petitioner Walt Dunlop served as
22 Oxnard’s Director of Compensatory Education before he retired in 2012. (Dunlop Depo., 1 JA
23 0219:24-0220:11.) As part of his duties in that position, Dunlop administered Oxnard’s EL
24 programs. (*Id.*, 1 JA 0221:19-0222:2.) He testified, for example, that the district’s reports were
25 based in part upon the fact that ELs at the intermediate level did not receive EL language
26 instructional services. (*Id.*, 1 JA 0223:5-10; 1 JA 0224:11-15; 1 JA 0225:11-24.) Four Oxnard
27 administrators charged with collecting data on EL instruction for the Language Census
28 confirmed Dunlop’s testimony. These counselors observed students who were not proficient in
English placed in mainstream classrooms where appropriate SDAIE instruction was not provided

1 and teaching was delivered at the level of native English speakers. (See, e.g., Johnson Depo., 1
2 JA 0263:22-25; Cordova Depo., 1 JA 0166:7-24, 109:4-12; Reyes-Castillo Depo., 1 JA 0152:15-
3 23; Calderon Depo., 1 JA 0237:12-16; 1 JA 0244:9-0245:12.) There is no record of Oxnard
4 having responded to CDE's February 15, 2013 inquiry regarding Oxnard's reports of students
5 not receiving any instructional services (Kazanis Depo., 1 JA 0059:19-0060:3), and CDE did not
6 follow up to obtain information from Oxnard regarding those reports (Kazanis Depo., 1 JA
7 0045:19-25).

8 **Compton Unified School District.** Compton reported having 1,697 ELs that did not
9 receive instructional services in the 2010-2011 school year. (See 2 JA 1005-1007.) Like
10 Oxnard, the Compton district has reported hundreds of students not receiving instructional
11 services annually since the 1995-1996 school year. (2 JA 1005-1042.) Compton teachers and
12 administrators corroborated the data collected and reported through the Language Census,
13 testifying that ELs spend weeks, even entire years, without instructional services required by
14 law. (Mendoza Depo., 1 JA 0285, at ¶ 6.) Lidia Mendoza has taught ELD for ten years in
15 Compton. (Mendoza Depo., 1 JA 0275:22-0276:3.) Recently, Ms. Mendoza personally
16 examined the class schedules of EL students, many of whom she had previously taught, and
17 found that 49 were not enrolled in a class where they would receive required instructional
18 services. (*Id.*, 1 JA 0277:5-0278:2.) Ms. Mendoza testified that in Compton there exists "no
19 system to ensure that all English learner students get ELD from the beginning of the school
20 year." (*Id.*, 1 JA 0287, at ¶ 10.) Other evidence corroborates that ELs, including Petitioner
21 students, received "NAs" on their report cards for ELD (as opposed to letter grades) and that
22 they did not receive appropriate instructional services in the classes to which they were assigned.
23 (E.A. Depo., 1 JA 0294:14-0295:10; A.R. Depo., 1 JA 0304:6-10.) When Petitioner E.A. asked
24 why her fifth grade daughter, D.J., received "NAs" on her report card, the teacher admitted that
25 she "did not have [an EL] class to give to her [daughter]." (E.A. Depo., 1 JA 0295:7-10, 1 JA
26 0295:20-0296:24; see also D.J. Depo., 1 JA 0311:25-0312:5.)

27 Dr. Zavala, Compton's Director of English Learner Programs, testified that the data
28 showing that nearly 1,700 ELs did not receive instructional services in the 2010-2011 school

1 year was 100% incorrect based on class rosters. (Zavala Depo., 1 JA 0183:21-0184:21.)
2 However, Dr. Zavala only referenced data from the 2010-2011 school year and could not provide
3 any explanation for why Compton has reported having ELs not receiving any services since the
4 1995-1996 school year. (*Id.*, 1 JA 0180:20-0181:25.) Dr. Zavala was unable to locate the rosters
5 which he asserted as the basis for his hearsay conclusion. (Zavala Depo., 1 JA 0194:21-0195:5).
6 Moreover, his testimony was directly contradicted by a review of the CDE's own Federal
7 Program Monitoring Division, which found as the result of onsite observations that ELs at
8 Whaley Middle School, Davis Middle School and Compton High School did not receive
9 instructional services as required by law. (Zavala Depo., 1 JA 0209¹⁶; Zavala Depo., 1 JA
10 0185:19-0186:5; 1 JA 0187:4-18.) Significantly, Director Kazanis testified that in monitoring
11 school districts, CDE does not keep track of school sites visited, because the agency assumes that
12 non-compliance as to the delivery of legally required services at one school in a district could be
13 reasonably presumed to be a problem at all schools in the district. (Kazanis Depo., 1 JA 0036:2-
14 0037:3.)

15 **E. After This Case Was Filed, Respondents Modified the Language Census to**
16 **Prevent Districts From Making Any Further Admissions That They Are**
17 **Denying Instructional Services to ELs**

18 In response to this lawsuit, CDE modified the Language Census reporting system to make
19 it impossible for districts to report the failure to provide required instructional services to ELs.
20 For the 2011-2012 school year, CDE began using a new system—the California Longitudinal
21 Pupil Achievement Data System (“CALPADS”)—for the language census and to report
22 instructional services for ELs. (Ashley Depo., 3 JA 1870:22-1871:13.) Under this system,
23 school district staff assigned one of four EL instructional codes to each course that is offered: (1)
24 ELD only, (2) SDAIE only, (3) ELD and SDAIE but *not* primary language instruction, and (4)

25 ¹⁶“Classroom observations and interviews with site and district personnel revealed that English learners at Whaley
26 Middle School, Davis Middle School, and Compton High School are not provided with a consistently implemented
27 program of instruction in English language development targeted to each student’s proficiency level. Evidence
28 indicates that a significantly high number of English learners at the middle and high schools failed to make progress
last year on the annual CELDT assessment.”

1 primary language instruction *with* ELD and/or SDAIE. (*Id.*, 3 JA 1872:22-1873:20, 3 JA
2 1875:1-11.)¹⁷ CALPADS then automatically determines that appropriate instructional services
3 are received for each EL student based on the course(s) that student is taking. (See *id.*, 3 JA
4 1874:12-24.)

5 On February 27, 2013, in the wake of this lawsuit and the U.S. DOJ investigation, Ms.
6 Kazanis sent a second letter to school districts regarding their initial submissions under this new
7 system of data about instructional services provided to ELs (which was for the 2011-2012
8 academic year). (See 2 JA 1044-1045.) Kazanis’s letter stated: “A review of the initial data
9 certified to date shows that many LEAs have certified “**no** EL education services” for all or a
10 large proportion of their EL students. This unexpected change or increase in the certified data
11 suggests that some LEAs may not have reported this data accurately.” (2 JA 1044 [emphasis in
12 original].)¹⁸ Kazanis’s letter then instructed districts that “[i]t is critical that LEAs indicate one
13 of the education service codes for each course section as CALPADS counts any EL student
14 enrolled in these courses as receiving EL education services.” (*Id.*)

15 Respondents never published the original 2011-2012 school year data submitted to CDE
16 by districts or the recertified data, and have refused to produce any of these data in discovery.
17 (In fact, CDE has determined that it would never publish these data, the first time such data has
18 not been released since at least 1996. (Ashley Depo., 3 JA 1876:16-1879:14.) And in July 2013,
19 two months after this litigation was filed, CDE eliminated the option in CALPADS for school
20 districts to report affirmatively that a student is receiving no services. (See 2 JA 1047.) In a

21 _____
22 ¹⁷ The new system allows districts to assume that because a credentialed teacher is assigned to the classroom,
23 English Learners are receiving instructional services. Specifically, CDE added a course code—SDAIE only—that
24 was absent from the prior language census and authorizes districts to code any course as meeting this definition if
25 there is a credentialed teacher assigned to the class. This represents a marked change of course—CDE previously
26 admonished districts that it is inappropriate to assume students receive required instructional services simply
27 because a credentialed teacher is assigned to the class. As noted, *supra*, at 11, this admonition was consistent with
28 testimony from numerous teachers that simply having a credentialed teacher is insufficient to ensure that required
instructional services are provided, and the DOJ has questioned the priority of this assumption. (1 JA 0459.)

¹⁸ Ms. Kazanis had no basis for asserting in her letter that there had been an “unexpected increase.” She does not
know if she compared the relevant data with any other data set regarding English Learners and testified that
conducting such a comparison is outside of her division responsibilities. (1 JA 0056:18-0057:20.) She never thought
about comparing, nor was she ever asked to compare, the data. (*Id.*)

1 memorandum to districts, CDE’s CALPADS Project Team stated that it was adding a new
2 “Education Service English Learner code . . . Code 6 - *Other English Learner Services* . . .
3 defined as ‘The course section is providing some type of instructional service, that, while
4 specifically designed for ELs, is an instructional service that is not narrowly defined in the other
5 English learner services’” (2 JA 1047.) Buried as a link in the memorandum (see *id.*
6 [“changes . . . will be available on the Release Updates link”]) is a statement that CDE was
7 simultaneously eliminating altogether the capacity of school districts to affirmatively code a
8 class as providing no EL instructional services. (Ashley Depo., 3 JA 1881:17-1882:8; 2 JA 1050
9 [“Modify code set ‘Education Service English Learner’ to: -Delete Code 5 (No Services)”].)
10 CDE has confirmed in deposition that there is no “active indicator” to represent a student
11 receiving no instructional services in CALPADS. (Ashley Depo., 3 JA 1879:15-1880:7.)
12 Accordingly, as of July 2013, if an educator or administrator at a school site or district believes
13 that a course provides no instructional services for ELs, there is no longer any way to directly
14 report that course-level information to the State.

15 **III. STATEMENT OF THE CASE**

16 Under the EEOA, state education agencies must take “appropriate action to overcome
17 language barriers that impede equal participation by its students in its instructional programs” as
18 a denial of equal educational opportunity. (20 U.S.C. § 1703(f); *see also id.* at § 1720(a)
19 [defining “education agency” to include “State educational agenc[ies]”].) Although the statute
20 allows agencies some discretion in determining “appropriate action,” courts have consistently
21 interpreted the EEOA to mean that “appropriate action” requires “something more than ‘no
22 action.’” (*Gomez v. Illinois State Bd. Of Education* (7th Cir. 1987) 811 F.2d 1030, 1043; *see*
23 *also Idaho Migrant Council v. Bd. Of Education* (9th Cir. 1981) 647 F.2d 69, 71.) Likewise,
24 under the California Constitution, the State has a mandatory duty to intervene when educational
25 opportunity provided to some students falls below “prevailing statewide standards,” resulting in
26 the “students of one district [being denied] an education basically equivalent to that provided
27 elsewhere throughout the State.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 685-87.) The
28 evidence conclusively establishes that Respondents have violated their mandatory duty to take

1 appropriate action in response to district admissions that they are denying legally mandated
2 instructional services without which ELs are denied equal educational opportunity.

3 **A. Respondents Have Established a Prevailing Statewide Standard that**
4 **Instructional Services Are a Necessary Element of Providing Equal**
5 **Educational Opportunity to ELs Until They Are Reclassified**

6 With the exception of arguments that they have advanced in this litigation and in a related
7 investigation by the DOJ, Respondents have repeatedly and consistently stated that districts must
8 provide instructional services to ELs until they are reclassified. (*See* Section I.A, *supra.*) For
9 purposes of the EEOA, Respondents have therefore properly defined “appropriate action” to
10 require providing instructional services to all ELs “until they are reclassified.” (1 JA 0413; 1 JA
11 0443 [instructional services are “required for English learners”].) Likewise, Respondents have
12 established that providing instructional services to ELs until they are reclassified is the prevailing
13 statewide standard for ensuring equal educational opportunity under the California Constitution.

14 **B. By Ignoring, for Nearly Two Decades, Reports by Hundreds of Districts that**
15 **They Deny Required Instructional Services to Thousands of ELs,**
16 **Respondents Abrogated Their Clear, Mandatory Duties under the EEOA**
17 **and California Constitution to Ensure Equal Educational Opportunity.**

18 The Language Census reports reflected admissions by school districts that they were
19 denying instructional services to ELs. Respondents have repeatedly stated that instructional
20 services are legally required as crucial to allowing ELs to access classroom content. The reports
21 alone triggered Respondents’ duty to take some action to ensure that these students were not
22 being denied equal educational opportunity. Based on the instructions accompanying the
23 Language Census, no interpretation of the category “ELs Not Receiving EL Instruction Services”
24 is plausible except that those students are not receiving instructional services. (See 1 JA 0459.)
25 Indeed, Petitioners have presented overwhelming evidence corroborating that students enrolled
26 in several districts that reported the denial of instructional services were, in fact, denied
27 instructional services. Under the standards that Respondents themselves established (and that are
28 consistent with federal and state law), admissions by districts that they were denying
instructional services activated Respondents’ mandatory duties under the federal EEOA and the
California Constitution to ensure equal educational opportunity.

1 Compliance with the EEOA is analyzed under a three-part test articulated by the
2 *Castañeda* court to determine compliance with the EEOA. (See *Castañeda v. Pickard* (5th Cir.
3 1981) 648 F.2d 989; *Flores v. Arizona* (9th Cir. 2008) 516 F.3d 1140 (using *Castañeda* test to
4 evaluate state action).) Under the test, the court must (1) “examine carefully the evidence the
5 record contains concerning the soundness of the educational theory or principles upon which the
6 challenged program is based”; (2) determine “whether the programs and practices actually used
7 by a school system are reasonably calculated to implement effectively the educational theory
8 adopted by the school”; and (3) decide whether, in fact, the program provides the students it is
9 designed to serve meaningful educational opportunity. (*Castañeda v. Pickard, supra*, 648 F.2d
10 at pp. 1009-1010.) There is no educational or scientific basis for Respondents’ complete and
11 deliberate indifference to reports of ELs receiving no instructional services. The analysis under
12 the EEOA of Respondents’ decision to ignore these Language Census reports therefore begins,
13 and ends, at prong one.

14 Likewise, *Butt* establishes the State’s duty to intervene where it has knowledge from its
15 districts that they are failing to provide EL students instructional services. (*Butt, supra*, 4 Cal.4th
16 at p. 673 [holding that the State “is *obliged to intervene* when a local district’s fiscal problems
17 would otherwise deny its students basic educational equality, unless the State can demonstrate a
18 compelling reason for failing to do so” (italics added)].) It is well-settled that failing to provide
19 appropriate services to ELs denies them equal educational opportunity. (See *Lau v. Nichols*
20 (1974) 414 U.S. 563, 566 [“It seems obvious that the [non-English]-speaking minority receive
21 fewer benefits than the English-speaking majority from respondents’ school system which denies
22 them a meaningful opportunity to participate in the educational program”].) Having defined
23 instructional services as an indispensable component of the services provided to ELs,
24 Respondents cannot, consistent with their constitutional duty, blithely ignore admissions by
25 hundreds of districts, implicating thousands of schools, that they are denying those services to
26 tens of thousands of children every year. (*Butt, supra*, 4 Cal.4th at p. 704 [requiring State
27 intervention to prevent district action that will result in deprivation of opportunity that falls
28 below “prevailing statewide standard”].)

1 **C. Respondents’ Decisions to Ignore Admissions of Denying Services and to**
2 **Change the Language Census Reporting Method to Prevent Districts From**
3 **Making Future Admissions Further Violated Their Mandatory Duties**

4 Respondents’ conduct subsequent to receipt of Petitioners’ demand letter represents a
5 distinct violation of their mandatory duties. Only when confronted with potential litigation based
6 on their inaction did Respondents inquire about the reports of no instructional services on the
7 Language Census. Their inquiry was designed to perpetuate inaction through willful ignorance
8 in the future, rather than meet their obligation to take some appropriate action to ensure equal
9 educational opportunity.

10 *First*, following CDE’s February 15, 2013 letter, Respondents did not analyze the
11 feedback received from the “voluntary” survey of school districts who reported violating the law,
12 nor did they follow up with the districts that did not bother to respond. (Kazanis Depo., 1 JA
13 0045:10-0046:4.) When Respondents received explanations from some districts confirming that
14 students were denied services, they did nothing. (Kazanis Depo., 1 JA 0062:12-0063:4; 1 JA
15 0063:16-0064:14, 1 JA 0069:2-4, 1 JA 0071:7-13, 1 JA 0071:25-0072:6.) Rather than act on the
16 corroborating admissions or undertake further inquiry, Respondents closed their inquiry.

17 *Second*, after the data reported through CALPADS reflected a substantial number of students
18 receiving no services in the 2011-2012 academic year, Respondents sent a second letter to
19 districts encouraging them to correct those submissions. (2 JA 1044-1045.) Respondents have
20 produced only some of the data, but their subsequent conduct strongly suggests that districts
21 reported high numbers of ELs not receiving services: Respondents eliminated school districts’
22 ability to report denials of instructional services. (2 JA 1047-1050.) The only meaningful action
23 that Respondents have taken in response to reports of students’ not receiving services has been to
24 modify the reporting mechanism so that it will be impossible for districts to make such
25 admissions in the future.

26 State education agencies must take appropriate action to ensure that their school districts
27 comply with the EEOA. (*Idaho Migrant Council v. Bd. Of Education* (9th Cir. 1981) 647 F.2d
28 69, 71.) Just as the “meaning of ‘appropriate action’” under the EEOA “must mean something
29 more than ‘no action’” (*Gomez v. Illinois State Bd. of Education, supra*, 811 F.2d at p. 1043), a

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1 state education agency cannot comply with the EEOA by ignoring evidence of longstanding
2 school district violations, and then changing its existing systems to ensure it will be ignorant
3 when such violations continue in the future.

4 Similarly, Respondents' constitutional duty to intervene was triggered when some
5 districts responded to CDE's inquiry by confirming that they were in fact denying language
6 instructional services. (*Butt, supra*, 4 Cal. 4th at pp. 686-87 ["The State itself, as the entity with
7 plenary constitutional responsibility for operation of the common school system, had a duty to
8 protect District students against loss of their right to basic educational equality."].) Although the
9 Language Census data alone triggered Respondents' duty to intervene, (see Section III.B, *supra*),
10 Respondents' decision to solicit and then ignore evidence confirming widespread denials of
11 instructional services violated their mandatory duty.

12 **IV. CONCLUSION**

13 Research proves and Respondents do not dispute that ELs who do not receive specialized
14 language instruction services are denied equal educational opportunity. Based on the
15 information reported to Respondents, corroborated by Petitioners, deponents, and school district
16 explanations to CDE's letter, an EL child could go her entire career without ever having access
17 to the curriculum, and the State does nothing even when it is aware that thousands of ELs in
18 California are not given that chance. Unless the Court requires the State to act in response to
19 reports that a school district is failing to serve ELs, Respondents will continue to disregard the
20 violations of students' rights and deny countless more students access to education.

1 Dated: June 12, 2014

Respectfully submitted,

2
3 LATHAM & WATKINS LLP

ASIAN AMERICANS ADVANCING
JUSTICE

4 By: Bryn McDonough /FRM
5 Robert D. Crockett
6 Monica R. Klosterman
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560.

On **June 12, 2014**, I served the following documents described as:

PETITIONERS' AMENDED OPENING BRIEF

by serving true copies of the above-described documents in the following manner:

BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described documents and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

Tara L. Newman, Deputy Attorney General
Chara L. Crane, Deputy Attorney General
State of California Department of Justice
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Los Angeles, CA 90013

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 12, 2014**, at Los Angeles, California.



Jenea C. Rivas