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SCHOOL LAW—THE FIFTH CIRCUIT PROLONGS EDUCATIONAL INEQUALITIES IN *UNITED STATES V. TEXAS*

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THE Fifth Circuit's 2010 decision in *United States v. Texas*, a case with a forty-year history,[1] represents an unfortunate failure of the defendants, the State of Texas and the Texas Education Agency (TEA), to provide equivalent educational opportunities to students with diverse backgrounds. The court incorrectly held, despite data indicating defendants' substandard monitoring of Limited English Proficient (LEP) programs and poor academic performance by LEP students, that insufficient evidence existed to show that defendants had violated the Equal Educational Opportunity Act (EEOA).[2] This decision was erroneous for several reasons. First, the Fifth Circuit mistakenly concluded that the trial court's analysis of the EEOA claim should have necessarily included an assessment of individual school districts. Second, the Fifth Circuit incorrectly determined that the trial court abused its discretion in relying on student data offered by the plaintiffs. Finally, equity and policy concerns weigh in favor of the plaintiffs prevailing here. For these reasons, the Fifth Circuit's decision as to the plaintiffs' EEOA claim should be overturned.

In Texas, although school districts primarily ensure compliance with state and local educational laws, the Texas Education Code (Code) requires the TEA, along with districts, to share responsibility for educating students.[3] In particular, the TEA must "'administer and monitor compliance'" with educational programs that federal or state laws require.[4] Two such initiatives are Texas's bilingual and English as a Second Language (ESL) programs.[5] The Code requires all Texas school districts to offer these programs for grade levels in which twenty or more students are

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1. Although the most recent holding in *United States v. Texas* follows a complex factual and procedural record that extends from the desegregation era into the present day, only that history most germane to this analysis is reviewed herein. *See* United States v. Texas, 601 F.3d 354, 357–60 (5th Cir. 2010).

2. *See id.* at 375.

3. *See id.* at 360.

4. *Id.* (quoting TEX. EDUC. CODE ANN. § 7.021(b) (West 2006)).

5. *See id.*

classified as LEP, which indicates that a student speaks a primary language other than English.[6] Mandated from kindergarten through fifth grade and permitted in grades six through eight, bilingual programs involve instruction in English and a student's home language.[7] Conversely, ESL programs are required in grades nine through twelve and involve modified English instruction.[8] Under the state's Performance Based Monitoring Analysis System (PBMAS) implemented in 2003, the TEA was to evaluate bilingual and ESL programs based on several indicators, including the "TAKS scores of LEP students, . . . the LEP annual dropout rate, the LEP graduation rate, and LEP reading proficiency."[9]

Subsequent to the PBMAS implementation, several data sets were collected on bilingual and ESL programs that eventually led the Fifth Circuit to acknowledge the following conclusions about the state's monitoring of these programs:[10]

> [S]ome school districts are likely under-reporting the number of LEP students, and TEA has done nothing to verify these numbers. . . . TEA has no procedure for comparing the performance of LEP students to non-LEP students directly. . . . PBMAS's aggregation of scores for multiple grade levels as well as for entire school districts distorted the performance indicators and masked problems at specific schools.
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> . . . [Additionally,] TEA had not conducted *any* on-site monitoring for some years and had *no* bilingual-ESL certified monitors at the time of the trial. . . . No Child Left Behind . . . and the Texas accountability rating system. . . . do not overcome the deficiencies in PBMAS.[11]

Further, contemporaneous data on secondary LEP students indicated that they were performing poorly compared to the general student population.[12] LEP students maintained substantially lower passage rates on TAKS and other standardized tests, were retained more often, dropped out at a higher rate, and generally failed to make progress in or exit from LEP programs within a reasonable time.[13]

In light of these events, in 2006 the United States, the League of United Latin American Citizens (LULAC), and G.I. Forum (collectively,

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6. *See* TEX. EDUC. CODE ANN. §§ 29.051–29.053 (West 2006); *see also* United States v. Texas, 572 F. Supp. 2d 726, 735 (E.D. Tex. 2008) (citing TEX. EDUC. CODE ANN. § 29.053(c)), *rev'd*, 601 F.3d 354 (5th Cir. 2010).

7. *See* United States v. Texas, 572 F. Supp. 2d at 735–36 (citing TEX. EDUC. CODE ANN. §§ 29.053(d), 29.055(a)–(b) (West 2006)).

8. *See id.*

9. United States v. Texas, 601 F.3d at 360–61. The Texas Assessment of Knowledge and Skills (TAKS), is Texas's mandated standardized test; the state is currently transitioning to a new standardized testing format, the State of Texas Assessments of Academic Readiness (STAAR). Press Release, Texas Education Agency, STAAR to Replace TAKS (Jan. 26, 2010).

10. *See* United States v. Texas, 601 F.3d at 361.

11. *Id.*

12. *See id.*

13. *Id.*

hereinafter "intervenors") filed a claim, *inter alia*, under § 1703(f) of the EEOA.[14] This provision prohibits states from denying opportunities to students by failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[15] Defendants consisted of the State of Texas, the TEA, and the Texas Commissioner of Education.[16] Specifically, intervenors argued that the TEA had "abandoned monitoring, enforcing, and supervising school districts to ensure compliance with Texas's bilingual education program" and had "failed to provide equal educational opportunity to LEP students above the elementary level."[17] Upon intervenors' motion for relief under the EEOA, the district court ultimately found a statutory violation and "order[ed] defendants to 'establish a new monitoring system and establish a language program'" to meet the statute's requirements.[18] Defendants then appealed to the Fifth Circuit.[19]

With respect to intervenors' EEOA claim, the Fifth Circuit held that the Eastern District had abused its discretion in finding a § 1703(f) violation "because the evidence presented d[id] not establish that a student's right ha[d] been violated or that defendants' acts or omissions [had] caused any claimed violation."[20] The Fifth Circuit hinged its conclusion on two key grounds.[21] First, it found the district court's decision "unreliable" because the lower court based its conclusion on claims that did not include individual school districts as parties.[22] Second, the circuit court reasoned that the lower court's decision was in error because the record did not show that defendants had failed to take "'appropriate action'" required by § 1703(f).[23]

As a rationale for its first key argument, the circuit court reasoned that the intervenors' issues could not be addressed properly without including individual school districts in the suit.[24] The Fifth Circuit asserted that "'there exists little if any practical or logical justification for attempting to deal on a statewide basis with the problems presented by this case.'"[25]

Addressing its second main argument, the circuit court determined that the evidence was insufficient to show that defendants had failed to act appropriately.[26] Foremost, the Fifth Circuit relied in part on the Supreme Court's decision in *Horne v. Flores* and noted that, of the three elements necessary to establish an EEOA violation, only the question of whether a

14. *See id.* at 357–58.
15. Equal Educational Opportunity Act (EEOA), 20 U.S.C. § 1703(f) (2006).
16. United States v. Texas, 601 F.3d at 357.
17. United States v. Texas, 572 F. Supp. 2d 726, 732–33 (E.D. Tex. 2008), *rev'd*, 601 F.3d 354 (5th Cir. 2010).
18. United States v. Texas, 601 F.3d at 359.
19. *See id.* at 359.
20. *Id.* at 375.
21. *See id.* at 364–65.
22. *Id.*
23. *Id.* at 365 (quoting Horne v. Flores, 129 S. Ct. 2579, 2605 (2009)).
24. *Id.* at 364.
25. *Id.* (quoting United States v. Texas, 680 F.2d 356, 373–74 (5th Cir. 1982)).
26. *Id.* at 365.

"violation 'stem[med] from a failure to take "appropriate action"' on the part of the defendants," was at issue in the case at bar.[27] The Fifth Circuit briefly mentioned the Seventh Circuit's stance on this subject, but drew no conclusions from it.[28] Next, the court applied the three-prong *Castaneda v. Pickard* test to determine whether an educational agency's action is appropriate.[29] Under this test, a court must determine "(1) whether the program is based on sound educational theory, (2) whether reasonable efforts are being made to implement the theory (implementation prong), and (3) whether the program, over a legitimate period of time, has achieved some success in overcoming language barriers (results prong)."[30] Because the district court found violations solely based on the latter two prongs, the Fifth Circuit only considered those factors.[31]

Applying the body of law regarding "appropriate action," the Fifth Circuit analyzed the defendants' implementation of the PBMAS and the results produced by that system.[32] Addressing the implementation prong first, the circuit court assessed "whether defendants ha[d] made a 'bona fide effort[ ] to make the program work'"[33] and found that the evidence was insufficient to show that they had not.[34] The circuit court found that the TEA's failure to provide LEP to non-LEP comparisons did not substantiate a finding of a violation because the EEOA does not mandate equalized results.[35] Also, the Fifth Circuit reasoned that the alleged under-identification of LEP students was erroneously based on the district court's belief that parental denials from bilingual and ESL programs changed student LEP identification status.[36] Further, the circuit court asserted that the trial court erred by relying on a study revealing the substandard campus-level performance of nearly 55,000 LEP students because the study was incomplete and did not provide necessary intervention data.[37]

Next, the Fifth Circuit turned to the results prong, under which it assessed "whether defendants' program . . . '[failed] to produce results indicating that the language barriers confronting students [we]re actually being overcome.'"[38] The circuit court found that the lower court overemphasized standardized test scores, relied on PBMAS data over a two-year period that constituted an insufficient trial time, and ultimately erred in recognizing a causative relationship between defendants' acts and sec-

27. *Id.* at 365–66 (alteration in original) (quoting *Horne*, 129 S. Ct. at 2605).
28. *See id.* at 365–66 & n.11 (citing Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1042–43 (7th Cir. 1987)).
29. *See id.* at 366 (citing Castaneda v. Pickard, 648 F.2d 989, 1009–10 (5th Cir. 1981)).
30. *Id.*
31. *See id.* at 366–73.
32. *See id.*
33. *Id.* at 367 (second alteration in original) (quoting *Castaneda*, 648 F.2d at 1010).
34. *See id.* at 373.
35. *See id.* at 367.
36. *Id.* at 368.
37. *Id.* at 369.
38. *Id.* at 370 (first alteration in original) (quoting *Castaneda*, 648 F.2d at 1010).

ondary LEP students' failures.[39] Because the Fifth Circuit found that intervenors failed to provide the requisite evidence to substantiate their § 1703(f) claim, the circuit court held that the district court abused its discretion on this issue.[40]

In reaching its conclusion, the Fifth Circuit in *United States v. Texas* erred on several grounds, each of which warrants a reversal of this opinion. First, the circuit court mistakenly determined that the EEOA claim could only be analyzed if individual districts were parties to the suit. The plain language of § 1703(f) makes no mention of individual districts; rather, the statute explicitly mandates that "[n]o *State* shall deny equal educational opportunity."[41] As the Fifth Circuit recognized in *Castaneda*, interpretation of the EEOA "should 'adhere closely to the ordinary meaning of the [statute's] language'" since it has virtually "no legislative history."[42] Further, although the state and its educational agency may share responsibility for educating Texas students, mandatory inclusion of individual districts as parties to an EEOA claim presumes that the educational inequalities the statute was meant to guard against must stem from a local level. This unnecessary relegation of § 1703(f) to the district realm diminishes defendants' roles in what the Supreme Court has declared to be an "area[ ] of core state responsibility"[43] and contravenes the flexibility envisioned by the higher Court.[44] In addition, other circuits diverge from the Fifth Circuit on this issue.[45] For these reasons, the district court acted within its discretion by analyzing the EEOA claim despite the fact that individual districts were not party to the suit.

Second, the Fifth Circuit incorrectly determined that the trial court abused its discretion in relying on evidence that defendants had failed to take "appropriate action" to overcome language barriers. Based on the *Castaneda* implementation prong, the district court acted within its discretion in concluding that defendants had violated the EEOA. Contrary to the Fifth Circuit's reasoning, the intervenors' desire for direct LEP versus non-LEP comparisons in standardized tests was not tantamount to an expectation of equal results; the state need not ensure equal outcomes in providing needed comparison data where none exists. Further, the circuit court mistakenly appraised the district court's scrutiny of under-identified

39. *See id.* at 370–72.

40. *Id.* at 375.

41. Equal Educational Opportunity Act (EEOA), 20 U.S.C. § 1703 (2006) (emphasis added); *see also supra* note 15 and accompanying text.

42. United States v. Texas, 572 F. Supp. 2d 726, 757 (E.D. Tex 2008) (alteration in original) (quoting *Castaneda*, 648 F.2d at 1001), *rev'd*, 601 F.3d 354 (5th Cir. 2010).

43. Horne v. Flores, 129 S. Ct. 2579, 2593 (2009).

44. *See id.* at 2594–95.

45. *See, e.g.*, Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1042–43 (7th Cir. 1987) ("The defendants maintain that the *Castaneda* decision applies only to local school districts. We disagree. There is certainly no language in that case to suggest that it is so limited. . . . *Section 1703(f)* could hardly be called detailed, but it does make clear, through the definition of the term 'educational agency,' that the obligation to take 'appropriate action' falls on both state and local educational agencies. We concur in the conclusion of the Ninth Circuit . . . .").

LEP students. The lower court pointed out that the percentage of parental denials from bilingual and ESL programs was likely much lower in reality than the percentages reported by districts.[46] This indicated that LEP students were not receiving assistance through required programs that their parents may well have supported participation in. Thus, the district court could have concluded, as it did, that defendants failed to properly monitor LEP programs when they took no action to verify the numbers.[47] Further, on the issue of data aggregation, the Fifth Circuit incorrectly dismissed the trial court's reliance on the study of nearly 55,000 LEP students' inferior academic performance at the campus level. The study had value in that it showed LEP student failures across campuses, a level on which defendants' system masked data. Importantly, the body of evidence against defendants here greatly outweighed the evidence presented against similar defendants in the Seventh Circuit.[48] That court has found that a state's failure to ensure identification and placement of LEP students alone may constitute a lack of implementation under the *Castaneda* test.[49] In sum, the lack of LEP to non-LEP comparisons, the under-identification of LEP students and under-provision to them of mandated programs, and the aggregation of data leading to masked failures all indicate that defendants were merely "go[ing] through the motions of solving the problem of language barriers"[50] instead of implementing an appropriate monitoring system and language program.

In addition, the Fifth Circuit erred in finding that the lower court abused its discretion as to the results prong of the *Castaneda* test. Intervenors' numerous data sets regarding secondary students—including lower performance on TAKS tests relative to the general student population, higher retention and drop-out rates, and general failure to progress reasonably through programs—indicated, as the Fifth Circuit stated, an "alarming" situation that spanned several years.[51] Further, the circuit court misconstrued the trial court's assessment of causation as to these results. Unlike the Fifth Circuit, which implied that only the defendants' overt actions could constitute a violation,[52] the lower court held that defendants "ha[d] *not met their obligation* to overcome language barriers."[53] Moreover, although a court owes deference to the Texas school system as the latter attempts to produce results, such compliance is not ironclad. As Seventh Circuit courts have noted, "'judicial deference . . . is unwarranted if over a certain period the system has failed to make substantial

46. *See* United States v. Texas, 572 F. Supp. 2d at 767.

47. *See id.* at 767–68.

48. *See Gomez*, 811 F.2d at 1032–33.

49. *See id.* at 1033, 1042–43.

50. *Id.* at 1043.

51. United States v. Texas, 601 F.3d 354, 370 (5th Cir. 2010).

52. *See id.* at 370–73.

53. United States v. Texas, 572 F. Supp. 2d 726, 779 (E.D. Tex. 2008) (emphasis added), *rev'd*, 601 F.3d 354 (5th Cir. 2010).

progress in correcting the language deficiencies of its students.'"[54] Clearly, the progress made here was insubstantial. Thus, defendants failed not only to faithfully implement the monitoring program as to LEP students but also to produce results indicating minimal progress under that program. Therefore, the trial court was justified in finding that defendants did not take "appropriate action" as required by the EEOA.

Finally, both equity and policy concerns support a reversal of the Fifth Circuit's decision. In terms of equity, many of the student plaintiffs here continue to show a poor record of academic performance, evidenced, as both courts involved in this decision recognize, by many indicators. Plaintiffs have sought relief in various forms through the intervening parties for the better part of four decades.[55] Yet the Fifth Circuit continues to deny relief, to overlook defendants' finger-pointing and buck-passing, and to allow the educational inequalities revealed in this case to continue. Also, this decision is simply bad policy. It offers states an incentive to create muddled monitoring systems and to hide behind the lackluster data produced by those systems in order to avoid facing consequences that rightly should be imposed under federal law. Meanwhile, without appropriate state action, students in need of help will continue to fail.

The Fifth Circuit in *United States v. Texas* improperly determined that the trial court abused its discretion. The State of Texas and the TEA failed to fulfill their obligation under § 1703(f) to overcome language obstacles faced by LEP students. Overwhelming data indicated that defendants did not implement an appropriate system to monitor LEP programs. Moreover, the available test scores and completion data pointed towards the defendants' contemporaneous failure to produce even minimal results. For these reasons, the district court was correct in finding a § 1703(f) violation, and the Fifth Circuit's decision regarding the intervenors' EEOA claim should be overturned.

54. Cortez v. Calumet Pub. Sch. Dist. No. 132, No. 01-C-8201, 2002 U.S. Dist. LEXIS 18848, at *20 (N.D. Ill. Sept. 27, 2002) (quoting *Gomez*, 811 F.2d at 1042).

55. *See* United States v. Texas, 601 F.3d at 357–60.