SCOMM

#19:4

1c

M E M O R A N D U M September 23, 1977

SUBJECT: Status of Agreement between Department of Education and Office of Civil Rights, DHEW Lau v. Nichols. (Work Order No. 4302)

TO: Repre~~Chairma~~n Thelma Buchholdt
Chairman, Educational Programs Committee

FROM: Richard A. Bradley
Legislative Counsel

The status of the agreement between the Department of Education (DOE) and the Office of Civil Rights, DHEW (OCR) could be briefly described: It is still in negotiation. However, because of the complexity of the situation, that brief statement of the status is perhaps more confusing than it is enlightening. Accordingly, this memorandum will provide an analysis of (1) the legal environment, (2) the negotiations that resulted, and (3) the present status of the agreement.

I. The Legal Environment.

In 1964, Congress adopted the Civil Rights Act of 1964. One provision of that Act bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving federal financial assistance." Sec. 601 of the Civil Rights Act of 1964, 42 USC §2000(d).

Implementing that law, the USSDeDepartment of Health, Education and Welfare in 1968 established a guideline that

> school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system."33 CFR §4955.

These guidelines were made more specific by DHEW in 1970 when it required school districts receiving federal funds "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies."

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by the school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. 35 Fed. Reg. 11595.

See also the DHEW regulations issued to implement §601 of the 1964 Act at 45 CFR Part 80.

The first case to reach the U. S. Supreme Court which interpreted these regulations and guidelines is the now famous Lau v. Nichols, 414 US 563 (1974). This case arose out of San Francisco. A report by the San Francisco Human Rights Commission indicated the presence in the San Francisco School System of some 3,457 Chinese students who spoke little or no English. While a substantial portion of these students were enrolled in special instruction classes, some 1,800 of the students were receiving instruction exclusively in English and the school district had taken no significant steps to deal with this language deficiency.

The case reached the Court with the plaintiffs urging two separate grounds for a decision in their favor:

> (1) The Equal Protection Clause of the Fourteenth Amendment.
>
> (2) Section 601 of the Civil Rights Act of 1964.

The District Court had denied relief. The Court of Appeals affirmed, holding that there were violations neither of equal protection nor of §601.

The Supreme Court did not "reach" the equal protection argument, using its classic approach of deciding cases on non-constitutional grounds where possible. The Court said, in an opinion by Justice Douglas:

> [S]ection [601] bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving federal financial assistance." The school district involved in this litigation receives large amounts of federal financial assistance.

> HEW, which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 USC §2000(d), in 1968 issued one guideline that "school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. 33 CFR §4655. In 1970 HEW made the guidelines more specific requiring school districts that were federally funded "to rectify the language deficiency in order to open the instruction to students who had linguistic deficiencies."

The Court continued:

> Respondent school district contractually agreed to "comply with Title VI of the Civil Rights Act of 1964.... and all requirements imposed by or pursuant to the Regulations" of HEW (45 CFR Pt. 80) which are "issued pursuant to that title...." and also immediately to "take any measures necessary to effectuate this agreement." The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Oklahoma v. Civil Service Commission, 330 U.S. 127, 142-143. Whatever may be the limits of that power,....they have not been reached here.

The concurring opinion of Justice Stewart notes that the language of §601 appears to require an affirmative or intentional act causing the inadequacy in services; if that were so, then he agrees that the San Francisco situation would not be covered. But, he notes, the OCR guidelines "clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Title VI [Sec. 601] as a condition to receipt of federal aid to public schools..." 35 Fed. Reg. 11595.

While three separate opinions were filed in Lau, all supported reversal of the lower court opinions; the court was, therefore, at least as to the result, unanimous.

Although it is not directly apropos to the question you asked my comments on, note that AS 14.30.400 - 410 also mandates bilingual-bicultural education in each school district or REAA attended by at least eight pupils of "limited English speaking ability...whose primary language is other than English." AS 14.30.400.

As noted, Lau does not rely on the equal protection arguments. The Court did not reach them. The Court has simply ruled that if Federal money is accepted, then Federal terms, perhaps unilaterally imposed, are similarly "accepted".

The Supreme Court's failure to "reach" the equal protection arguments should not be taken, in my judgment, as an indication that the questions the arguments present would, if reached, not be resolved favorably to the plaintiffs. As the Supreme Court of Alaska said in Hootch v. ASSOS, 536 P.2d 793, 808-809 (1975):

> Our disposition of this appeal, in this manner [without reaching the equal protection arguments] is by no means intended to disparage the weighty nature of the claims presented. * * * We shall not,...hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or the United States Constitutions is established. [Bracketed material added.]

Accordingly, while the States and their districts in their response to OCR have the technical option of rejecting all federal funds for education and thus escaping Lau remedies, it is not clear that the problem can thus be avoided. It is much more likely that the implementation of Lau remedies under §601 is a legislative and regulatory formulation of a presently existing constitutional mandate.

I note that in prepared testimony before the Department of Education on the Handbook for Bilingual-Bicultural Programs, the executive director of the State Human Rights Commission stated that "We were prepared to proceed with enforcement under State law (AS 18.80.255) if OCR failed to follow through." A copy of that testimony is enclosed.

II. The Resulting Negotiations.

Lau v. Nichols could not have been decided at a more awkward time for the Department of Education. By the time DHEW/OCR initiated its implementation of Lau, the Alaska State Operated School System [ASOSS] was on its way out of existence, to be replaced with the Alaska Unorganized Borough School District [AUBSD]; the latter lasted only one year and was itself replaced by the 21 Regional Education Attendance Areas [REAA].

The dates of those organizational changes should be noted: ASOSS went out of business on June 30, 1975. ASOSS, in its new status as AUBSD, was in existence for one year from July 1, 1975 through June 30, 1976. Sec. 38, Ch. 124, SLA 1975. About June 30, 1976, the responsibility for rural education passed to the REAAs.

Just a few months before ASOSS went out of business, on January 17, 1975, OCR asked it, as well as the Anchorage and Fairbanks School districts for "Lau compliance information". A letter was also sent, at that time, to Commissioner Lind.

The letter to Lind noted that guidelines issued by OCR had been approved by the U.S. Supreme Court in Lau. The letter also noted that all school districts receiving federal funds had agreed to comply with Title VI of the Civil Rights Act of 1964 and with the requirements of the regulations HEW had adopted under Title VI.

The letter continued that on May 25, 1970 OCR had asked all districts receiving federal funds to examine their procedures regarding students whose home or primary languages are not English and to advise OCR of its plans to remedy the situation. The form letter noted that few districts responded.

The letter also noted that a response to a survey conducted by OCR indicated that

> "a number of school districts in your state have substantial numbers of pupils whose primary or home language is other than English. The same [survey] reveals that no more than 10 percent of these students receive any form of instruction in a language other than English.

The letter continued that because the lack of response from Alaska to earlier requests, OCR was seeking the assistance of the Department of Education to obtain the required information. A response within 45 days was requested.

Specific forms were required for the response; if the state department had the information in a different format, OCR agreed to consider its appropriateness as a response.

By early May, 1975, OCR acknowledged receipt of ASOSS's report and requested supplementary information.

In a letter to ASOSS (then in reality AUBSD) on August 12, 1975, OCR acknowledged that the ASOSS report lacked certain information. The letter detailed unsuccessful efforts to reach ASOSS personnel to obtain the information. Deadlines for compliance during May and June were established and passed without a response. As of the date of the letter on August 12, 1975, OCR had "yet to receive the compliance report."

A response within 10 days was requested; ASOSS was advised that failure to provide it would constitute a violation of the 1964 Civil Rights Act and may lead to an enforcement action by OCR.

ASOSS provided responses to the specific questions on the report. While one-third of the students ASOSS identified as having a home or primary language other than English were individually interviewed and appraised by ASOSS personnel, the remaining two-thirds were not so assessed and their linguistic abilities were "estimated" by ASOSS. The response was accordingly not individualized.

On January 23, 1976 OCR responded to AUBSD. OCR determined, based on the AUBSD response to Lau compliance requirements, that the

> "District is in presumptive noncompliance with Title VI of the Civil Rights Act of 1964; the accompanying regulation, 45 Code of Federal Regulations Part 80, specifically Sections 80.3(b)(2) and 80.6(b); and the United States Supreme Court decision in Lau v. Nichols.

The letter then discussed the details of the requirements for the information sought under the Lau Compliance Reports. One of the requirements of the report, according to OCR, is individual student language assessments by bilingual personnel; the OCR determination apparently being that unless personnel making the assessment are themselves bilingual, the assessment will not truly reflect the student's skills on a required five point spectrum [A - Monolingual in the home/primary language; B - Speak mostly the home language and some English; C - Speak the home language and English equally; D - Speak mostly English and some of the home language; and E - Speak only English. "Village English" was eventually added as F.]

> "Without a proper diagnosis of linguistic skills/deficits there can be no effective prescriptive educational program designed to assist students who have English language deficiencies. * * * Without a proper pre-program assessment of the students' language skills (in both languages) a student may easily be placed in an inappropriate program or may receive no program. For example, the fact that a student exhibits some facility in English does not mean he/she is capable of succeeding with subject matter instruction in English.

Based on the finding of presumptive noncompliance with Title VI of presumptive noncompliance with Title VI and Lau, OCR directed AUBSD to submit within 30 days whatever facts or arggments it believed useful to dispel or rebut the finding

of presumptive noncompliance. OCR promised a review and then a determination on AUBSD's compliance status.

The District responded February 17, 1976. It noted that the dissolution of ASOSS presented problems for it because different personnel prepared the ASOSS report and the present AUBSD personnel cannot justify its figures. It offered a new estimate of children affected, based on a study done for "OE" (apparently the U.S. Office of Education.)

OCR also had stated that AUBSD/ASOSS failed accurately and adequately to identify primary or home language or to assess the degree of linguistic function or ability.

AUBSD agreed. It reported several attempts to obtain the information but "neither the resources nor the expertise necessary have been available to do the job." It related "remoteness, climate, transportation and communication problems." It related the existence of "seven major languages and over fifty dialects," some of which "have not been reduced to writing." It noted that eighty of the district's [AUBSD] schools had one or two teachers; that teacher turnover had exceeded 30 percent annually; that only 47 natives had graduated from teacher training programs since 1970 and that only 18 of these had "some" command of a native language, and only 11 are in classrooms where the languages are useful.

AUBSD invited an early determination by OCR on final noncompliance so that plans can be made to respond. AUBSD noted that 21 new districts would be established in the next 60 days, with the districts assuming full responsibilities in their areas in four months.

On March 26, 1976 OCR found AUBSD in noncompliance:

> (1) AUBSD failed to identify and assess the primary or home language of the District's students.
>
> (2) District records demonstarate the failure of current bilingual-bicultural programs provided by the District adequately and effectively to address the linguistic needs of students whose primary or home language is other than English.

The letter then directed AUBSD to submit an educational plan which will indicate that all language groups "where 20 or more students" with a primary or home language other than English will be treated in a manner consistent with Lau remedies.

OCR stated it was not requiring completion of the items in the plan within the 30-day period but rather only that the plan address the identified problems.

At about these times, from September, 1976 on, OCR refused to deal with the individual REAA's as principals, which by then had come into existence and assumed their responsibilities. Rather, it determined to hold DOE responsible for the development and and submission to OCR of a comprehensive education plan for compliance with Lau remedies. See the letter from the Regional Director of OCR to Commissioner Lind of September 14, 1976. Copy enclosed for OCR's reasons for this determination.

In January, 1977 OCR indicated it would initiate an administrative procedure within the Department of Health, Education, and Welfare. In February of 1977, OCR offered to allow REAA school districts to prove that they did not have Lau children, that is, that they did not have twenty children in an individual school who required education in a native Alaskan language. Under this option, three REAA's in Southeastern Alaska as well as the Adak and Whittier-Tatitlek District (Chugach) were dropped from the administrative proceeding.

The hearing in the administrative proceeding was initially set for June, 1977; presently it is scheduled for October 31, 1977.

In May, 1977, the State Board of Education proposed to adopt as a regulation the minimum guidelines proposed in "A Handbook for Bilingual Bicultural Education Programs in Alaska." The "Handbook" is described as a result of negotiations between DOE and OCR, with assistance from the Alaska Native Foundation. (Ihave not included a copy of the Handbook since I assume you have access to one in Anchorage.)

The question of adoption of the Handbook as a regulation will be before the State Board of Education when it meets in mid-October. Eleven REAA superintendents are adid to have asked SBOE not to adopt it as a regulation.

One difficulty between DOE and OCR exists as to the implications of the Handbook. The Handbook addresses the "components of a bilingual education program (Ch. 6); community involvement (Ch. 7); language assessment (Ch. 8); instructional programs (Ch. 9); materials development (Ch. 10); instructional personnel, recruitment and training (Ch. 11); program management (Ch. 12); and evaluation design (Ch. 13). At the prenene time, DOE is proposing that the Handbook be viewed

as a minimum guideline but it also is willing to consider substitutions in programs so long as the essentials are achieved. See "Use of This Handbook", page 23 - 24. DOE is maintaining this proposal because of opposition from REAAs; as noted earlier, eleven superintendents of REAAs had asked SBOE not to adopt the regulation which adopts the Handbook by reference.

OCR maintains, on the other hand, that if the Handbook is to be acceptable under the Lau remedies, no substantial variations in the Handbook are possible except under Ch. 9 [Instructional Programs] and OCR has asked DOE to change its regulation to make this explicit. OCR does not suggest that any change would create problems, only that it is acceptable and effective as as presently constituted.

III. Present Status of the Agreement.

At the present time, the State Board of Education has a meeting set for mid-October on the Handbook. The administrative hearing is set over until October 31st and may be set over further or possibly cancelled if OCR and the state parties reach agreement on the handbook and its implementation.

OCR has agreed to seek avoidance of any forfeiture of funds otherwise due from DHEW because of the delays arising out of compliance with Lau guidelines.

Resolution of the OCR-DOE difficulties is premised on adoption by SBOE of the Handbook and its implementing regulation of the October meeting in a format acceptable to OCR. Failing that event, OCR apparently intends to return to the administrative proceeding.

Assuming that the Handbook in its final form is acceptable to OCR, DOE has also largely agreed to make proposals regarding foundation funding of bilingual education in each school district in Alaska to the next session of the legislature.

Other more detailed aspects of the agreement are suggested in the document entitled "Further Stipulations". (Copy enclosed) The enclosed represents the latest thinking of OCR and Doe on the subject.

Similarly, DOE submitted a Management Plan to OCR on July 5, 1977. DOE considered the document submitted a construct of what OCR wished. Before OCR commented on it, DOE submitted

a revision of the plan. As of the date of this memorandum, OCR has not commented on either Management Plan. (Copies of both are enclosed))

Jim Miles advised me that he has asked personnel within OCR to come to Alaska soon to complete appraisal of the submission and its approval by OCR.

One other document is of significance in these matters: the memorandum of agreement. The document represents the final settlement of the case. Because certain issues may remain technically open, it seems that there is no document which can be described as the Memorandum of Agreement, and no such document is enclosed.

Accordingly, it appears that settlement of the case may be close depending on the action of the State Board of Education during October. However, regardless of its action, it appears that the number of REAAs affected is diminishing:

> Five REAAs are presently in compliance and excluded from further participation in the hearing:
>
> > Annette, Chatham, Chugach, Adak, Southeast Islands.
>
> Three more are expected to sign a consent decree dropping out of the case:
>
> > Delta/Greely, Iditarod, and Yukon Flats.
>
> I understand that the Bering Straits Board has recently endorsed the Handbook and may logically therefore be in a position to withdraw from the proceedings.

For the remaining regional school districts, the focus of the action appears to be with the State Board of Education at its October meeting.

RAB:jpd/hjd