UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA Plaintiff	§ § §	
and	§ §	
GI FORUM and LULAC Plaintiff – Intervenors	§ § §	Civil Action No. 6:71-CV-5281-WWJ
v.	§ §	
STATE OF TEXAS, et al. Defendants	§ §	

GI FORUM AND LULAC'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO ALTER OR AMEND JUDGMENT

NOW COME Plaintiff-Intervenors, GI Forum and LULAC, in the above-entitled matter and, pursuant to FED. R. CIV. P. 52(b) and 59(e), respectfully ask the Court to amend its Findings of Fact and Conclusions of Law in the Court's Memorandum Opinion and to amend or alter its Judgment, both entered on July 30, 2007. In support, GI Forum and LULAC show the Court as follows:

Introduction

GI Forum filed their Motion for Further Relief in this case arguing two principal points: 1) Defendants lacked a sufficient monitoring system to ensure that the State was fulfilling its obligation under the Court's desegregation order and under the Equal Educational Opportunities Act of 1974 to provide equal educational opportunities to students with limited-English proficiency ("LEP Students"); and 2) Defendants had failed to evaluate and make necessary changes to the statewide Bilingual and ESL Programs as required by the Equal Educational

Opportunities Act of 1974, in light of the failure of the ESL program to afford appropriate instruction to tens of thousands of secondary school LEP students across the State.

The Court held a trial from October 23, 2006 through October 26, 2006. Following a continuance to allow GI Forum and LULAC time to analyze and present evidence on the latest data received from the State, the parties concluded trial on December 4, 2006.[1] The parties submitted post-trial briefs to the Court on or about January 24, 2007 and GI Forum and LULAC filed a response brief on February 5, 2007.

On July 30, 2007, this Court entered its Judgment and supporting Memorandum Opinion denying GI Forum and LULAC and the Plaintiff United States all the relief they sought. Essentially, the Court concluded that: Defendants do not have to monitor programs for LEP students down to the school level, and need only include on-site review of a very limited number of school districts' programs for LEP students; Defendants need not address the failure of secondary LEP students educated under the State's English as a Second Language program when elementary LEP students educated under the State's bilingual program demonstrate success; and plaintiffs in EEOA cases bear the burden of identifying the type of evaluation necessary for the State to carry out its duties under the EEOA.[2]

[1] The Court found that GI Forum and LULAC's expert, Roy Johnson, had analyzed "outdated data." Mem. Op. at n.31. However, the Court interrupted the original trial schedule on the fourth day, because State Defendants had not propounded updated data to GI Forum and LULAC. *See* Order, Dkt. No. 704. After Mr. Johnson was provided with an opportunity to review the data, he submitted a supplement expert report (Intv. Ex. 99) and testified to his findings and conclusions on December 4, 2006. *See* Trial Tr. vol. V, 159-73. Thus, Mr. Johnson did in fact analyze the most recent data provided by the State.

[2] The Court also concluded that under Section G(1) of the Court's desegregation order, GI Forum and LULAC did not sustain their burden in proving a violation because evidence of curriculum opportunities for LEP students, linked to the vestiges of discrimination in this case, was lacking. Mem. Op. at 15-17. Although GI Forum and LULAC do not challenge the Court's findings regarding the Section G(1) issue in the present motion, GI Forum and LULAC do not waive their right to address that issue on appeal.

Argument

Standard of Review

Under FED. R. CIV. P. 52(b), a motion to amend findings of fact and conclusions of law must be predicated on the need to correct manifest errors of law or fact. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). Findings of fact shall be set aside if clearly erroneous. FED. R. CIV. P. 52(a). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *see also Santamaria v. Dallas Indep. Sch. Dist*., 2007 U.S. Dist. LEXIS 26821 *10 (N.D. Tex. April 10, 2007) (revising the court's own finding of fact after concluding that credible evidence in the record supported the amendment).

Although a trial court is afforded much discretion in considering a case before it, the court's discretion "is not left to its inclination but to its judgment; and its judgment is to be guided by sound legal principles." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1985). A district court abuses its discretion when its judgment is not guided by sound legal principles such as: 1) when a court relies on clearly erroneous fact findings; 2) relies on erroneous conclusions of law; or 3) misapplies its factual or legal conclusions. *Alcatel U.S.A., Inc. v. DGI Techs, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999).

Under FED. R. CIV. P. 59(e), a party may file a motion to alter or amend a judgment no later than 10 days after entry of the judgment. Motions to amend or alter the judgment should be granted when there exists "a manifest error of law or fact, so as to enable the court to correct its own errors and thus avoid unnecessary appellate procedures." *Meghani v. Shell Oil Co.*, 2000 U.S. Dis. LEXIS 17402 *2, (S.D. Tex. Aug. 24, 2000) (citing *Divane v. Krull Elec. Co., Inc.,* 194

F.3d 845, 848 (7th Cir. 1999) (internal citations omitted)); *see also Kyle v. Texas*, 2006 WL 3691204 (W.D. Tex. Oct. 31, 2006) (granting a motion to reconsider under FED. R. CIV. P. 59(e) and reversing the court's previous denial of a motion to remand based on a manifest error of law)). A court has discretionary authority to amend its prior decision. *See Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 276 (5th Cir. 2000).

Without waiving their right to appeal other issues, GI Forum and LULAC suggest that the Court has committed manifest errors of law and fact[3] in: (1) concluding that, under the EEOA, the failure of language programs for LEP students at the secondary level can be ignored by Defendants if language programs at the elementary level demonstrate success on a statewide basis; and (2) determining that GI Forum and LULAC bear the burden of identifying the type of evaluation required by the State under the EEOA. GI Forum and LULAC further suggest that the Court committed manifest errors of law and fact in denying all relief entitled to Plaintiff-Intervenors under the EEOA in the Court's Judgment. GI Forum and LULAC respectfully request that the Court amend its Judgment and Findings of Fact and Conclusions of Law and order the State to evaluate its ESL program for LEP students at the secondary level and to remedy any deficiencies.

I. THE COURT IGNORED THE RESULTS OF THE ESL PROGRAM FOR SECONDARY LEP STUDENTS, DENYING THOSE LEP STUDENTS EQUAL EDUCATIONAL OPPORTUNITIES.

The Court affirmed that under the Equal Educational Opportunities Act, Defendants are required to take "appropriate action to overcome language barriers." *See* Mem. Op. at 18-19 (citing *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981)). In assessing the appropriateness of

[3] The Court's Memorandum Opinion did not separate the Court's findings of fact from its conclusions of law. *See* FED. R. CIV. P. 52(a). Accordingly, for each challenged finding of fact, which should more appropriately be challenged as a conclusion of law, Plaintiffs adopt and refer the Court to its applicable legal analysis and arguments and vice versa.

a state's actions, courts apply the three-part *Castaneda* test: 1) whether the program is "informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy"; 2) whether "the system follows through with practices, resources, and personnel necessary to transform the theory into reality"; and 3) whether the program, after "being employed for a period of time sufficient to give the [program] a legitimate trial," fails to "produce results indicating that the language barriers confronting students are actually being overcome." *Id.* at 19 (citing *Castaneda*, 648 F.2d at 1009-10).

On October 12, 2006, GI Forum and LULAC filed their Motion for Further Relief to add as intervenors named members of their organization including three families with LEP children enrolled in the ninth grade in the Dallas Independent School District and one family with a child enrolled in the tenth grade in the same school district. These high school students, and others similarly situated to them, have individual rights under the Equal Educational Opportunity Act, 20 U.S.C. § 1703 (f). However, under the Court's present ruling, secondary LEP students virtually have no rights to equal educational opportunities under the EEOA against the State of Texas, in spite of the abysmal statewide failure of the ESL program for secondary students.[4] *See* Mem. Op. at 32.

A. The Secondary LEP Students are More Than a Statistical Anomaly.

As the Court correctly noted, the inquiry does not end with Defendants' monitoring and implementation of the programs for LEP students. Mem. Op. at 27. The final *Castaneda* prong requires the State to evaluate the results of the language programs in order to ensure that LEP students are actually overcoming language barriers. *Id.* at 27 (citing *Castaneda*, 648 F.2d at 1010). Defendants offer two different language programs for LEP students in Texas, bilingual

[4] GI Forum and LULAC request that the Court amend its findings and conclusions to reflect the need to evaluate the ESL and bilingual education programs separately under the *Castaneda* three-prong test.

education primarily for elementary students and English as a Second Language, primarily for secondary students (*see infra* at §II).[5] Nevertheless, the Court concluded that: "It would be inappropriate to gauge the success of TEA's bilingual/ESL program solely on the performance data of a small minority of the overall LEP population in Texas schools." Mem. Op. at 32.

The Court's refusal to require Defendants to evaluate the ESL language program for secondary LEP students denies those students the right to have their educational programs reviewed for success or failure, as required by *Castaneda*, and fails in two respects. First, as further explained below (*see infra* at §II), the bilingual and ESL programs are distinct programs requiring separate analyses under the EEOA. Second, the evidence conclusively demonstrates that LEP students in secondary schools comprise roughly 20% of the overall LEP population (Mem.Op. at 29), a number far from *de minimis*, and those secondary LEP students are failing in all areas.[6]

It is not contradicted in the record that there are nearly 140,000 LEP students in grades 7-12, and that 85,000, or 61%, have attended schools in the United States four or more years.[7] (Intv. Ex. 3, D. Ex. 17). In the context of this case, a high school student's right under § 1703(f), if it has any meaning at all, must entail an examination of Defendants' ESL program as it has succeeded or failed for secondary students for that is the only program that currently affects LEP

[5] GI Forum and LULAC request that the Court amend its findings and conclusions and find that the State program for secondary LEP students is separate and distinct from the State program for elementary students for the purpose of analyzing compliance under the EEOA.

[6] GI Forum and LULAC request that the Court amend its findings and conclusions and find that the lower number of LEP students at the secondary level is still significant enough to warrant a demonstration of success or failure under *Castaneda* for LEP students, especially in light of the different programs available to students in the primary and secondary levels.

[7] GI Forum and LULAC request that the Court amend its findings and conclusions and find that a sizeable majority of LEP students in grades 7-12, or 61%, are not new immigrants and have attended schools in the United States for four or more years. *See* Mem. Op. at n.41.

students in these grades.[8] Although the secondary LEP students may constitute a minority of all LEP students, by the same token, *they comprise the entire universe of secondary LEP students.*

If secondary LEP students are failing under Defendants' ESL program, it does not matter to them that other unrelated students in the primary grades are doing well. Indeed, since middle school and high school grade students will always constitute a minority of all LEP students, logically there would be no need to provide them with any special program to overcome language barriers if Texas could satisfy its obligations under the EEOA by succeeding only with K-5 or K-6 students. But for students in middle school or high school, what happens in the secondary schools *is* their education and future.

In *Castaneda v. Pickard*, the Court of Appeals stated that § 1703(f) imposed on educational agencies a duty to: "design programs which are reasonably calculated to enable . . . students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system." 648 F.2d at 1011. GI Forum and LULAC's argument on behalf of secondary students is that secondary LEP students, including those who have lingered for four or five years in a state program that has not allowed them to learn English, are not attaining "parity of participation in the standard instructional program within a reasonable length of time after they enter the school system."[9] The *Castaneda* court also found that there was a duty to provide LEP students with "compensatory and supplemental education" to remedy academic deficiencies incurred while they were learning English.[10] 648 F.2d at 1011.

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[8] GI Forum and LULAC request that the Court amend its findings and conclusions and conclude that providing a successful program for LEP students in elementary schools does not absolve the State of its duty to provide an appropriate language program under the EEOA for LEP students in secondary schools.

[9] GI Forum and LULAC request that the Court amend its findings and conclusions and find that secondary LEP students are not attaining "parity of participation in the standard instruction program" as required by *Castaneda*.

[10] GI Forum and LULAC request that the Court amend its findings and conclusions and find that Defendants have not presented credible evidence that they have satisfied their duty to provide secondary LEP students with compensatory and supplemental education to remedy academic deficiencies incurred while the students learn English.

Accordingly, GI Forum and LULAC request that the Court amend its findings and conclusions and determine that the success of TEA's ESL program for these long term secondary school students can only be gauged by looking at the results of the secondary program in which they are enrolled to see whether those academic deficiencies have been remedied.

B. The Statistical Data of LEP Secondary Students Demonstrates a Failing Program.

In determining whether a program has proven successful, the Court treated the use of statistical data differently in this case. On the one hand, the Court concluded that "the record clearly shows that language barriers confronting LEP students are being over come at the elementary school level," relying on student performance on the State's standardized test, the Texas Assessment of Knowledge and Skills ("TAKS").[11] *See* Mem. Op. at 29-30. However, the Court then found to the contrary that "evidence of statistical under-performance among a minority of the overall LEP population does not, without more, establish a failure to take appropriate action." In essence the Court relied upon statistical data to note the "success" of the State's program for one set of LEP students, but then refused to apply the same analysis of the same statistical data to demonstrate the failure of the State's program for secondary students.[12] Accordingly, GI Forum and LULAC request that the Court amend its findings and conclusions and determine that the statistical evidence in the record sufficiently demonstrates the failure of the ESL program for secondary LEP students.

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[11] In this case, the Court also acknowledged that the only evidence before the Court pertaining to LEP student success is statistical data regarding the aggregate performance of LEP students in Texas. Mem. Op. at 29.

[12] For example, GI Forum and LULAC showed that thousands of LEP students in ESL programs attend high schools throughout the State that would be identified as failing schools under State Defendants' own standards but which failure is masked by the success of the bilingual education program in elementary schools. The data used in this analysis was the latest TEA data which the Court ordered TEA to provide to GI Forum and LULAC during the trial. The Court's finding in footnote 31 that: "Johnson's study was largely based on outdated data" is thus clearly erroneous and belied by the study, the testimony and the course of the trial proceedings. Therefore, this finding should be amended. *See also supra* at n.1.

The Court further based its findings on a circular motion that "it is foreseeable that secondary LEP students will perform worse on the TAKS in English than their non-LEP counterparts because the test is in English and once a student has mastered English, then he or she is no longer classified as LEP."[13] *See* Mem. Op. at 31. It is true that the LEP students in the secondary schools, like the LEP students in the elementary schools, are classified as LEP because those students have not mastered English. However, unlike their secondary LEP counterparts, the limited-English proficient students in the elementary schools are closing the achievement gaps relatively quickly on the TAKS in English. *Id.* at 30; *see also, e.g.,* GI Forum and LULAC's Post-Trial Br. at 20-22. Unfortunately for secondary students, Defendants do not have the answer as to why LEP students across the state in bilingual education programs at the elementary level are succeeding while LEP students receiving ESL instruction at the secondary level are not, because Defendants have not evaluated the ESL program.[14] Instead, Defendants have taken a "sink or swim" approach to the secondary LEP students.

Furthermore, GI Forum and LULAC urge the Court to amend its findings and conclusions and find that Plaintiff-Intervenors have not relied solely on evidence of test scores on TAKS tests administered in English. *See* Mem. Op. at 32. Rather, GI Forum and LULAC have introduced from TEA's own documents, uncontradicted evidence showing that secondary LEP students are much more likely to drop out of school and to be kept back or retained in class than white students and also are much less likely to be afforded opportunities for advanced placement classes even though such classes could be offered to LEP students.[15] *See, e.g.,* GI

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[13] GI Forum and LULAC request that the Court amend its findings and conclusions and conclude that based on the record, the evidence does not support the notion that secondary LEP students will perform at the dismal level at which they are performing simply because those students are classified as LEP.

[14] In addition, Defendants offered no evidence, other than pure speculation, to support a finding that factors other than the State's ESL program caused the poor performance of secondary LEP students.

[15] Some of these same measures, such as low achievement scores and low graduation rates, were used as a basis for this Court's prior Memorandum Opinion in 1981. *See United States v. Texas*, 506 F. Supp. 405, 419 (E.D. 1981).

Forum and LULAC's Post-Trial Br. at 19, 23-25 (§§IV(A)(i), (ii) and (vi)). GI Forum and LULAC have presented aggregate data on every available measure that Defendants publish to show that the State is not affording secondary LEP students the opportunity to actually overcome language barriers. That data shows across all such measures that the secondary ESL program is a failure for those secondary LEP students. *See id.* at §IV.

Beyond the data, however, GI Forum and LULAC's contention that Defendants have failed to evaluate the secondary level LEP program rests on the testimony of TEA's witnesses including the Associate Commissioner for Standards and Programs, the Senior Director for No Child Left Behind Program Coordination, the director of the TEA bilingual education office and the TEA employee in charge of assessment of LEP students.[16] No TEA witness testified otherwise. GI Forum and LULAC also relied on the unchallenged testimony of the former TEA monitor, Lina Flores, who described from the vantage point of her classroom observations, the comparative failure of the secondary level ESL program. (*See infra* at 12).

The only evidence of any type of "analysis" or "review" of the bilingual and ESL programs performed by Defendants is the review of student performance data on a district basis, and to a limited extent by campus. There is no evidence of a statewide analysis of the State's ESL program and therefore GI Forum and LULAC request that the Court amend its related findings and conclusions to conform. To the extent that the Court has concluded that Defendants have evaluated the State's ESL program, then any type of evaluation performed by TEA would have only relied on student performance data. *See* Mem. Op. at 29 ("the only evidence before the Court pertaining to LEP student success is statistical data regarding the aggregate performance of LEP students in Texas"). However, the Court determined that such a limited

[16] *See* GI Forum and LULAC's Post-Trial Br. at 26-28.

analysis would not satisfy the burden of proving satisfactory results under the EEOA in this case.[17]

Even if the Court now concludes that statistical data is sufficient to determine whether language barriers confronting LEP students are being overcome, the overwhelming evidence with respect to LEP secondary student performance indicates that those students are not succeeding—twenty-five years after the ESL program was given a chance to work—and thus GI Forum and LULAC urge the Court to amend its findings and conclusions accordingly. *See* GI Forum and LULAC Post-Trial Br. at §IV. These are the very "results" of a program's success, or in this case, a program's failure. *See Castaneda,* 648 F.2d. at 1010. As Defendant Commissioner Neeley admitted in response to a question about LEP student performance in middle and high schools: "There's not anybody in their right mind that would say that these are good scores." Intv. Ex. 74 at 113:1-5.

II. SEPARATE ANALYSES ARE REQUIRED FOR TWO DIFFERENT PROGRAMS FOR LEP STUDENTS AT THE SECONDARY AND PRIMARY LEVELS.

Under the Court's analysis of GI Forum and LULAC's challenge to Defendants' failure to take appropriate action under the third prong of *Castaneda*, the Court did not "bisect the data for secondary and elementary students," based on its finding that "the program for secondary students is not separate and distinct from the elementary school program." *See* Mem. Op. at 29. By failing to analyze the results of the distinct bilingual and ESL programs, and relying solely on

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[17] *See* Mem. Op. at 31-32. "The sole evidence of aggregate, statewide student performance data cannot present a clear explanation of the causal factors for LEP secondary student under-performance. . . Intervenors have failed to establish that it is the program that bears responsibility, as opposed to a confluence of countless other potential factors." If the sole evidence of aggregate data cannot present a clear explanation of the causal factors for LEP secondary student under-performance, then how can the sole evidence of aggregate data present a clear explanation of the causal factors for LEP elementary student success in elementary schools. GI Forum and LULAC request that the Court amend its findings and conclusion and find that, although GI Forum and LULAC do not bear the burden of evaluating the programs for LEP students, the evidence of aggregate data and other testimony as presented by GI Forum and LULAC, does satisfy the "results-prong" of *Castaneda* and those results do not reflect that language barriers are being overcome.

the success of elementary LEP students, the Court has allowed Defendants to shirk their responsibility to demonstrate that the ESL program for secondary LEP students actually allows those students to overcome language barriers.

However, the evidence before the Court demonstrates that the bilingual education program and ESL instruction are two different programs and theories. Bilingual education is a "full-time program of dual language instruction that provides for learning basic skills in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills." TEX. EDUC. CODE §29.055(a). In contrast, English as a Second Language is not a required "full-time" program but is described as a program of intensive instruction in English from teachers trained in recognizing and dealing with language differences.[18] *Id.* at §29.055(a). The State also has additional textbooks for bilingual education. *See* Trial Tr. vol. III, 45:15-23 (G. Gonzales). Because of the distinct instructional practices and resources involved in the delivery of the two separate programs, the State also requires different certifications for the teachers, or personnel, in each program. *Id.* at §29.061; *see also* Trial Tr. vol. III, 34:16-19 (G. Gonzales testifying about her two separate certifications for bilingual education and ESL).

As described by Defendants: ". . . Texas school districts offer a program in which bilingual education is provided in elementary school (through grade six) and English as a second language (ESL) is offered thereafter." Defs.' Post-Trial Br. at 1. In fact, in 1981 this Court recognized the distinction between the two programs when it held that the State's proposed plan to offer bilingual education in the elementary grades and ESL instruction in the secondary grades

[18] The Court's reference to ESL instruction as "ESL instruction teaches all courses in modified English that is easier for [LEP students] to comprehend" is clearly erroneous. *See* Mem. Op. at 10. There is no evidence to support the proposition that all courses are taught in modified English. To the contrary, TEA's witness Laura Ayala testified at trial that although she and the TEA bilingual/ESL division were of the opinion that even those LEP students who exhibited higher levels of English proficiency needed classroom assistance from teachers with specialized training, TEA has no policy that requires that kind of training. Tr. vol. V, 92, 106, Dec. 4, 2006.

did not fulfill its obligations under the EEOA because the evidence in that case demonstrated that bilingual education was required at all grade levels. *See United States v. Texas*, 523 F.Supp. 703, 724 (E.D. Tex. 1981) *rev'd* and *remanded* 680 F.2d 356 (5th Cir. 1982) (on grounds that State plan should be given a chance to work). In the end, the Court in this case noted that: "Bilingual programs are distinct from ESL programs" yet still chose to combine them for purposes of its analysis under the EEOA.[19] Mem. Op. at 10.

Importantly, the evidence in this case demonstrated that the program implementation and results also differ between elementary and secondary schools. Lina Flores, an experienced former TEA program specialist and on-site monitor, testified about what she observed in Texas classrooms while performing monitoring of school districts' compliance for TEA. She noted significant differences between the ESL services provided to secondary and bilingual services provide to elementary students. For instance, in the elementary schools, she witnessed students who were able to engage in learning with a bilingual teacher. (Trial Tr. vol. V, 154 (L. Flores)). But at the secondary level, Ms. Flores observed that: "the students were totally disengaged, and the language was a barrier for their… performance, for their learning." *Id.* Ms. Flores' testimony was not challenged or rebutted by Defendants. *See also* Trial Tr. vol. I, 151-52, Oct. 24, 2007 (R. Johnson) (describing the different implementation between the two programs)).

Because bilingual education and English as a Second Language involve two separate theories, or programs, and because their implementation at the elementary and secondary level differs, the Court must evaluate separately the two separate programs (bilingual education and ESL instruction) in order to determine if each program has produced satisfactory results under the EEOA. The effect of the Court's judgment, as it stands, would deny students under one

[19] GI Forum and LULAC request that the Court amend its findings and conclusions that are to the contrary, including the Court's conclusion that the programs should be evaluated *in toto*.

program, in this case students in grades 7-12 including the high school students who intervened in this case, the right to equal educational opportunities.

III. DEFENDANTS BEAR THE BURDEN OF EVALUATING THEIR PROGRAMS FOR LEP STUDENTS.

The Court also placed the burden on GI Forum and LULAC to determine the "type of evaluation" requested by the Intervenors. *See* Mem. Op. at 31 ("It is unclear what Intervenors seek regarding 'evaluation.'"). However, the Fifth Circuit places the responsibility of evaluating language programs for LEP students on the responsible state and local education agencies. *See Castaneda,* 648 F.2d at 1009-10. Therefore, GI Forum and LULAC request that the Court amend its findings and conclusions and determine that the burden lies on Defendants to separately evaluate and remedy the ESL program in order to determine why language barriers are not being overcome by secondary LEP students.

The evaluation that GI Forum and LULAC seek is simply the predicate analysis that *Castaneda* requires of educational agencies in the face of a failing program; that is, to look at the results along a range of measures and ask why the program is not working and how it could be improved, in this case particularly for the 140,000 LEP secondary students receiving ESL instruction, including at least 85,000 secondary students who have been struggling to learn English and content for four and five years and are at high risk of dropping out of school. GI Forum and LULAC intentionally did not set out an exact method for this evaluation in the belief that it is TEA's responsibility (and legal burden) in the first instance to describe what it would do to analyze the secondary LEP program. That is what GI Forum and LULAC sought in their Motion for Further Relief filed in this case. The result would be that TEA would respond appropriately to an order from this Court that it undertake a comprehensive and serious review of

the results of the secondary LEP program in order to determine why language barriers were not being overcome at the secondary level.

Conclusion

For the reasons set forth above, GI Forum and LULAC respectfully request that the Court grant this motion and amend its Findings of Fact and Conclusions of Law in its Memorandum Opinion accordingly. GI Forum and LULAC further request that the Court amend or alter its Judgment and grant them relief by ordering Defendants to evaluate the ESL program for secondary LEP students and to remedy any deficiencies. GI Forum and LULAC request all other relief so entitled.

Dated: August 13, 2007

Respectfully submitted,

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CERTIFICATE OF SERVI CE

I hereby certify that a true copy of the foregoing document was served via the electronic court filing system on this, the 13th day of August, 2007 upon:

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