In the

Supreme Court of the United States

KINNEY KINMON LAU, a MINOR BY AND THROUGH MRS. KAM WAI LAU, HIS GUARDIAN AD LITEM, ET AL.,

Petitioner,

vs

ALAN H. NICHOLS, ET AL.,

Respondents.

NO. 72-6520

Washington, D. C.
December 10, 1973

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v.	No. 72-6520
ALAN H. NICHOLS, ET AL., Respondents.	

Washington, D. C.
Monday, December 10, 1973

The above-entitled matter came on for argument at 11:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD H. STEINMAN, ESQ., Washington, D. C.; for the Petitioners.

J. STANLEY POTTINGER, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C.; for the United States, as amicus curiae, supporting petitioners.

THOMAS M. O'CONNOR, ESQ., City Attorney, San Francisco, California; for the Respondents.

C O N T E N T S

* * *

Afternoon session begins at page 40.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-6520, Lau, Et al. v. Nichols.

Mr. Steinman, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD H. STEINMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. STEINMAN: Thank you. Mr. Chief Justice, and may it please the Court:

I wish to devote the first 20 minutes of my opening argument to the constitutional issued raised in this case. I would then be followed by Mr. J. Stanley Pottinger, Assistant Attorney General of the United States, who will address himself to the statutory violations of the Civil Rights Act of 1964.

The issue in this case concerns the discrimination suffered by nearly 1,800 non-English speaking Chinese students in San Francisco in the provision of educational benefits and opportunities.

Both the Federal District Court and the Ninth Circuit Court of Appeals below were satisfied that so long as the San Francisco school system provides the same instruction, the same material, and the same teachers to all students, the equal protection clause is satisfied. Regardless of the fact that these students, since they do not understand English, and since they are sitting in classes where English is the instruction -- was the language of instruction, regardless of the fact that these

students cannot learn.

Q Mr. Steinman, might I interrupt you. Actually, are these 1,800 more or less students -- they are referred to in your brief and I think in the record as Chinese students. They are not Chinese Americans, they are Chinese?

MR. STEINMAN: They are both Chinese Americans, they are both native born and they are also foreign born, Your Honor. The school system, in answer to interrogatories, said that it does not keep records on the origin of birth or on citizenship of the students. But of the seven named petitioners before this Court, five of them are native born American citizens.

Q They are?

MR. STEINMAN: Yes, five of them, David Leong, David Sun, Judy Sun, Karen Yee and Joan Yee.

Q There has been a good deal of recent immigration into the United States, and particularly into the City of San Francisco, is there not, from Taiwan and --

MR. STEINMAN: Oh, definitely. I think it is clear that many members of the 1,800 students that we represent are recent immigrants. I think though that one thing must be pointed out, which was pointed out in the reply brief of petitioners, that the immigration laws were relaxed in the mid-sixties and the new laws went into effect on July 1, 1968. Yet the defendants, in their own survey conducted in November of 1967, seven months before the new immigration laws even went

into effect, admitted that there were close to 2,000 non-English-speaking Chinese students who, as petitioners are before you, effectively pursued an education.

Q And this 1,800 is out of how many Chinese or Chinese American students in the school population of San Francisco?

MR. STEINMAN: The school population of San Francisco, in the record of the case, there are approximately -- one figure is 13,000 from the City Attorney, one figure is 15,000 from the school district. There are also 3,000 Chinese speaking students in San Francisco, of which the petitioners represent approximately 63 percent of those. The petitioners represent those Chinese speaking students, Your Honor, who receive nothing but the regular instruction in English.

In the lower court below, there was another class, group of petitioners who were non-English speaking Chinese students who did receive some special help. Those petitioners are not before this Court.

Q What was that 13,000 or 15,000 figure?

MR. STEINMAN: The total number of Chinese students within the San Francisco school system.

Q So that this group of 1,800 is something more than 10 percent?

MR. STEINMAN: Probably between 10 and 15 percent, depending on which figure you use.

Q I was just curious whether or not native born American citizens in San Francisco grow up not knowing English, or whether this group does and it does embrace primarily recent emigres from Taiwan and elsewhere, and Hong Kong?

MR. STEINMAN: I don't think that -- based on the facts in the case, Your Honor, although the school system does not break it down, as I said, seven months before the immigration laws even went into effect, the school system admitted that there were nearly 2,000 non-English speaking Chinese students who receive nothing. The November '67 survey admitted that there were approximately 2,400 non-English speaking Chinese students within the entire school district, and of those 2,400 nearly 2,000 were of the same type of dilemma confronting the petitioners. They don't speak English, they don't understand English, and yet their entire instructional program is in regular classes where English is the language.

Q Yes, I know the argument, but my query is to why, it was as to why they don't speak English, and I think that may have something to do with this case.

MR.STEINMAN: I think why they don't speak English -- of course, it is not in the record, but I think that this Court can take cognizance of the fact that the Chinese community in San Francisco is what we refer to as a ghetto, it is quite insular. And when the students who are born in this country come to the schools, they do not have facilities in English.

And unfortunately the actions of the school system perpetuate that inability to speak English.

Q Well, in the Chinatown part of San Francisco, is it true that most of the people there don't speak English?

MR. STEINMAN: I don't know the facts --

Q The fact that it is a ghetto doesn't answer that question one way or the other.

MR. STEINMAN: I don't know, I don't think we can speak in terms of most. I think we can speak in terms of the 1,800 students, a vast percentage are native born Americans who have lived their entire lives in San Francisco and have come to the school system speaking no English.

Q You say a vast majority now, these 1,800, are native born?

MR. STEINMAN: Well, again, I cannot address that because it is not in the record. All I can rely on the fact is that in 1967, the school system admitted, even before the immigration laws were changed, that there were 2,000 students in the school system right then who were Chinese speaking who do not speak English. And this was before the immigration laws were even changed. So that is all I can surmise from the record, Your Honor.

Q What is your ultimate complaint, that English should be taught in these schools?

MR. STEINMAN: Well, what we would --

Q Or that the instruction should be in Chinese?

MR. STEINMAN: Oh, no. Our goal is the same announced goal that the school system in the State of California has made. Our goal is that we want these students to be taught English and to understand English so they can have the type of mastery of English which our society requires. The problem now is that they are being taught in a language they do not understand, and we would like the school system to take whatever steps that are reasonable, and this of course is within their province, since they are the experts in this area, to take whatever steps that are reasonable to guarantee that these students are able to benefit from the instruction that they are given.

Q So you would have the same objections if they taught them in Chinese?

MR. STEINMAN: If the school system decided that teaching them in Chinese was the most effective method, that would be a bilingual method, Your Honor. If the school system decided that teaching them in Chinese --

Q You wouldn't complain if they taught them in Chinese?

MR. STEINMAN: So long as they would be able to understand the language of instruction which they are getting throughout the school system.

Q I thought you said you wanted them to learn English so that they could survive in our society?

MR. STEINMAN: Well, under the laws of the State of California, the school system must primarily teach them in English, so the school system would not teach them totally in Chinese. The school system might wish to employ Chinese speaking teachers in a bilingual setting, if that is their choice. Our complaint is not methodology. We are not asking this Court to get involved in pedagogical questions. Our complaint is that right now the school system is utilizing no methods, based on their own admissions, if I can refer the Court to the --

Q Do you know how many other students from the so-called ghetto besides these 1,800 are in the schools? How many total ghetto school children are there?

MR. STEINMAN: Again, the school system has not broken down the place from which the Chinese students come. In response to Mr. Justice Stewart's question, I can just cite you the fact that there are in San Francisco schools at the time this case was brought either 13,000 or 15,000 Chinese students.

Q And you complain only about 1,800 of them who aren't facile in English?

MR. STEINMAN: Well, we are complaining of the 1,800 who are not English speaking Chinese students. I guess the Court -- there are different classes the Court can look at. In our brief, what we have done is we have said that in San Francisco there are approximately 90,000 students who are given

instructions from which they can receive educational benefits and opportunities, whereas there are 1,800 students who are foreclosed from receiving any opportunity. In essence, it is effective exclusion.

Q I never did get your answer to Mr. Justice Stewart on why -- you say the record is just silent on this, as to why -- there may be 5,000 or 10,000 other ghetto Chinese students who, although they come from the ghetto, are perfectly competent to learn English, to understand English. Now, what is the reason about these 1,800? Did you ever answer him?

MR. STEINMAN: Well, I cannot tell you why these 1,800 came to school not knowing English and other Chinese students --

Q Well, do you think you carried your burden of proof, if that isn't in the record?

MR. STEINMAN: Oh, I think we have, because I think we have shown that the school system has admitted that these 1,800 students receive today no educational opportunities. If I may quote the record, at page 56 of the appendix, the school system says these students "must learn English to function in a regular class room."

Q So for whatever reason, for whatever reason a person comes to the school not knowing any English, your position is that he must -- the school has an obligation to take some special steps to make him facile in English?

MR. STEINMAN: Well, the school district, Your Honor, is not passive in this regard. The school district compels these students to come to school, the school district enforces the state requirements that they attend classes.

Q I understand that, but now for whatever -- is it your position, for whatever reason the child comes to school, without knowing English, the school system must take some special steps for teaching him English?

MR. STEINMAN: If two things are satisfied. As in this case, the school system admits that these students are effectively excluded from any educational opportunities and we argue that our case may also be different from the one Your Honor is thinking of because the individuals here are members of an identifiable national origin ethnic group, a group which this Court has traditionally given special classes.

Q But the majority of which children from that group know English.

MR. STEINMAN: That may be so under Fox, but my understanding of the case is that not every member of a suspect class -- if I can use that terminology -- must be discriminated against before this Court will give the special protection.

Q Of course, this takes us to the next obvious question. Suppose there were five Portuguese children who couldn't speak anything but Portuguese.

MR. STEINMAN: Sure.

Q Under your analysis, is the school system obliged to teach them, give them special instruction in English also?

MR. STEINMAN: If Your Honor assumes that the situation concerning the Portuguese children is the same as in this case, where the school system admits that they can receive no possible educational benefits -- using the phrase "effective exclusion" -- then I think the school district would have an obligation to do something.

The issue which we are concerned with, naturally, and the Court is, is what should the relief be. What may be reasonable in San Francisco to do with 1,800 children may not be reasonable in a given community with five Portuguese. One of the problems which that type of question --

Q Why not?

MR. STEINMAN: Well --

Q Isn't the interest of five people just as important as 1,800?

MR. STEINMAN: No, I am speaking to relief, that the teaching of five Portuguese, that it might be the type of relief that they might just be able to use cassettes, that they might just be able to use some type of Berlitz, whereas the teaching of 1,800 --

Q Well, that has nothing to do with the constitutional rights.

MR. STEINMAN: Oh, no. I am saying that if they are effectively excluded, these Portuguese students would have, since they are I would assume members of a national origin -- you know, if you are assuming that they are members of a national origin minority group, as petitioners are, that they would have a right to have the school system do something for them, if the school system is admitting that currently they are effectively excluded.

What the school system does, of course, is something within their own expertise.

Q Well, the something can only be one thing, and that is teach them English.

MR. STEINMAN: But how that is done, there are a myriad of methods which can be employed.

Q Yes.

MR. STEINMAN: One of the problems that has been raised before is that when you speak of five Portuguese children, it seems to raise the spectral, well, they have to have someone in the community who can speak Portuguese. And as the record in this case shows, there are a host of different methods to employ.

What I am saying that may be reasonable, what methods may be reasonable for dealing with five Portuguese children may not be the same thing that San Francisco might do for these 1,800.

Q But you say the constitutional right is the same right?

MR. STEINMAN: Assuming that there is the effective exclusion, which of course is a factual question which has to be dealt with in the case.

Q But if they cannot speak English, there is a constitutional obligation on the government to teach them English, that is your point, isn't it?

MR. STEINMAN: If the government is going to have --

Q Well, just answer yes or no. I don't mean to press you unduly, but that is a yes or a no, isn't it?

MR. STEINMAN: The answer is yes, if we have a system of public education.

Q And then obviously that applies, to pursue Mr. Justice Blackmun's point, to Russians, Israelis, Norwegians, Danes, et cetera. There is no stopping point, is there?

MR. STEINMAN: Well, again, we are assuming that the one Russian student in a given community, his knowledge of English is so little that he receives no educational benefits. I contend, Your Honor, that that is the factual situation that may not be true. In this case, we have the school system admitting that these students are "inevitably doomed to be dropouts and become another unemployable in the ghetto." That appears in the school district publication at pages 103 to 105 of the appendix.

Q Is your position the same as to deaf children, too?

MR. STEINMAN: We are contending that our students, unlike the deaf child, is not permanently handicapped. Our students do not have a handicap. They have the capacity and the ability, like other students, to receive educational opportunities. What they need is a very short-term effort.

Q You are not concerned then with the deaf children?

MR. STEINMAN: I am very much concerned. I don't think that that is this case. Naturally, our students come from a suspect class, whereas I don't believe that children who are deaf are inherently members of a suspect class in the way this Court has framed it -- race, national origin, et cetera. If the deaf child is effectively excluded, then of course you would have the issue of then whether or not that effective exclusion would guarantee him some type of constitutional rights.

I think that our case is different because we don't have children whose -- if you want to use the word -- handicapped, as permanent. They, like other children, have the native ability and capacity to learn.

Q What if the state were to relieve your plaintiffs of their compulsoy obligation to attend school, would that undermine or overcome your constitutional argument?

MR. STEINMAN: That is sort of the question which I

think this Court would have to answer after Rodriguez, whether the Court in Rodriguez framed it as a minimum basic education, adequate education, and whether that is one compared to others, or that would exist if the school system ended tomorrow. I am hoping that this Court would never have to reach an issue like that.

The problem here is one of the equal treatment vis-a-vis students who are getting educational benefit in a compulsory setting.

Q Mr. Steinman, I take it that the Title VI argument was never -- couldn't have been raised in the District Court?

MR. STEINMAN: It was raised in the District Court, Your Honor. I believe that the fifth or sixth clause of action addressed itself to that. The memorandum of the guidelines were issued -- the press release concerning the guidelines came down the day before the lower court made its decision, but naturally all the HEW regulations before that time on which the guidelines were based, regulations going to national origin discrimination under the Civil Rights Act of 1964, had been in existence. The court was made aware of the HEW guidelines on May 25 and issued its decision the next day, so it had it in the record, Your Honor.

Q If Congress had intended to have Title VI apply to this kind of a situation, do you think they would have been

more precise in their statutory language?

MR. STEINMAN: Well, I have addressed the question, I hope this is what Mr. Pottinger will address himself to. I think that the language is precise in the sense that Congress is concerned that in programs receiving federal funds, there will be no basis, there will be no discrimination on the basis of national origin. One of the inherent components of national origin would be language discrimination, and the regulations which came down even before this law suit were brought were issued pursuant to that mandate, and the guidelines which came down the day before the lower court order was issued extend further than that.

I would hope that Mr. Pottinger would answer more fully questions addressed to that, unless Your Honors would wish to pursue it now.

As we have indicated, the overall result in this case is an effective exclusion of petitioners from educational benefits, opportunity to receive educational benefits.

To contrast this with the situation confronting this Court in Rodriguez, in Rodriguez this Court said -- and this is at 93 Supreme Court, pages 1291-1299 -- "The Texas financing system provides at least an adequate program of education for every child in every school district. No charge fairly could be made that the financing system fails to provide each child with an opportunity to acquire basic minimal skills."

That is the very charge that we are making here, and as the record shows the respondents have admitted this. This Court has always been concerned with looking beyond, if you will, surface equality. The Ninth Circuit was satisfied, as was the lower court, that surface equality satisfied the equal protection clause, giving everybody the same thing even though some cannot benefit from it.

But this Court has alwasys shown, in cases even decided before Brown v. Board of Education, in the education area, Sweatt v. Painter, McLaurin v. Oklahoma State Regents, that there is something to education, that education is the essence, if you will, of communication, an interplay of ideas, an ability to discuss.

Mr. Justice Frankfurter, twenty years ago, made I feel a very acute observation in the Dennis v. United States case, in a dissenting opinion, when he said, "There is no greater inequality than the equal treatment of unequals." And I think the Ninth Circuit is ignoring the truth of this observation by failing to recognize that education is not solely a matter of physical presence in a classroom. But although the 1,800 petitioners and all other students in San Francisco do receive the same materials, the pages are blank for these petitioners. The print conveys nothing. And I think this is what the Court was contrasting, if you will, in Rodriguez. At least in Rodriguez the students were provided the minimum amount of

education, that every student was given an opportunity to acquire basic minimal skills.

Once we have this discrimination, the next question I believe the Court must face is how to evaluate it. And since 1886, when this Supreme Court decided the case of Yick Wo v. Hopkins, this Court has historically given close scrutiny and special protection to Chinese individuals like petitioners.

In fact, last term, in Rodriguez, this Court, through Mr. Justice Powell's decision, stated the three indicia of what constitutes a suspect class, it said -- 93 Supreme Court page 1294, and I would just like to repeat them to show you how clearly the petitioners in this case fall within those indicia: "saddled with historical disabilities, relegated to a position of political powerlessness, subjected to a history of purposeful unequal treatment." This Court has always recognized this concerning Chinese individuals.

In fact, in a case orty years after Yick Wo, Yu Cong Eng v. Trinidad, in 1926, a Supreme Court case, the Supreme Court in that case recognized discrimination to Chinese speaking individuals, not just Chinese people.

Moreover, Your Honor, even if this Court would use the more differential, rational relationship tests, respondents have offered no reasons to even satisfy that test. Unfortunately, they have offered no reasons to satisfy any test. And we submit that the discrimination and the absence of any type

of justification for it must lead this Court to find for the petitioners and order the respondents to develop plans within their own expertise which would overcome the deprivations these petitioners suffer and provide them opportunities to learn.

My twenty minutes are up, Your Honor. Mr. Pottinger will now speak.

MR. CHIEF JUSTICE BURGER: Mr. Pottinger?

ORAL ARGUMENT OF J. STANLEY POTTINGER, ESQ.,

ON BEHALF OF PETITIONERS

MR. POTTINGER: Mr. Chief Justice, and may it please the Court:

The State of California, like most states of the Union, has seen fit to compel its students to attend school, to set as one of the educational goals the mastery of the English language, indeed to require a demonstration in this language as a condition for graduation from high school.

Ascribing this critical role to the English language is not, hoever, in our opinion, the issue in contention. The issue is whether in so doing the state, in this case the San Francisco School Board, assumes a correlative obligation to insure that national origin minority children are not effectively excluded from participation in the educational process by virtue of that choice. And we believe that such an obligation does exist.

Now, as mentioned to you, there are two areas of the

law under which this obligation may be shown to exist: The equal protection clause, to which Mr. Steinman has addressed himself, and Title VI of the Civil Rights Act of 1964, to which we wish, the United States, to address itself at the present time.

It can be shown in this case that the conditions for application of Title VI exist. The language itself of Title VI, the three basic protections of Title VI go beyond the Fourteenth Amendment in their coverage. That title provides that no person shall on grounds of color, ract or national origin first be excluded from participation in a program; second, be denied the benefits of a program; or, third, in more equal protection type language, be subjected to discrimination under a program or any activity receiving federal financial assistance.

In other words, Title VI is not coterminous with the Fourteenth Amendment because it was enacted not only pursuant to that amendment but pursuant to the welfare clause enhanced as it is by the necessary and proper clause. And thereby finding that the power of the federal government is the basis for this enactment to condition expenditure of its funds upon reasonable restrictions related to the purpose or purposes for which those grants are made. This is clear in the legislative history of the Act --

Q Mr. Pottinger, this applies only to school districts that participate in the grant program?

MR. POTTINGER: That is correct.

Q And is that rather comprehensive throughout the country or --

MR. POTTINGER: It is, Mr. Justice.

Q That is virtually every school district in one form or another?

MR. POTTINGER: It would reach virtually all public school systems.

Q Well, does it reach all the districts involved in this case?

MR. POTTINGER: It does. There is only one.

The legislative history to Title Vi makes clear that -- even the opponents of the Act conceded, indeed discussed in some colloquy -- the broader basis for the Act, that is broader than the equal protection clause.

Now, San Francisco, in this particular case, has bound itself to compliance with Title VI and its regulations and all requirements of the Department of Health, Education and Welfare imposed pursuant to those regulations. Specifically, it has said in a so-called 441 assurance of compliance that it hereby agrees that it will comply with Title VI of the Civil Rights Act and all requirements imposed by or pursuant to the regulation of the Department of HEW, to the end that no person shall be denied the benefits of that Act.

Q Doesn't the HEW itself have a sanction if it

finds non-compliance with the Act, with Title VI, i.e., cutting off the funds?

MR. POTTINGER: Yes, Mr. Justice, it does. In this particular case, it was not invoked because in fact this case is in court and HEW under its own regulations has the administrative discretion to allow the case to go forward toward enforcement through the federal courts rather than by a duplicative administrative process. Nevertheless, the provisions of Title VI under the regulations would apply equally, whether the forum is the Federal District Court or HEW.

Q Didn't this Court suggest that that was the remedy, in think in Rosado v. Wyman or one of the New York cases, that when states are not complying with conditions of grants that the remedy was to cut off the grants, and that the District Court had an alternative remedy or a duty indeed to stop the expenditure of federal money?

MR. POTTINGER: Yes, Mr. Chief Justice, that is correct. That could have been done in this case had the District Court so found its duty to be such under Title VI. Of course, it did not do so because it did not in fact, we believe, give reasonable consideration to Title VI.

The regulations of Title VI make even more specific the obligation of school boards not to provide any service or other benefit in such a way that is different from that provided to other groups of children, to restrict an individual in

a way that would restrict his enjoyment of an advantage or privilege or to deny an individual an opportunity to participate. And, of course, as this Court has recognized in such cases as the Public Utilities Commission of California v. United States, regulations so issued have the force of law.

Now, in addition to that, however, in interpreting both the basic protections of Title VI and the regulations, HEW has indeed gone further. It has construed the meaning of Title VI in a national origin discrimination memorandum relevant to this case by stating that 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 school district must take affirmative steps to rectify the language deficiency.

Again, as this Court has held in such cases as Trafficante v. Metropolitan Life Insurance, or Griggs v. Duke Power, or Udall v. Tallman, where a consistent administrative construction of the Act by HEW, like the former regulations of the Act are shown, that consistent construction is entitled to great weight. In fact, HEW for a number of years now has sought to implement Title VI by this consistent known official policy in 71 school districts which have been notified of violations of Title VI, or reviewed for violations, 34 of which have been notified of non-compliance, 30 of which have been reviewed pursuant to another statute which refers to the

national origin minority memorandum and the like. There is, in other words, consistent practice in known contours of what this policy and practice would lead to.

And may I say at this moment that we in the United States also appreciate the specter of a chaotic policy that might flow from a ruling which would require a massive effort on behalf of virtually every child who could show in any sense an ethnic heritage. We are not contending, as Mr. Steinman has pointed out, (a) that the law would require such chaos or be -- in this particular case, it would be necessary to go beyond the class of students who are effectively excluded --

Q Mr. Pottinger, would you relate that concretely to me to the colloquy we had with your associate on Russians, Portuguese, Danes, Israelis, et cetera?

MR. POTTINGER: Yes, Mr. Chief Justice, I would be pleased to. I think that there are three points that are crucial to understanding that specter. The first is that any child on account of national origin who may suffer discrimination is indeed protected under Title VI as well, we believe, as under the equal protection clause.

The actual remedy of course would be something that would determine whether a specter truly exists or not, or whether chaos would exist. But the right is protected.

Second, we believe it is clear from long-standing administrative practice at the Department of Health, Education,

and Welfare that effective implementation of Title VI in this area does not lead to a difficult or burdensome effort on the part of school districts to meet specific needs of virtually every ethnic minority. And the reasons for that are simple. We believe that historically the 19th Century system of assimilation of ethnic minorities, particularly Caucasian minorities in this country, has been one of a melting pot, but historically, as this Honorable Court knows, non-Caucasian minorities in this country have not been able to assimilate in quite the same fashion, there has been an insularity historically in this country, and in this particular case that insularity is even greater where language difficulties or incompatibilities exist.

Indeed, this case does go beyond the Chinese speaking community, it affects the hundreds of thousands of Spanish speaking children in our society who, although their ancestors predate my own and many Caucasians in this country, still do not speak the English language, still are the objects of societal forms of discrimination and still in the context of this case are effectively excluded from any participation in the educational process.

Q Are you suggesting that Spanish speaking people are not Caucasian?

MR. POTTINGER: No. I would like to correct myself in that regard. I would say Western European Caucasian or Western

European whites as the regulations define them.

Q Well, do you think the Spanish aren't Western Europeans?

MR. POTTINGER: The --

Q Or the Portuguese?

MR. POTTINGER: The Portuguese and Spanish clearly are Western European, if my understanding of geography is still correct, Mr. Justice, but I would hasten to add that the -- without going too much into the history of the Mexican-American population in this country to a significant degree, that particular segment of our population has not been treated as Western European Caucasians.

The point I am trying to make is a simple one, and that is that the specter of a morass of differing rules and regulations for virtually all ethnic groups simply has not been the experience that HEW has had in this field. Indeed, it has focused on minorities such as the Spanish speaking and Chinese minorities of this country, and Indian-American minorities who have suffered historically and continue to suffer from this kind of exclusion in ways that other minorities typically do not. They may and, if shown, of course, their rights are protected. But typically we are not faced with that jungle and welter of regulations.

Q Do you think our recent opinion in the Farrah case bears on this one at all in terms of the significance of

your guidelines and their validity?

MR. POTTINGER: Mr. Justice White, I don't believe it is controlling. I believe that we are not looking to the question of alienage versus citizenship in this case.

Q But you're claimining this is a national origin discrimination?

MR. POTTINGER: That is correct.

Q Although nothing reads on national origin in school district policy because they teach -- they certainly admit Chinese, they treat all Chinese the same as whites.

MR. POTTINGER: Mr. Justice White, with all deference to --

Q Except for those that they give special instruction to.

MR. POTTINGER: Well, I believe that it is not the case, that they do treat all Chinese the same.

Q That is your point, I take it?

MR. POTTINGER: That is correct. That is the point. And to underline Mr. Steinman's point in this regard, the class of petitioners here is excluded entirely. It is not a question of balancing careful educational considerations in this case. There is total, effectively total, virtually total exclusion in this particular case, as in the case of so many other school districts which we believe the importance of this decision will affect.

Finally, if I may, I would like to respond to the question Justice Blackmun raised with regard to congressional intent. We believe that the Congress has considered in its language the question which is presented to the court today. It presented this not only in terms of mandating regulations which deal with the issue and specifically the national origin memorandum which flows lawfully from that Act, but it dealt with it in section 602 of the Act in which the United States Congress provided that each federal department -- in this case HEW -- which is empowered to extend federal financial assistance, is authorized, indeed the language is directed to effectuate the provisions of section 601, the basic three protections, consistent with the achievement of the statute which authorizes the expenditure of money. In other words, section 601 protections are to be defined in part by the objectives to be served by the funding program. In this particular case, there are two critically important funding programs which give meaning and content to 601, and that is the bilingual programs under Title VI of the Elementary and Secondary Education Act, and Title I of ESEA which focuses federal money on disadvantaged children. In both cases, the Congress recognized that HEW would be attempting to serve the children who were petitioners in this case with those programs and thereby said specifically that section 602 would incorporate the meaning of those programs into 601, the basic protections of the Act.

Q Mr. Pottinger, I note in your brief you support Mr. Steinman's constitutional argument.

MR. POTTINGER: That is correct, Your Honor.

Q But I gather, from what you told us about the scope of 601, if we agree with this, we don't have to reach the constitutional argument, do we?

MR. POTTINGER: That is possible that that is the case. We do believe that the equal protection clause does support the same relief. It is possible that there are petitioners or classes of petitioners who would not be affected by federal funds and thereby be treated separately.

Q But that is not so here, and ordinarily I think our practice has been -- our policy, rather, is not to reach constitutional questions if a statutory determination favorable to the petitioners can be made.

MR. POTTINGER: Well, I believe the distinctions that do exist here may be addressed by Mr. Steinman, if that is adequate.

Q But if you are right, and we agreed with you on your statutory basis, it would be quite inappropriate to reach the constitutional issue at all, wouldn't it?

MR. POTTINGER: Well, we believe that with regard to the effect this decision will have on other cases similarly situated that would not be correct. In this particular case --

Q Well, why wouldn't we have other cases?

MR. POTTINGER: Well, that is distinctly possible. I would say that the effect of this decision in the court below, where a 14th Amendment decision has been made adverse to our position adversely affecting the Department of HEW and perhaps other school districts in their ability to deal with the problems that are presented in this case, and to that extent --

Q Well, I thought all courts were obliged to deal with statutory issues before constitutional issues, including the Ninth Circuit?

MR. POTTINGER: Well, I believe that is the case. Regrettably the Ninth Circuit chose not to deal with Title VI in any reasoned way.

Q But is it clear that the Title VI remedy is broad enough to reach all the people who are now before the Court?

MR. POTTINGER: Yes, it is correct that that would happen. By the same token, I would like to emphasize that a decision based on the 14th Amendment now stands in the Ninth Circuit, and we would hope that this Court would deal with that because it is so fundamentally in error in our position, and because of that error it is likely to affect additional cases such as one recently --

Q I suggest the technique is simply to decide the statutory issue and say therefore it is not necessary for us or any other court to have reached the constitutional question.

Q Well, of course, the Ninth Circuit had no choice, did it? It reached the statutory issue and decided it against the plaintiffs, and then the plaintiffs say, well, even if you decide the statutory issue against us, we have got a constitutional issue. The Ninth Circuit had no choice in doing what it did. You have given its line of reasoning.

MR. POTTINGER: That is correct, Mr. Justice Rehnquist. However, by attempting to dispose of the Title VI argument in virtually a single sentence on the basis of a 14th Amendment argument was clear error.

Q Conceivably, it states -- perhaps it is remote, but it is conceivable -- that a state might say if those are the burdens on Title VI grants, we will reject all these grants and run our school system without federal aid, and then that case would present the pure constitutional question, would it not?

MR. POTTINGER: That is correct, Mr. Chief Justice. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pottinger.

Mr. O'Connor?

ORAL ARGUMENT OF THOMAS M. O'CONNOR, ESQ.,

ON BEHALF OF RESPONDENTS

MR. O'CONNOR: Mr. Chief Justice, and may it please the Court:

I am here representing the San Francisco School District, and it is our position, of course, that we don't

depreciate or challenge any particular educational aids which a school district provides, including the one to provide special instruction in English, for non-speaking English students. In fact, contrary to statements that have been made, the San Francisco School District, which operates all the elementary junior high schools and high schools in San Francisco, has for several years been committed to a policy of providing this special language instruction not only to Chinese students but to Spanish children as well, and have now started a Japanese non-speaking English program in San Francisco.

And in the years 1966-67 the program for the Chinese children was started. Commencing in 1967-68, the special instruction in English program was started for Spanish speaking children. And commencing in 1971-72, a separate special instruction in English program was commenced for Filipino children, which program had been part of the Spanish speaking program up to this point and, as I mentioned, a special program for Japanese speaking children was started this year.

The expenditures on this program rose to $2.37 million in 1972-73. For the Chinese program, $1,196,550 was spent during that fiscal year. For the Spanish program, $956,000, and for the Filipino program, $222,000.

Q If all of this is true, what is this case about then?

MR. O'CONNOR: This case I think is a case which says

that the School Board in San Francisco must supply special instruction in English to all students who may require it.

Q Well, you have told us that you provide it for Japanes, Filipinos, Chicanos, and Chinese. And it is the Chinese who are involved here. What is it, just that your program for the Chinese is not big enough, is that what the case is about?

MR. O'CONNOR: These are my preliminary statements to show the disposition of San Francisco as far as an attitude toward instructing its children who do not speak the language.

Q Right, and you told us that the practice and policy is to teach English to these people, and that prompted my inquiry as to if that is true, what is this case of controversy?

MR. O'CONNOR: Our contention is that, contrary to what the plaintiffs in this case stated, they are the group who has not been reached as far as programs are concerned, and that San Francisco, under the equal protection clause, must cover every child with a non-English speaking problem. It is our contention, of course, that under the equal protection clause this is not so, that the school district has not the constitutional duty to provide such instruction.

Q But if you are doing it, as I thought I had understood you telling us, that you are, then nobody needs to decide whether or not it is your constitutional duty.

MR. O'CONNOR: I didn't mean to say that we were

covering the program entirely. I was saying that the attitude and the direction and the practice of San Francisco was to afford as much of this type of program as it can.

Q Well, let's come down to the 1,800. Are they all covered or not?

MR. O'CONNOR: Well, in 1970, when this case was decided, there were -- under a stipulation of facts, and it was not a stipulation that the children, as stated, were doomed, they did not get education. The stipulation was that 1,800 needed special instruction in the English language, Chinese children.

Q And weren't getting it?

MR. O'CONNOR: There were 2,856 students in the school district who were non-English speaking Chinese children, and of that number 1,800 received no special instruction.

Q All right.

MR. O'CONNOR: The remaining 1,066 did receive special instruction in Chinese in three programs. One was the Chinese Center program, one was the Bilingual program which was funded by the federal government, and the third was the ESL program, English as a Second Language program, which the rest of the children did get.

And the California Bilingual Education Act of 1972 called upon the districts in California to specify the children in their district which had limited English speaking ability,

and also to make a list of those children who had no English speaking ability. And pursuant to that census which was taken by the classroom teachers in San Francisco in April of this year, the extent of the problem and the numbers of children who do not speak English or who have a limited speaking English ability at the present time in April of this year are as follows:

There are 9,000 children who have either limited English speaking or no English speaking ability. Non-English speaking, 1,180. Limited English speaking, 7,904. And while we deal only with the Chinese children in this case, I think the Court would be interested in the statistics as far as the other groups are concerned. The Spanish total, both of non-speaking and limited speaking, 2,980. The Filipino total, including both, 1,395. The Japanese total, 202. The Somoan total, 179.

Q And Chinese, what was that?

MR. O'CONNOR: I haven't gotten to the Chinese yet.

Q Oh, sorry.

MR. O'CONNOR: Others, not including the Chinese, 747. The Chinese census report gives a total of 3,457. Non-English speaking, 436. And they broke it down into schools. Of the 436, there were 232 in the elementary school, 138 in the junior high, and 66 in the senior high, non-English speaking ability, 1,768.

Q Now, where is this in the appendix?

MR. O'CONNOR: This is not in the appendix, Mr. Chief Justice.

Q Where would the Court find it if they wanted to go about it?

MR. O'CONNOR: This is compiled in the --

Q Is it in the published report?

MR. O'CONNOR: -- in the statistics of the school board. I would be very happy, if I may, to supply a copy of the statistics as a part of the record.

Q If you consider it important, if you want us to think about it, then we should have it. Of course, you could give it to your friend. He indicated that there was an inability to give us these figures.

MR. O'CONNOR: Well, I have supplied, I believe, both to Mr. Pottinger and Mr. Steinman, this report.

And the Chinese program today shows 2,012 enrolled. Now, I have presented these statistics --

Q How many Chinese are there in San Francisco who do not speak the English language and are in public school age groups?

MR. O'CONNOR: There are 13,037 Chinese children in the schools. There are -- the difference between 3, 457 and 2,012 that do not speak the language and do not have special instruction in English.

Q Isn't that what this case is all about?

MR. O'CONNOR: Yes.

Q Is that true?

MR. O'CONNOR: Yes.

Q Well, why are they not getting it?

MR. O'CONNOR: I think primarily the main answer is that San Francisco would attempt to cover all if it had the resources with which to do it. That is the inclination of the Board of Education. However, they have not moved up on the complete coverage of all these children because of the other requirements of the budget. I think that is the answer, in simple form.

Q Any other answer, other than lack of money?

MR. O'CONNOR: Of course, if required under the Constitution to do so, they would, but there is --

Q You don't think the Constitution requires it?

MR. O'CONNOR: That is my point. I do not. I think that this is one of the great purposes of the country education, but as stated in the decision of this Court in the Rodriquez case, it is not a fundamental right, it is not a fundamental constitutional right, so that the great aim and problem and work of school districts in states in the educational field, while one of the most important, is not one that unless every facet of the problem is covered is one where a person can come into court and state "I am not covered."

Q Do you think that you may possibly be running

into some equal protection problems if you give some Chinese, non-English speaking Chinese training in English and do not give it to others when they are, except for that difference, exactly the same, part of a category, an identifiable group? They can't speak English, they are of Chinese origin. Perhaps you can address yourself to that right after lunch.

[Whereupon, at 12:00 o'clock noon, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. O'Connor, you may resume.

MR. O'CONNOR: Mr. Chief Justice, and may it please the Court:

I believe your question, Mr. Chief Justice, was what is the classification between the Chinese students who do receive special English education and those who do not. The classification in this case, if the Court please, is something that the original petitioners have made. It is our position that, as a constitutional matter, under the equal protection clause, there is no constitutional duty to supply any of the non-English Chinese students these special courses in the English language.

Q But my question was, if you give it to some, then does that raise equal protection problems for giving it to all? Suppose, for example, that you gave automobile licenses to one group but denied it to the others and they are, except for that, alike?

MR. O'CONNOR: As far as education is concerned, these are educational policy questions, when they don't arise --

Q Well, is there a policy with reference -- is there a policy that explains why several hundred of them get it and several hundred don't get it, or is it just the accident of the shortage of funds in the budget?

MR. O'CONNOR: Well, it is just a combination of things. That is one of the factors. I will avert to what has been talked about, the immigration problem in San Francisco. It is the increasing number of non-English Chinese speaking students that are coming in, it is the --

Q How do they pick the ones that are going to get it distinguished from those who are not going to get it?

MR. O'CONNOR: There is a certain limit to the number and I have been advised that they are taken into the Chinese Center to determine their ability. But because there aren't enough teachers and enough classes, it is really by waiting lists.

Q Well, is there anything in this record that shows how many teachers in the San Francisco system speak both English and Chinese?

MR. O'CONNOR: I do not believe so, Mr. Chief Justice.

Q Well, are you suggesting a shortage of teachers? I get some intimations of that, a shortage of qualified people to teach?

MR. O'CONNOR: Well, that is part of the problem, of course, especially with the Chinese language, to get qualified teachers. But, of course, again, with unlimited resources, that is a problem that could be surmounted. I say it is partly a question of resources of the school district. And in California, and in San Francisco in particular, the school

district is operating to the limit of its budget, so it would mean a reallocation of items to fully staff this program. And of course, I might add that this is one of the competing special educational features which children with other handicaps require attention of the school board as well.

It has been mentioned that the Chinese are a suspect classification and there has been a long history of discrimination against the Chinese. In this connection, I would like to briefly revert to or speak about the decision in Guey Heung Lee v. David Johnson, in which Mr. Justice Douglas denied the application for a stay after a denial by the District Court and the Circuit Court and the Court of Appeals in this case. I want to state that this was not a petition by the School District of San Francisco. It was a petition by some Chinese parents who did not wish to have their children moved from the schools in Chinatown to the schools that were provided for them under the integration order in the case that the city and county school district was involved in. That is Johnson v. San Francisco Board of Education.

Q As I recall, San Francisco did have a history of a de jury segregated school system, didn't it?

MR. O'CONNOR: That is correct, Mr. Justice Douglas, and that is what I wanted to talk about. You mentioned in your decision, and correctly, properly, and rightly so, that under the education code of California there was a provision, not

repealed until 1947, that there could be provided for Chinese, Japanese and children of Mongolian origin separate schools, and if separate schools were provided these children could not attend other schools.

Now, I can speak from the experience now of fifty years, and research confirms it, that in San Francisco there has not been a separate school under this statute as far as any children of San Francisco are concerned, including Chinese children. And it is a fact that the Chinese, like the Irish and the Italians, who first settled around the Chinatown area, when they fanned out over the city to the various neighborhoods and went to the neighborhood schools, the Chinese children did so as well. And I ran across, which I think the Court might be interested in, a recent book called "Long Time Californian," a documentary study of an American Chinatown by Victor and Barry Nee, and an account of an interview with Leland Chin, who is now age 73, and he is on the staff of the Young China Daily. He stated that he left San Francisco after the fire and earthquake and went up to a small town on the Sacramento River and when his father found that he couldn't attend a school there he returned to San Francisco and went to Lowell High School. He says, "Well, in 1910, my parents sent me back to San Francisco because Orientals weren't allowed in the schools down there. I was going to Lowell High School and there I met some young Chinese students." And Lowell High School, we have

mentioned in our brief, was then and is now the academic high school in San Francisco where, as we mention in our brief, the Chinese have a greater percentage in that school than their city-wide percentages for high school students as the academic school of San Francisco, and in 1910 Mr. Chin went there. That documents, of coures, what I know to be the fact that the Chinese, as with others, moved out into the schools of San Francisco and to --

Q What about the petitioners in this case?

MR. O'CONNOR: They are children who attend the schools in Chinatown and the surrounding area as well as other districts of the city. There is no --

Q And who aren't taught anything?

MR. O'CONNOR: What?

Q And who aren't taught anything, is that right?

MR. O'CONNOR: Well, they aren't taught by special instruction in English.

Q Well, they are only given English books? Do you say they are being taught?

MR. O'CONNOR: Yes, Mr. Justice.

Q How are non-English speaking Chinese taught by non-Chinese teaching English persons? How can you teach that way?

MR. O'CONNOR: I revert I think to the statement in Meyer v. Nebraska, which of course was the leading case on the

question of English in the schools and where Mr. Justice Holmes dissented from the opinion, but stated that the best thing for young children -- and I think he mentioned the Poles and Russians who have no English in their homes, was to come to the schools and not be taught in German primarily, so that --

Q Well, are you teaching these children Chinese?

MR. O'CONNOR: So that --

Q Are you teaching these children Chinese?

MR. O'CONNOR: They are being taught, those that aren't covered --

Q Well, Meyer's was teaching German. Well, is this teaching Chinese? If it doesn't, Meyer's doesn't have anything to do with it.

MR. O'CONNOR: Well, he stated, and I want to follow it up, that the best thing for a child who can't speak the language to do without any special instruction is to come to an English speaking school. And I think common experience, as well as some of the authorities, although bilingual or special courses are better, nevertheless by the immersion process a child learns to speak, and especially a child because it is easier, the authorities say, for a child to learn language by total immersion than other individuals.

Q Did these children get any training in the English language that can be taught to a Chinese speaking person? The answer is no, isn't it?

MR. O'CONNOR: No, no formal training. But I can't concur in that entirely. I think any child who comes to a school -- and I want to mention that --

Q Do you think if I went to a Chinese school in Peking I would learn something?

MR. O'CONNOR: I think you would.

Q You do?

MR. O'CONNOR: Yes.

Q Learn what?

MR. O'CONNOR: I think you would learn anywhere, but I think that being immersed in that atmosphere, where nothing is spoken but the language around you, from a child's viewpoint, the authorities tell us --

Q Well, why do you waste money on the other schools?

MR. O'CONNOR: You mean to teach?

Q Yes.

MR. O'CONNOR: I don't come here and say that this is the best way. I think it is the least effective way, and it would be better if San Francisco could cover all of its children with --

Q Would you say it is a little bit effective?

MR. O'CONNOR: I say it is, yes, effective, not to the extent that --

Q And why are these children singled out for that little bit of effective treatment?

MR. O'CONNOR: Because the program as yet hasn't covered them, but --

Q Well, when it reaches the point that it will cover them, they will be out of school, won't they?

MR. O'CONNOR: They find that children on the waiting list -- and I have been told this -- go back to the school where there is no special language education, and by the time they get back to number one on the waiting list, they no longer have a need for this special education.

Q Are you violating the guidelines put out by the federal government?

MR. O'CONNOR: I believe not.

Q Why not?

MR. O'CONNOR: Title VI of the Civil Rights Act speaks of discrimination on the basis of race, minority national origin. No Chinese speaking child is discriminated against in any of these courses. He has the same education as others. He may not be able to benefit by it as much, but it is not up to the HEW to determine what effect this has. I think that it is not --

Q Oh, you think HEW doesn't have that authority?

MR. O'CONNOR: I think it has the authority, but until it is declared by this Court to be a deprivation of constitutional rights or --

Q I didn't say constitutional rights, Mr. O'Connor,

I said the guidelines put out by HEW. Do you violate those or not?

MR. O'CONNOR: I believe not. The guidelines adopted in 1970 talks for effective programs for non-English speaking children, and in the grants which San Francisco has, for instance, under Title VII of the education act for a bilingual program, this is not only a program which HEW gives the funds for to teach this particular -- or to help solve this particular problem, but requires that on the basis of Title VI that there be no discrimination, and in that program children of other national origins are included. The other program, as mentioned in the --

Q Well, you don't agree with the Assistant Attorney General at all then, do you?

MR. O'CONNOR: I do not. The other program under --

Q Assuming he is right, then can we decide this case on that point without reaching the constitutional point?

MR. O'CONNOR: Yes, except that I think this record shows that --

Q Well, could we? Could we?

MR. O'CONNOR: Yes. Yes, Mr. Justice.

Q Do you think if the statute itself or the regulations -- let's assume the statute itself expressly said that in order to qualify for grants the states must undertake training in English language for those who need it, such as the

Chinese in San Francisco, let's assume that it just said that expressly, would you have any doubt about the congressional power to enact that statute?

MR. O'CONNOR: No, I would not, and that would be part of the statute, a direct statement and --

Q Would you think that is -- what constitutional power would you consider that to be an exercise of, the spending power to condition a grant of money on rational conditions?

MR. O'CONNOR: Yes, under the --

Q But it doesn't have to be valid under the 14th Amendment, I take it?

MR. O'CONNOR: No, I would say not.

Q Well, now, if Congress had said that, and you would think that it constitutionally could, would San Francisco be bound by it in the sense -- is San Francisco participating in this grant program so that you would be bound by the statute?

MR. O'CONNOR: If there was a statute specifically directing this, yes, I would say so.

Q And if we construed the statute or construed the regs or guidelines to the same effect, then I suppose we would be -- necessarily we would decide against you?

MR. O'CONNOR: Yes, except I think there is a further point, whether San Francisco, in connection with any grant of monies in education, has not included Chinese children.

Q Yes.

MR. O'CONNOR: And even under the Title VI grant for compensatory education for children, the appendix shows that the Commodore Stockton School in Chinatown was included with a special program for the children in that school as part of the poverty area covered by that program. So, yes, except under the circumstances, I don't think even under that construction San Francisco has violated any guideline.

Q But, Mr. O'Connor, I gather if Title VI does reach this kind of program, the funding would be adequate, would it not, to include these plaintiffs as well as those presently being taught in those programs?

MR. O'CONNOR: No, it would not.

Q It would not?

MR. O'CONNOR: In fact, in San Francisco itself, under its own funds in the last fiscal year, supplies over 50 percent of the funds needed for these programs.

Q But if the conditions were that all of these plaintiffs, as well as the other Chinese children, had to be given the benefit of this kind of teaching under Title VI, San Francisco would have to match whatever the federal grant was, would it not?

MR. O'CONNOR: Right.

Q If it didn't, the federal grant I gather could be withdrawn in its entirety. Is that right?

MR. O'CONNOR: I believe that is correct.

Q Mr. O'Connor, let me put this hypothetical question to you and maybe shed some light for me. Let's start with the assumption that there is no constitutional obligation on the part of the state to furnish any public schools at all, assume that for the moment. But then the state and the local government does undertake to furnish schools, but they have enough money to take care of only 18,000 children in the primary schools, and there are 20,000, and you just put the other 2,000 on the waiting list and say, well, we will work you in when we get enough money in the budget. Do you think that would give you any equal protection problems?

MR. O'CONNOR: Yes, I do, Mr. Chief Justice. I think under Brown v. Board of Education, that where free public education is supplied, it must be done on an equal basis.

Q Well, then, how do you distinguish that between giving this English language training to a thousand or 1,400 of the Chinese speaking students and not giving it to 400, 500 or 800 who are on the waiting list?

MR. O'CONNOR: I think that this is not part of what may be called minimum basic education.

Q To teach the English language?

MR. O'CONNOR: I think it is -- I am not admitting, Mr. Chief Justice, that the English language is not spoken without the special courses, but supposing that is the case, it is extremely important, one of the most important functions of

the department to teach these pupils, but there are also other competing and, some may say, equally important matters that the school department must cover beyond this minimum education. The deaf were mentioned, the mentally retarded, the disabled. I think those are questions that must be left to the discretion of the administrative authorities on the local level, the state guidance, if it be by state statute, and that the court will not decide between priorities. And I contend that the teaching of English by the special courses is one of these educational priorities. And I think the point that, say, a thousand are left out shows that in San Francisco the school board has demonstrated that it considers this a highly important matter, but that with the thousand left out as of now, they cannot be covered because in the estimation of the school board there are equally important special problems to be covered.

Q Mr. O'Connor, if you lose this case, what will happen, is the city likely to withdraw all special instruction to all Chinese?

MR. O'CONNOR: I cannot answer that, Mr. Justice Blackmun, except to state that as of now the city is covering over 50 percent of the $2.7 million that is now spent on this program.

Q Well, Mr. O'Connor, I notice in Mr. Pottinger's brief that -- footnote 4 on page 12, I think this has connection with Mr. Justice Blackmun's question. It stated that you are

already obligation by contracts to comply with both the regulations and guidelines. You contractually agreed to comply with Title VI and all requirements imposed by HEW and immediately to take any measures necessary to effectuate this agreement, and Mr. Pottinger cites a case, Sumter County School District, for the proposition that that contract is binding and specifically enforcible. Is that so?

MR. O'CONNOR: Yes, no question about it.

Q Well, if that is so, I suppose, so long as that contract is effective, San Francisco is not at liberty to pull out of the program, is it?

MR. O'CONNOR: No, it must abide by all valid regulations.

Q Can you terminate the program at any time, your participation in this?

MR. O'CONNOR: Not under a grant of this sort.

Q You have a grant?

MR. O'CONNOR: Yes.

Q Well, you could withdraw it.

MR. O'CONNOR: We could redraw from it, yes.

Q At the end of the year, at the end of the period.

MR. O'CONNOR: Depending on the terms of the contract.

Q Well, do you know what those terms are under this contract?

MR. O'CONNOR: I haven't specific information, but it is grant terms, I presume.

Q Which would be annual or something?

MR. O'CONNOR: They are annual. And I understand that the funding by the federal government, under Title VII, expired as of the end of this fiscal year, so that there are no more federal funds available under the Title VII bilingual program participation.

The question has been of discrimination and past history of discrimination, and my adverting to the opinion was to admit, of course, that there was education code 3007, but San Francisco has not followed that for fifty years, and also to point out that, as mentioned earlier, it is our view that it is not anything to do with the discrimination in any respect that all of the Chinese children are not covered. It is directly the involvement of the recent immigration of Chinese from -- into the United States. Our briefs document not only the change of the immigration act of 1968 but point out also that, under President Kennedy's program earlier, the refugees from Hong Kong came into San Francisco, and just to illustrate, in the interrogatories, which were answered by the school district in 1970, it said immigrants who arrived in this country between September '68 and September 1969 as children to the schools, those were the interrogatories -- answer, 691, covering only the three schools in the Chinatown area. Immigrants who arrived

in this country between September 1969 and since September 1969 -- answer, at page 57, 538. So there has been a tremendous influx of immigrants and children into the United States in the last years, which has been the cause of this problem, and it has nothing absolutely to do with the historical discrimination against --

Q I take it you disagree with the professor's suggestion that there were as many underprivileged back in '67 as there are now?

MR. O'CONNOR: As many unprivileged?

Q Yes, who were not receiving English instruction. His point I thought made three times was that this is not attributable to the relaxation of the immigration requirements. You disagree with that?

MR. O'CONNOR: Yes, I do.

Q Mr. O'Connor, have there been any demands upon the San Francisco school system to conduct any classes in the Chinese language?

MR. O'CONNOR: Demands on the school department?

Q Yes, by these people or similarly situated people.

MR. O'CONNOR: Back to the Heung case, the main reason, one of the main reasons why the parents in Chinatown didn't wish their children to move from the neighborhood schools -- and, incidentally, the order of the Court has gone into effect and the schools, the three neighborhood schools with the

predominantly Chinese students are now in 13 schools in a much larger area, their main reason was that they would not be -- one of the reasons alleged was they would not be close to the Chinese schools which were operated not by the school department but by the Chinese community. As far as I know, there have never been any demands upon the department itself to teach Chinese, although --

Q Well, I mean to teach classes, teach arithmetic, or whatever, in the Chinese language, is what I am asking about, not to teach the Chinsse language, but to teach school in the Chinese language.

MR. O'CONNOR: The bilingual --

Q Teach arithmetic or geography or social studies, or whatever.

MR. O'CONNOR: The limited bilingual program in San Francisco is designed to teach in Chinese until the child reaches a level where he can progress into the English language. So in that sense, certain subjects are taught by bilingual teachers to Chinese speaking children in Chinese.

Q In the schools located in the Chinatown area of San Francisco, have in the past any classes been taught in Chinese? Now, again, I don't mean teaching the Chinese language, I mean teaching arithmetic in Chinese.

MR. O'CONNOR: Traditionally, the Commodore Stockton and the other two schools in Chinatown have been predominantly

Chinese schools with Chinese students, that is 80 percent, 90 percent.

Q And by Chinese, I expect you mean, if I understood here, actually Americans of Chinese descent?

MR. O'CONNOR: Right.

Q Isn't that what most of them have been?

MR. O'CONNOR: Yes. And once again, I don't have statistics, but I have knowledge of this, where there was such a mingling of the Chinese in that school by teachers who not only spoke Chinese but students who not only spoke English and Chinese that there was in effect a bilingual atmosphere whereby English was learned by those who could not speak it.

Q And is that now disappearing because of the school desegregation orders?

MR. O'CONNOR: I cannot say that myself as a fact, but the 80 and 90 percent concentration in the neighborhood schools in Chinatown has -- is not there any more. It is more like a percentage of 50 percent, whereas in the schools in surrounding area in the zone have from 15 to 20 percent Chinese. So the problem, say, of getting the course in one place rather than having it spread out has been made more difficult.

Q Mr. O'Connor, may I ask you one question. What is your position with respect to the memorandum of HEW of July 10, 1970? That is the memorandum that is addressed specifically to this problem. It is at the top of the page, on page 12

of the SG's brief. It has been alluded to in this argument.

MR. O'CONNOR: My position is that this regulation states that it is under Title VI of the Civil Rights Act of 1964. I believe it is beyond the scope of the authority given in that statute, and that Title VI does not purport to go into programs for teaching those who have language disability, and that school authorities are in no position to know what this regulation means at the time that they obtain the grant, and it is indefinite and beyond the scope -- not the regulation that is indefinite, but it is an indefinite application of the limits of authority which are covered by Title VI.

MR. CHIEF JUSTICE BURGER: I think your time has expire, Mr. O'Connor. Thank you.

Mr. Steinman, one practical problem that may or may not be lurking in this case, I gather that there are at least two, three and perhaps more major Chinese dialects spoken in such form that a person from one area of China can barely communicate with another. What is the obligation of the state, must they have classes in the Cantonese dialect and then in some other dialect?

REBUTAL ARGUMENT OF EDWARD H. STEINMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. STEINMAN: Well, I think that what has been happening, Your Honor, is that the Court is focusing on only one possible method, that would be a bilingual method, where the

teacher speaks Chinese as well as English. In San Francisco today though, the method most commonly employed --

Q Well, which Chinese? Which Chinese dialect, that is what I am asking?

MR. STEINMAN: Well, the problem -- it is a problem which the city has never alluded to. I don't really know the particular dialect. In San Francisco, most of the Chinese speaking students who are receiving help, not included within the 1,800 petitioners, are receiving help in a method called "English As A Second Language," in which the teacher does not speak Chinese, in which the teacher employs special methods--- it is almost like a Berlitz type approach -- the teacher employs special methods.

The point we are raising is that what method to utilize is the decision for the school system. The problem that the 1,800 students face is that today they are receiving nothing, just regular instruction.

In response to Mr. Justice Blackmun's comment about whether or not there is any record concerning this as a problem of recent origin, let me just cite that at page 45 of the appendix, the respondents admitted in November of 1967, seven months before the immigration relaxation came about -- and, again, there is no dispute that the numbers have been increased because of immigration relaxation -- but seven months before the immigration quotas even came into effect, the respondents

admitted that 1,982 non-English Chinese speaking students were in San Francisco public schools needing special instruction, not understanding the language of instruction, and getting nothing.

And my point is that the school system has long known, the record shows as far back as 1949 the school system made statements on this, again it is in the appendix, the school system knows that these students don't know English. The school system admits and knows that they cannot learn English sitting and languishing in regular classrooms. The school system --

Q Sooner or later they will learn to communicate, but not very rapidly.

MR. STEINMAN: That is something which is debatable, Your Honor. The school system has never even said that the students will learn -- to use Mr. O'Connor's words -- by immersion. There is no contention by the school system that if they sit in these classes they will learn. To the contrary --

Q Well, those that are now getting instruction, do they learn English?

MR. STEINMAN: Those getting the special help, yes. We are not disputing what the method those students --

Q Now do those programs succeed?

MR. STEINMAN: I am not an educator. My understanding is that they do succeed. Our point is that we want the school

system to use some method because right now, Mr. Justice White, the school system admits that if no method is employed, these these students "will inevitably be doomed to be dropouts." Now, we contend that --

Q That isn't what your colleague there said a little while ago. He said that it was effective.

MR. STEINMAN: Well, I am citing appendix pages 103 to 104. Mr. O'Connor is, I believe, making statements that are not reflected by the record. The school system has admitted, even before this law suit was brought, that these students cannot learn, that they are "inevitably doomed," that they are frustrated by their inability to understand the regular word. That is a quote that appears at appendix page 101.

Our contention is that this system is totally irrational, that a school system which states that its purpose is to provide educational opportunities, which they said its purpose is to have students develop the mastery of English, provides 1,800 students a program which guarantees that they will not learn this. Mr. O'Connor says today the situation is such that 1,445 students are affected. I am not going to get into that type of issue. If the Court wants further data on the current situation, I will be glad to provide it. My understand is that it is even more.

But even today, the Court concedes -- the respondents concede that there are close to 1,450 students who languish in

classes and do not even get the type of education which the respondents in their publications state as their goal.

Q I notice 4a and 5a of your brief, is this contract, Title VI contract, which apparently dates back to 1965 -- how does the school district get out from under that if it wants to?

MR. STEINMAN: My understanding is that the -- and I just checked with Mr. Pottinger -- that the school system at the end of a given contract year can refuse to, you know, say we don't wish to participate any more. The problem that we face clearly in this case, we are claiming as a statutory violation. The problem that we are facing is that obviously federal funds can be pulled out, as Mr. O'Connor alluded to; obviously, San Francisco can choose not to go into a federal program, and then what happens to these students?

As we have said, we think that the respondents own stated --

Q Well, I gather, at least the breadth of this contract would indicate that you can't get out of the particular program but that you have to get out of all programs, all Title VI programs that are covered by this contract.

MR. STEINMAN: Mr. Pottinger agrees with your interpretation.

Q And San Francisco couldn't just drop this one, it would have to drop all funded programs, wouldn't it?

MR. STEINMAN: That's right. And, as Mr. O'Connor said, he does not know what they would do.

Q Well, practically, how much of -- Title VI programs, that is -- just how much practically is that a problem?

MR. STEINMAN: Well, I cannot --

Q What you are getting at is, you want us to decide the constitutional question. But I am putting to you, why should we if we can decide this on the statute?

MR.STEINMAN: Your Honor, I am just saying that the possible problems in the future which the Court, if it does not wish to address now, it need not.

Q Well, can't we wait until they arise if the statute protects you, covers it?

MR. STEINMAN: If that is the Court's wish, naturally. We are --

Q Well, don't we usually?

MR. STEINMAN: My understanding is that in some cases, especially cases where we have national origin type of problems, race problems, some of the segregation cases, that this Court, when faced with a combined statutory-constitution argument, has chose not to. Naturally, this is something for the Court to decide. We are dealing with a national origin group.

Q Do you remember one of those where we have done that?

MR. STEINMAN: My understanding is in some of the

segregation cases raised in the late sixties involved both complaints under civil rights as well as constitutional.

Q Can you give me an example?

MR. STEINMAN: I cannot give you one.

Q I gather an intimation from what you said that as a practical matter, the State of California or any particular school district could not afford to withdraw totally from federal programs, that is their losses would be far more than their gains even if the result was that they did not need to run any special schools for --

MR. STEINMAN: I would guess that would be true. I think there is one other point that when you are --

Q Do you know offhand what in millions of dollars, how much California is getting under these programs?

MR. STEINMAN: No, I don't know offhand. I know that San Francisco --

Q But it is a very large sum of money?

MR. STEINMAN: Yes, and San Francisco is receiving large sums of money for the programs that it is now operating.

Q Vastly more, I should assume, than the $2 million they are now spending for the second language program?

MR. STEINMAN: Well, the $2 million is for all non-English speaking people in San Francisco, the Chinese as much as --

Q And only half of that --

MR. STEINMAN: For the petitioners, the Chinese speaking people, it is much less. One thing which I think the Court should be aware of is that right now, currently, facing the facts of the record from 1970, the school system in San Francisco is spending an average of $1,300 per child. The figures now is close to $2,000 per child. And for 1,800 students right now this money is being wasted. San Francisco is spending money on these petitioners. We are not denying that. They are spending money to put them in regular classrooms and have a teacher be paid, et cetera. And right now the school system is wasting millions of dollars, and this is one of the responses that we have in that it is not a matter that the school system suddenly is going to have to come up with all this money, that they are now spending monies from which students are receiving no types of benefits.

Mr. Pottinger has given me a figure, Your Honor, that currently I guess this is all Title -- all monies under HEW for San Francisco schools, is $11 million in San Francisco.

Q Mr. Steinman, would your constitutional grievance be met if the classes were conducted for these 1,800 children in Chinese, if they went to a school where they could learn manual training and arithmetic and domestic science and things like that in Chinese?

MR. STEINMAN: If the school system feels, Mr. Justice Stewart, that the most effective way for these children to gain

the mastery of English is to teach them only in Chinese, then I would bow to their decision. The fact of the matter is that there is no program that I know of which immerses the child only in his own language to learn another language. The bi-lingual program uses both languages. The teacher has the facilities in both languages.

Q I am just asking about your constitutional grievance.

MR. STEINMAN: So long as the children would not be effectively excluded from having understanding the instruction given in other courses, my constitutional grievance I think might be settled. Now, if their entire program was going to be in Chinese for twelve years, that is something else, because California says that it could not be under California laws.

Q But we are talking about your constitutional grievance, not California laws.

MR. STEINMAN: If they were just taught Chinese --

Q Just taught in Chinese.

MR. STEINMAN: I would think that they would then possibly have a constitutional grievance if they wished to be taught what other students in California are being taught, that is in the English language which --

Q A good deal of theory, educational theory around sometimes, at least by people who take an extreme position, sometimes couched in terms of the Constitution, that it is

wrong to homogenize everybody, it is wrong to destroy the culture and the traditions of various groups, be they American Indians or Chinese or American Negroes or whoever, that it is incumbent upon the schools, for example, to conduct classes in the vernacular of the so-called ghettos where American Negroes live, rather than in the kind of English that you and I are speaking to each other, hopefully.

MR. STEINMAN: I believe what you are alluding to, sir, is bilingual programs where --

Q No, I am not. I am not.

MR. STEINMAN: Pardon me. I'm sorry.

Q And I wonder if there might not be alternative answers therefore to your constitutional grievance.

MR. STEINMAN: The alternative answers would be within the methods and programs devised by the school system. All we want the school system to do is provide programs which would meet the right now the effective exclusion. If the school system chooses that type of program and it turns out to be effective, then we would not complain. We are not asking this Court to choose one method over another.

Q It might be a little hard to teach Shakespeare or Charles Dickens in Chinese, might it not?

MR. STEINMAN: I think it would be, Your Honor. I think that is what the bilingual program, the English aspect is utilized.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:47 o'clock p.m., the case was submitted.]

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