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Is Federal Court Oversight of the Arizona ELL Public School Program No Longer Necessary?

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Case at a Glance

For the past nine years, the defendants and plaintiffs in this case have fought over how the State of Arizona should go about taking "appropriate action" to cure its violation of the Equal Educational Opportunities Act of 1974 (EEOA). The state and the mother of a minority student in the English language learner (ELL) program of the Nogales Unified School District disagree fundamentally on not only the appropriate model for ELL education, but also on the amount of funding it would take to cure the defects in the program.

Is Federal Court Oversight of the Arizona ELL Public School Program No Longer Necessary?

by Paul M. Secunda

PREVIEW of United States Supreme Court Cases, pages 430-434. © 2009 American Bar Association.

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20 U.S.C. § 1703(f), to "take appropriate action" to overcome language barriers that impede participation in instructional programs?

FACTS

Horne v. Flores started all the way back in 1992, when the mother of Miriam Flores, a minority student in the English language learner (ELL) program of the Nogales Unified School District (NUSD), filed a class action against the State Superintendent for Education, the State Board of Education, and the State of Arizona (collectively "defendants"). Plaintiffs sought declaratory relief, alleging the NUSD (a district in southwestern Arizona along the Mexican border) was "failing to provide [ELL] children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students."

ISSUES

Did the district court abuse its discretion in denying the state defendants' Rule 60(b)(5) motion, which would have dissolved its orders requiring Arizona to provide an appropriate program for English Language Learner (ELL) students in the Nogales Unified School District (NUSD)?

Does the state testing and accountability plan that was approved by the Secretary of Education as a condition for funding under the No Child Left Behind (NCLB) statute automatically satisfy the requirement under the Equal Educational Opportunities Act of 1974 (EEOA),

HORNE V. FLORES ET AL.
AND
SPEAKER OF THE ARIZONA HOUSE
OF REPRESENTATIVES ET AL. V.
FLORES ET AL.
DOCKET NOS. 08-289 AND
08-294

ARGUMENT DATE:
APRIL 20, 2009
FROM: THE NINTH CIRCUIT

After eight years of litigation, the federal district court in Arizona entered declaratory relief, finding that the State of Arizona was in violation of § 1703(f) of the EEOA. That section of the EEOA provides that “[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin” by “the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” The EEOA provides individuals with an express private right of action and authorizes courts to grant “such relief, as may be appropriate” for failures to take appropriate action. Relying on *Lau v. Nichols*, 414 U.S. 563 (1974), which held that the failure to provide English instruction to non-English-speaking students denies them “a meaningful opportunity to participate in” public education, the district court found that the state’s system of ELL programs, which appropriated only \$150 for each non-English speaking student, was “arbitrary and capricious and bears no relation to the actual funding needed to ensure that [ELL] students in [Nogales] are achieving mastery of its specified ‘essential skills.’” The state was thereafter put under federal court remedial oversight until it took “appropriate action” to cure the statutory violation.

Over the next nine years, the defendants and plaintiffs in this case have fought over how the state should go about taking “appropriate action” to cure its violation of the EEOA. The parties disagree fundamentally on not only the appropriate model for ELL education, but also on the amount of funding it would take to cure the defects in the program. For instance, at one point in 2005, the district court became so frustrated with Arizona’s inability to increase funding for its ELL programs that it

found the state in contempt and fined it \$500,000 per day until the state complied with its order.

The defendant state superintendent and state legislative intervenors eventually sought Rule 60(b)(5) relief to end federal court oversight of its ELL program on the ground that compliance with the objectives of § 1703(f) had been achieved as a result of changed circumstances in the provision of ELL programs to the certified class of minority children in NUSD. (Interestingly, the defendant state and the defendant Board of Education did not join this motion.) Rule 60(b)(5) allows relief from federal court oversight where “the judgment has been satisfied, released, or discharged ... or it is no longer equitable that the judgment should have prospective application.” U.S. Supreme Court case law has emphasized in this context that, “it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a significant change either in fact or in law.” *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

The state defendants maintain that although they have never reached close to the funding levels envisioned by the court, they have taken appropriate action in other ways, including by improving ELL test scores, providing better training for teachers, and providing more individual assistance to ELL students. More specifically, the defendants claim that, “[s]ubstantial legal and factual changes occurred [from 2000–2007], including a change in the ELL program to Structured English Immersion, funding increases, compliance with federal standards under [No Child Left Behind] NCLB, better management, and increased oversight.” Indeed, Arizona Proposition 203 now requires ELL students to be taught

through structured English immersion (SEI) strategies so that all ELL students are placed in English language classrooms and taught in English. The defendants point out that SEI instruction (rather than bilingual or ESL instruction) is now offered in small groups at the elementary schools and that small self-contained ELD classes are provided at both the middle schools and high school. Defendants argue that the new SEI program, substantial state support for that program, and changes within NUSD, remedied the deficiencies in its ELL program that were identified in the original 2000 order. In short, defendants believe that ELL programs in NUSD are now reasonably calculated to permit ELL students to learn English and advance academically and that federal court oversight is no longer necessary.

Defendants also place weight on the changed educational circumstances in the wake of the passage of the No Child Left Behind Act (NLCB) in 2002, two years after the initial *Flores* remedial order. ELL students are a specifically defined NCLB subgroup and must meet annual measurable achievement objectives for both academic annual yearly progress (AYP) goals and progress toward attainment of English proficiency. The defendants maintain that because NCLB requires that Arizona’s school meet certain minimal standards with regard to ELL learners, and Arizona has met those standards, the more rigorous standards of the 2000 order have been superseded by NCLB standards.

The district court disagreed with the defendants, finding that the state funding for ELL programs bore no relation to the costs of an appropriate program. Specifically, applying the standard set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court found no

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“changed circumstances that would warrant modification or dissolution of this Court’s order.” The Ninth Circuit affirmed, holding that Rule 60(b)(5) relief could only be achieved if Arizona funded ELL programs from a designated source of funds that could cover the incremental costs of ELL education in coming years. *Flores v. Arizona*, 516 F.3d 1140, 1171 (9th Cir. 2008). The Ninth Circuit further found that because the EEOA and NCLB had disparate purposes, Arizona’s compliance with the requirements of NCLB was irrelevant to the issue of whether Arizona had taken “appropriate action” under the EEOA.

CASE ANALYSIS

In *Horne v. Flores*, the defendant state superintendent and the state legislative intervenors appeal the Ninth Circuit finding, maintaining that compliance with Section 1703(f) of the EEOA should not be all about educational funding, but also should be about how the state is now performing in providing ELL programs to the NUSD public school students *in toto*. (In a procedural move, the plaintiffs have challenged whether the Ninth Circuit had the authority to hear the challenge to the denial of the Rule 60(b)(5) motion, since the defendant state and defendant state board of education did not join that appeal.)

The defendants argue that what matters for EEOA purposes is whether there is adequate programming, not whether there is funding from a particular source. In their petition for certiorari, the defendants exhaustively lay out a multitude of funding improvements, program improvements, and student successes to support their view that “appropriate action” should be based on funding and oversight concerns combined, and not funding alone. As a result, defendants write in their petition for

certiorari, by 2007, “NUSD’s students engaged in a coherent program of instruction, were overcoming language barriers, and advancing academically. The purpose of § 1703(f) had been fulfilled.”

Plaintiffs counter that a universally accepted standard exists for determining what “appropriate action” means under the EEOA. In *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), the Fifth Circuit held that “appropriate action” consists of three elements: (1) the school system must select a sound educational theory; (2) it must “follow through with practices, resources and personnel necessary to transform the theory into reality,” and (3) the programs must “produce results indicating that the language barriers confronting students are actually being overcome.” The plaintiffs maintain that the defendants had failed to satisfy the second *Castaneda* prong because it did not “follow through” with sufficient “practices, resources, and personnel” to implement its chosen instructional methods. Specifically, and agreeing with the Ninth Circuit in this regard, plaintiffs point to the fact that resource constraints have resulted in “persistent achievement gaps” between ELL students and other students in Nogales, that resource constraints caused ongoing, serious programmatic deficiencies in teachers, tutors, teacher aides, and class size, and that the record thus did not “call into serious question [Nogales’s] need for increased incremental funds.” In short, plaintiffs agree that the district court acted within its discretion in declining to dissolve its orders in the absence of sound evidence of material and sustainable change to the NUSD ELL program.

In bolstering their argument that the Ninth Circuit improperly denied Rule 60(b)(5) relief, defendants

advance additional legal arguments. First, based on notions of federalism, they argue that state and local authorities should be permitted to manage their own affairs once the federal statutory violation has been cured, even if cure of that defect has not occurred in the manner contemplated by the federal court. Second, and connected to their federalism argument, defendants argue that state and local authorities are entitled to discretion in deciding how to cure a federal violation.

Plaintiffs respond to this federalism argument by asserting that the district court acted in a limited remedial manner in dealing with the statutory violation. Specifically, the plaintiffs assert in their brief to the Supreme Court that the district court never directed the state to implement any particular ELL programs, never directed the state to adopt a particular method for determining the costs of an appropriate ELL program, and never ordered the state to adopt any particular funding model for ELL programs or to spend any particular amount of money on ELL programs. Instead, plaintiffs argue, the district court only ordered that Arizona ensure that funding bear a nonarbitrary relationship to the actual costs of an appropriate ELL program. In short, plaintiffs maintain that the court’s remedial approach is consistent with the Supreme Court’s standards in *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

Finally, the Supreme Court must decide if the meaning of the EEOA, passed in 1974, may be defined by the subsequent passage of the NCLB. This question turns on whether the Court believes that the NCLB is more specific legislation addressing the same subject matter as the EEOA.

The defendants argue that the enactment of NCLB has brought

about significant changes to the manner in which ELL students are being taught nationwide and say that as a result, ELL students are now provided equal education opportunities by the State of Arizona as required under the EEOA. This fact, they argue, is therefore not irrelevant, as the Ninth Circuit held. Because NCLB sets forth specific requirements to ensure that school districts are held accountable to effectively teach ELL students, those specific requirements define the meaning of "appropriate action" under EEOA § 1703(f). In this regard, defendants argue that the NCLB contains more specific guidelines for the implementation of adequate ELL programs to satisfy both its and the EEOA's identical goals of ensuring that there are effective ELL programs. In short, to the defendants, the NCLB fleshes out the EEOA to ensure that ELL students "overcome language barriers" so they can "participate in instructional programs." And because Arizona has met its NCLB requirements, it follows that it has met its EEOA obligations; it would be illogical, defendants maintain, for the plaintiffs to claim that Arizona can simultaneously comply with the stringent requirements of NCLB and still violate the vague requirement of § 1703(f) to "take appropriate action."

As to defendants' NCLB argument, plaintiffs point out that the NCLB did not amend or replace the EEOA. Instead, they assert, Congress enacted a savings clause prescribing that "[n]othing in [NCLB] shall be construed in a manner inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847. Moreover, plaintiffs maintain in their brief that, "[h]ad Congress intended for approval of an NCLB plan to establish compliance with the EEOA, Congress would have

said so explicitly, particularly given that the Secretary's approval of an NCLB plan involves no substantive review of the adequacy of the State's ELL programs. And whereas the EEOA imposes mandatory duties on all states and provides for private actions resulting in judicial remedies, NCLB involves duties voluntarily assumed by states and provides for enforcement by administrative action alone." These differences mean that the defendants' NCLB arguments are far-fetched and that "there is no basis for inferring an implicit intention by Congress that a state's possession of an approved NCLB plan—which every state now possesses—would somehow automatically establish compliance with the EEOA."

Plaintiffs also agree with the Ninth Circuit that the purposes of the two statutes are different. Whereas the NCLB is about a "general plan gradually to improve overall performance" of schools, § 1703(f) of the EEOA is an "equality-based civil rights statute" designed to deal with the immediate rights of ELL students. Consequently, the NCLB is irrelevant for purposes of interpreting the EEOA because it is not more specific legislation addressing the same subject matter as the EEOA. Indeed, if the NCLB were read as a gloss on the EEOA and the accountability and performance standards were met in any given year by a school district, the plaintiffs believe this state of affairs would lead to a repeal of the EEOA by implication and, as the Ninth Circuit characterized this situation, enforcement rights under § 1703(f) would "wink in and out of existence."

SIGNIFICANCE

Although predicting Supreme Court cases is like reading tea leaves, this case may have little to do with the relationship between the ELL provisions of the NCLB and the EEOA.

The statutes do appear to be differentially focused and there is no congressional indication that the latter NCLB was supposed to amend the EEOA. On the other hand, *Horne v. Flores* is more likely to have everything to do with whether the Supreme Court believes that the district court has exercised appropriate, limited remedial oversight in this case. That means that this case will likely come down to a discussion over the scope of federalism and whether the various federal-court decrees exceeded their appropriate limited scope by forcing Arizona to adopt specific remedial actions to cure the EEOA violation.

In all, *Horne v. Flores* is not merely an education law case. It has parts that concern the proper equitable powers of federal courts in institutional reform litigation, the proper relationship between federal and state government in making funding decisions concerning the rights of historically disadvantaged groups, and the relationship between two educational statutes passed more than 25 years apart and touching upon the improvement of education opportunities for ELL students. And what perhaps makes this case most compelling of all is that it takes place within the larger debate of how the states and federal government should deal with illegal immigration over this country's borders and what is to be done with the education of such immigrants' children.

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