

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

ELIEZER WILLIAMS, et al.,)
)
 Plaintiffs,)
)
 vs.) No. 312 236
)
STATE OF CALIFORNIA, DELAINE,)
EASTIN, State Superintendent)
of Public Instruction, STATE)
DEPARTMENT OF EDUCATION,)
STATE BOARD OF EDUCATION)
)
 Defendants.)
-----))
STATE OF CALIFORNIA,)
 Cross-Complainant,)
)
 vs.)
)
SAN FRANCISCO UNIFIED SCHOOL)
DISTRICT, et al.,)
)
 Cross-Defendants.)
-----))

DEPOSITION OF HENRY DER
San Francisco, California
Friday, November 9, 2001
Volume II

Reported by:
ASHLEY RESSA
CSR No. 12019
JOB No. 29529

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF SAN FRANCISCO

3
4 ELIEZER WILLIAMS, et al.,)
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6 Plaintiffs,)
7 vs.) No. 312 236
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9 STATE OF CALIFORNIA, DELAINE,) EASTIN, State Superintendent)
10 Of Public Instruction, STATE)
11 DEPARTMENT OF EDUCATION,)
12 STATE BOARD OF EDUCATION,)
13)
14 Defendants.)

15)
16 STATE OF CALIFORNIA,)
17 Cross-Complainant,)

18 vs.)
19 SAN FRANCISCO UNIFIED SCHOOL)
20 DISTRICT, et al.,)
21 Cross-Defendants.)

22)
23 Deposition of HENRY DER, Volume 2,
24 taken on behalf of the Plaintiff,
25 at 425 Market Street, 33rd Floor,
San Francisco, California, beginning
at 10:00 a.m. and ending at
2:35 p.m., on Friday, November 9, 2001,
before ASHLEY RESSA, Certified
Shorthand Reporter No. 12019.

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1 San Francisco, California, Friday, November 9, 2001
2 10:00 a.m. - 2:35 p.m.

3
4 HENRY DER,
5 having been first duly sworn, was examined and
6 testified as follows:

7
8 EXAMINATION

9 BY MR. AFFELDT:

10 Q Good morning, Mr. Der. How are you?

11 A Okay.

12 Q Have you reviewed your last deposition
13 transcript?

14 A No, I didn't.

15 Q So you haven't read it at all?

16 A No.

17 Q How are you feeling this morning?

18 A I'm trying to get over a cold so if I cough,
19 that's the reason why, but other than that I'm fine.

20 Q Are you on any medication that might impair
21 your ability to answer questions truthfully?

22 A No.

23 Q And will your cold impair your ability to
24 answer questions in any way?

25 A I hope not.

1 last time, but you can have that today.

2 MS. KAATZ: I'm there now.

3 MR. AFFELDT: Well, why don't we just proceed
4 and see if there's a problem.

5 The letter identifies his current and former
6 position dealing with education as part of the -- the
7 facts may have changed, but the scope of the letter is
8 the same.

9 MR. HERRON: Except the letter is dated as of
10 July 13th and that letter deals then with his duties as
11 of that date not that may have occurred subsequently.
12 And we've had, you know, what, four intervening months
13 or three and a half intervening months and if you've
14 decided that you want to change the scope of the
15 deposition, we certainly expected a letter, but again
16 I'll let him answer the question.

17 MR. AFFELDT: Well, you know, it's certainly --
18 we are not -- it's not an acceptable position that any
19 facts regarding special education or anything that
20 occurred since the last deposition is somehow out of
21 bounds.

22 MR. HERRON: We are not taking that position.
23 You're asking him about a new topic. Go ahead.

24 THE WITNESS: As stated, administrator at Emery
25 Unified, E-M-E-R-Y. As state administrator at Emery

1 Q Will you let us know if it does?

2 A Yeah.

3 (Mr. Hajela enters the deposition room.)

4 MR. AFFELDT: Good morning, Abe, we're just
5 getting started.

6 Q I think you've changed jobs since our last
7 deposition; is that correct?

8 A That's correct.

9 Q What is your current position now?

10 A I'm currently serving as the state
11 administrator at Emery Unified School District.

12 Q And what are your duties in that position?

13 MR. HERRON: Well, I'm going to object. At
14 this point, it is going beyond the scope of the items
15 that you identified in your July 13 letter as being the
16 subject of the deposition. If you just wanted to recite
17 where he's at right now, I suppose that's fine.

18 You may answer the question.

19 MS. ALTAMIRANO: I'm joining in the objection.
20 Can we get a stipulation that I will be joining you?

21 MR. AFFELDT: We have that continuing
22 stipulation from last time.

23 MS. KAATZ: I think that I'm only on that as to
24 objection to form.

25 MR. AFFELDT: I'm not sure if that's true from

1 Unified School District, I serve on behalf of the state
2 superintendent of public instruction, Delaine Easton,
3 who is the governing board for the school district.

4 On April the 6th, the Emery Board of Education
5 voted to accept a loan from the state, and as such, the
6 state superintendent assumes responsibility for the
7 district.

8 BY MR. AFFELDT:

9 Q And what are your duties in that position?

10 A I have the responsibility to administer all of
11 the affairs of the district, fiscal education and other
12 problematic issues.

13 Q Would it be fair to say that your position is
14 equivalent to that of a superintendent?

15 A No.

16 Q How is it different?

17 A The position of state administrator really is a
18 combination of the state superintendent and the local
19 governing board.

20 Q So your position encompasses the duties of a
21 local governing board which go beyond the duties of
22 merely a local superintendent?

23 A That's correct.

24 Q And with respect to the state superintendent
25 portion of your duties, what are those?

1 A I serve on her behalf because she is by law the
2 governing board.

3 Q Have you had any -- strike that.

4 Last time we talked about special conditions
5 that the Federal Department of Education had negotiated
6 with the State Department of Education for receiving
7 Part B funding for various fiscal years. Do you recall
8 that?

9 MR. HERRON: Did you say federal government?
10 MR. AFFELDT: Yeah.

11 THE WITNESS: Can you specify the year?
12 BY MR. AFFELDT:

13 Q My question just went to -- for any years at
14 all. Do you recall our discussions?

15 A Yes, I do.

16 Q And we -- you testified that special conditions
17 were negotiated for the '99/2000 year and 2000/2001
18 grant year. Do you recall that?

19 A Yes, I do.

20 Q Are there any special conditions that have been
21 put in place for the current fiscal year 2001/2002?

22 MR. HERRON: Objection. Calls for speculation.
23 THE WITNESS: I don't know.

24 BY MR. AFFELDT:

25 Q When did that fiscal year begin?

1 MS. ALTAMIRANO: I'm going to object that it's
2 vague. Which fiscal year are you talking about?

3 MR. AFFELDT: The current fiscal year related
4 to the previous question.

5 THE WITNESS: Is that 2001/2002?
6 BY MR. AFFELDT:

7 Q Yes.

8 A Which fiscal year? Are you talking about the
9 state or federal?

10 Q The grant year that pertains to Part B funding
11 under the IDA.

12 MS. ALTAMIRANO: I'm going to object. The
13 question is still vague. Mr. Der's question was
14 correct. There are two separate fiscal years for
15 federal purposes and for state purposes. So are you
16 asking for the federal fiscal year?

17 MR. AFFELDT: I'm asking for whatever fiscal
18 year attaches to Part B funding under the IDEA.

19 MS. ALTAMIRANO: Thank you.

20 THE WITNESS: Well, you know, generally,
21 I worked on the July to June fiscal year so that would
22 be the state fiscal year. And can you ask -- if we are
23 referring to that, can you then ask your question again.
24 BY MR. AFFELDT:

25 Q Last time you testified that special conditions

1 were put on Part B funding by the federal government for
2 grant years '99/2000 and subsequently 2000/2001 so
3 presumably you had some knowledge as to the time period
4 of the Part B grant year. So I'm asking you what is the
5 Part B -- when does the Part B funding grant year run
6 from?

7 A I believe July 1 to June 30.

8 Q Thank you. And you were still in your former
9 position as deputy superintendent until what time
10 period?

11 A Until August 6th.

12 Q And as of August 6th, had any special
13 conditions been placed on the 2000/2001 Part B funds?

14 MR. HERRON: Objection. Asked and answered.
15 THE WITNESS: Not to my knowledge.

16 BY MR. AFFELDT:

17 Q Are you aware of any special conditions being
18 placed on those funds subsequent to August 6?

19 A No.

20 Q Has there been an agreement with the federal
21 government not to place any additional special
22 conditions on IDEA funding?

23 MS. ALTAMIRANO: Objection. Calls for
24 speculation.

25 MR. HERRON: During this grant year?

1 MR. AFFELDT: Subsequent to the last special
2 conditions.

3 THE WITNESS: I don't know.

4 BY MR. AFFELDT:

5 Q You have no idea one way or another?

6 A No.

7 Q What was the status, according to your
8 understanding, when you left that position as to whether
9 or not the federal government was going to place special
10 conditions on California IDA funds?

11 A As of -- up to August 6th there were
12 preliminary discussions, but I don't know what happened
13 to those discussions.

14 Q What was the status of those preliminary
15 discussions as of August 6th?

16 MR. HERRON: Objection. Asked and answered the
17 question.

18 You may respond again.

19 THE WITNESS: The feds, you know, indicated
20 that they wanted to look at special conditions and that
21 was about as much as I knew at that time.

22 BY MR. AFFELDT:

23 Q When you say they "indicated that they wanted
24 to look at special conditions," does that mean that they
25 had expressed an interest in still pursuing special

1 conditions?
 2 MR. HERRON: Objection. Calls for speculation.
 3 MR. HERRON: Asked and answered.
 4 THE WITNESS: That was my understanding that
 5 they gave me indication.
 6 BY MR. AFFELDT:
 7 Q Were you part of those discussions with the
 8 Federal Department of Education?
 9 A No.
 10 Q Who was, in the department?
 11 MR. HERRON: Objection. Calls for speculation.
 12 THE WITNESS: I believe Alice Parker, who was
 13 the division director for special ed, had preliminary
 14 conversations with the feds.
 15 BY MR. AFFELDT:
 16 Q And is it your testimony that you have no
 17 knowledge as to what the current status of those
 18 conversations regarding special conditions are?
 19 MR. HERRON: Objection. Vague and ambiguous.
 20 THE WITNESS: No.
 21 BY MR. AFFELDT:
 22 Q No, that's not your testimony?
 23 A No, I have no knowledge of what, if any,
 24 special conditions there may be.
 25 Q Have you had any conversations with

1 Q Anyone else?
 2 MR. HERRON: Same objection.
 3 THE WITNESS: I would imagine maybe Alice's
 4 staff would have some knowledge of the special
 5 conditions in the special ed division.
 6 BY MR. AFFELDT:
 7 Q When you were negotiating special conditions
 8 with the Department of Education, which you identified
 9 last time as -- what you testified last time as
 10 participating in almost every discussion. What
 11 percentage of your time was spent on that issue?
 12 MS. ALTAMIRANO: Objection. Could you be
 13 specific as to which issue?
 14 MR. HERRON: Vague and ambiguous. Calls for
 15 speculation. Mischaracterizes prior testimony.
 16 Mr. Der, simply because Mr. Affeldt says that
 17 you testified to something or not, you need not agree
 18 with him or believe that that's the fact. You can rely
 19 on your own recollection as to what you testified to and
 20 did not. Simply focus on the question he's asking you
 21 and respond as best you can.
 22 MR. AFFELDT: Can we have the question
 23 repeated, please.
 24 (Record read as follows:
 25 "Question: When you were

1 Alice Parker regarding whether or not -- regarding
 2 special conditions in any respect since our last
 3 deposition?
 4 A No, I don't recall any conversations with her
 5 about special conditions for the O1/O2 year other than
 6 she had indicated there was some discussions that the
 7 feds were interested.
 8 Q Other than Alice Parker, who else in the
 9 Department of Education, if anyone, would have knowledge
 10 about the current status of the special conditions?
 11 MR. HERRON: Objection to the extent it calls
 12 for speculation.
 13 THE WITNESS: Who else would have knowledge of
 14 it?
 15 BY MR. AFFELDT:
 16 Q Yes.
 17 A Well, I would imagine the state superintendent
 18 should have knowledge and chief deputies would have
 19 knowledge.
 20 Q Which chief deputies?
 21 A Both chief deputies, Scott Hill and
 22 Leslie Fausset.
 23 THE REPORTER: Leslie who?
 24 THE WITNESS: Fausset, F-A-U-S-S-E-T.
 25 BY MR. AFFELDT:

1 negotiating special conditions with the
 2 Department of Education, which you identified
 3 last time as -- what you testified last time
 4 as participating in almost every discussion.
 5 What percentage of your time was spent on that
 6 issue?")
 7 THE WITNESS: I would ask you which year of
 8 '99/2000 or 2000/2001?
 9 BY MR. AFFELDT:
 10 Q Why don't you answer for both years.
 11 MR. HERRON: If you're able to. If you're not,
 12 you can break it up.
 13 THE WITNESS: The question was how much of my
 14 time was spent on special conditions?
 15 MR. HERRON: Percentage.
 16 THE WITNESS: I don't want to guess. I can't
 17 remember, you know, my specific schedule and what else
 18 was going on at the time. So it would be difficult for
 19 me to paint a specific percentage.
 20 BY MR. AFFELDT:
 21 Q Would you say it was a peripheral issue, would
 22 you characterize it as a substantial amount of your
 23 time?
 24 MR. HERRON: Objection. Compound. Vague and
 25 ambiguous.

1 THE WITNESS: It was not a peripheral issue.
 2 It was a substantial issue, but what amount of time
 3 I spent, I really would have to look back on my calendar
 4 and logs as to meetings that we had or telephone
 5 conversations, something like that.
 6 BY MR. AFFELDT:
 7 Q And why is it that, given your characterization
 8 this was not a peripheral issue, why is it that you do
 9 not have knowledge as of August 6th as to whether or not
 10 special conditions were going to be imposed even though
 11 we're already into the current grant year?
 12 MS. ALTAMIRANO: Objection. The question is
 13 argumentative and speculative and it is irrelevant.
 14 MR. HERRON: Asked and answered. It's
 15 harassing as well.
 16 THE WITNESS: When the state superintendent
 17 asked me to assume the responsibility of state
 18 administrator of the Emery Unified School on August the
 19 7th, I no longer held any responsibilities for the
 20 deputy superintendent in the education equity branch.
 21 And as such, I had no authority or responsibility
 22 whatsoever for special education for the Department.
 23 BY MR. AFFELDT:
 24 Q I understand. My question was as of August
 25 6th.

1 So as of that point in time, why didn't you
 2 know what's going on? Given that we're already within
 3 the grant year.
 4 MS. ALTAMIRANO: Same objections.
 5 THE WITNESS: I mean I knew what was going on.
 6 It was Alice Parker, as I best recollected, indicated to
 7 me that there was preliminary discussions between the
 8 feds and her and that was it. And that they were going
 9 to get specific at some future time as to what they
 10 wanted to do.
 11 BY MR. AFFELDT:
 12 Q Was that common practice for the federal
 13 government to negotiate special conditions during the
 14 actual grant year as opposed to prior to it?
 15 A Yes.
 16 Q I'm going to hand you what will be marked as --
 17 with an exhibit number.
 18 (Off the record discussion.)
 19 (Plaintiff's Exhibit 50-A was marked for
 20 identification by the court reporter.)
 21 BY MR. AFFELDT:
 22 Q I'm handing you what has now been marked as
 23 Plaintiff's Exhibit 50.
 24 Just for the record, we stipulated off the
 25 record, if this exhibit number overlaps an already

1 existing Plaintiff's exhibit, we'll make it 50-A and do
 2 so for other exhibits as well.
 3 Let me know when you've had a chance to finish
 4 reviewing this.
 5 A Okay.
 6 MR. HERRON: I object to the use of this
 7 deposition. It's dated 8-1, 2001. It's certainly been
 8 requested -- it's been requested at prior discovery and
 9 has not been produced and it's being used here as a
 10 surprise exhibit. This follows our motion on this exact
 11 issue on Tuesday. It's alarming and incredible to me
 12 that we are facing these kinds of surprise exhibits at
 13 deposition still.
 14 MR. AFFELDT: A motion on this point you lost
 15 and faced --
 16 MR. HERRON: Actually didn't lose.
 17 MR. AFFELDT: -- an unsympathetic judge is not
 18 about to order us to turn over our work product.
 19 MR. HERRON: You know, what, Mr. Affeldt, you
 20 people and your sand bagging is just incredible. I mean
 21 producing 162 declarations, 564 pages of them, many of
 22 them you have had for over a year and a half that were
 23 expressly requested by request 506, 507 and 508 over ten
 24 months ago is outrageous. This is in keeping with
 25 that -- that same conduct and you may characterize it as

1 a lost, but I can guarantee we will be back before the
 2 court with these very same kind of documents because
 3 this conduct has got to end.
 4 BY MR. AFFELDT:
 5 Q Have you had a chance to review the exhibit,
 6 Mr. Der?
 7 A Yes, I have.
 8 Q The document is entitled "Governor Prevents
 9 Expansion of Quality Assurance and Focus Monitoring
 10 Program." And describes the deletion from the 01/02
 11 state budget of certain funds related to the quality
 12 assurance program. Were you familiar with the
 13 governor's deleting those funds from the budget?
 14 MR. HERRON: Objection. Relevance. Assumes
 15 facts not in evidence. Calls for speculation.
 16 THE WITNESS: Generally.
 17 BY MR. AFFELDT:
 18 Q What was your general level of familiarity with
 19 the governor's action?
 20 MR. HERRON: Objection. Asked and answered the
 21 question before.
 22 THE WITNESS: At the time that he signed the
 23 budget, I was in a meeting in Hawaii. And after I came
 24 back, I was informed that he had vetoed some money out
 25 and which is not -- that he had vetoed some money out

1 and at that particular time I was actually, you know,
 2 trying to get caught up with all my work that had
 3 piled -- you know, that had accumulated during the time
 4 I was gone because I was gone for about ten days. End
 5 of July or early -- end of July early August.
 6 BY MR. AFFELDT:
 7 Q What were the 2 point 3 million dollars in
 8 funds to be used for?
 9 MR. HERRON: Objection.
 10 MS. ALTAMIRANO: Go ahead.
 11 MR. HERRON: Vague and ambiguous. Calls for
 12 speculation. The document speaks for itself.
 13 THE WITNESS: Well, this document reiterates
 14 Provision 12 and states what the funds would have been
 15 used for had it not been vetoed.
 16 BY MR. AFFELDT:
 17 Q And I'm asking did you have knowledge about
 18 what these funds were to be used for beyond what's
 19 stated in this document?
 20 A No, other than what's stated here.
 21 Q Who would have that knowledge in the
 22 Department of Education.
 23 MS. ALTAMIRANO: Objection. Calls for
 24 speculation.
 25 THE WITNESS: The special ed staff.

1 BY MR. AFFELDT:
 2 Q Would that include Alice Parker?
 3 A Yes.
 4 Q Anyone else?
 5 MR. HERRON: Objection. Calls for speculation.
 6 THE WITNESS: It's possible that people will
 7 follow the state budget.
 8 BY MR. AFFELDT:
 9 Q I'm sorry, could you repeat your answer.
 10 MR. HERRON: Well, anything is possible. Just
 11 answer with the knowledge that you have.
 12 THE WITNESS: It's possible the people in the
 13 state budget office, our budget office.
 14 BY MR. AFFELDT:
 15 Q That's an office within the Department of
 16 Education?
 17 A Yes.
 18 Q During your -- strike that.
 19 You're still an employee of the State
 20 Department of Education; is that correct?
 21 A No.
 22 Q Who is your current employer?
 23 A I have a contract with the state superintendent
 24 to serve as state administrator.
 25 Q Does that make you an independent contractor?

1 MR. HERRON: Objection. Calls for a legal
 2 conclusion. Irrelevant. Asked and answered.
 3 THE WITNESS: As I stated, I have a contract
 4 with her to carry out my duties.
 5 BY MR. AFFELDT:
 6 Q So who is your current employer?
 7 MR. HERRON: Same objections.
 8 THE WITNESS: Can you define employer?
 9 BY MR. AFFELDT:
 10 Q Well, I'm trying to get your understanding.
 11 You said you're not an employee of the State Department
 12 of Education. Are you an employee of anyone?
 13 MR. HERRON: Objection. Calls for a legal
 14 conclusion. It's irrelevant to the case. He's already
 15 answered the question.
 16 THE WITNESS: The -- you know, I have a
 17 contract with her and Emery Unified School District pays
 18 for that cost of the contract.
 19 BY MR. AFFELDT:
 20 Q Do you consider yourself employed by Emery
 21 Unified?
 22 A No.
 23 Q Do you consider yourself employed by the State
 24 Superintendent of Public Instruction?
 25 MR. HERRON: Same objections. You know, John,

1 I've been doing labor and employment law for ten years
 2 and I couldn't answer your question. You're asking him
 3 to speculate. You're asking him to draw legal
 4 conclusions about something that is not relevant.
 5 You may respond again.
 6 THE WITNESS: I have a contract with her to
 7 carry out the duties of a state administrator.
 8 BY MR. AFFELDT:
 9 Q I understand that. Have you retained the
 10 benefits that you had as a deputy superintendent in your
 11 current position?
 12 A No.
 13 Q Are you provided benefits by Emery Unified?
 14 MR. HERRON: Objection. Relevance. It also
 15 calls for private personal information about this
 16 witness that isn't possibly relevant to the case.
 17 I think you're going to an area where his right to
 18 privacy outweighs your right to know.
 19 BY MR. AFFELDT:
 20 Q You can answer.
 21 MR. HERRON: No, he can't, not unless you are
 22 going to tell us why that's possibly relevant.
 23 MR. AFFELDT: Because your witness is not
 24 telling me who his employer is, I have to ask him
 25 questions that inform me what his current status is with

1 respect to his employment.
 2 MS. ALTAMIRANO: John, why don't you ask him
 3 what his current status is with respect to the
 4 Department of Education? If that's what you want to
 5 know.
 6 MR. AFFELDT: Let's start there.
 7 THE WITNESS: I'm sorry. What?
 8 BY MR. AFFELDT:
 9 Q What is your current status with respect to the
 10 Department of Education?
 11 A I am on leave of absence from my current
 12 position.
 13 Q How long do you expect to be at Emery Unified
 14 in your current position?
 15 MR. HERRON: Calling for speculation.
 16 THE WITNESS: I don't know.
 17 BY MR. AFFELDT:
 18 Q Have any terms been discussed in terms of time
 19 period?
 20 A With whom?
 21 Q With Delaine Easton, since she's the one that's
 22 contracting with you.
 23 A The contract goes to the end of June of 2003.
 24 June of 2003, I believe. I really don't recall
 25 specifically.

1 Q What is your current expectation after the
 2 contract ends?
 3 MS. ALTAMIRANO: Objection. Calls for
 4 speculation.
 5 MR. HERRON: Were you done with the question?
 6 MR. AFFELDT: Uh-huh.
 7 MR. HERRON: Vague and ambiguous.
 8 THE WITNESS: Can you ask your question again?
 9 BY MR. AFFELDT:
 10 Q Sure. After the contract ends, is it your
 11 current expectation that you will return to the
 12 Department of Education when your leave of absence is
 13 over?
 14 A I don't know.
 15 Q You don't have a current expectation, is that
 16 your testimony?
 17 MR. HERRON: He just answered the question.
 18 THE WITNESS: I don't know what will happen
 19 come June 30th, 2003.
 20 BY MR. AFFELDT:
 21 Q It is your current expectation that you will be
 22 in your current position at least until June 30th, 2003?
 23 MR. HERRON: You're asking him to speculate and
 24 I object on that basis. It's vague and ambiguous. It's
 25 not relevant to anything.

1 Go ahead, Mr. Der.
 2 THE WITNESS: I don't know what will happen in
 3 my current position as state administrator.
 4 BY MR. AFFELDT:
 5 Q So you really don't know how long you're going
 6 to be there?
 7 A That's correct.
 8 MR. HAJELA: Can we go off the record for a
 9 second, John?
 10 MR. AFFELDT: Sure.
 11 (Off the record discussion.)
 12 BY MR. AFFELDT:
 13 Q During your tenure with the Department of
 14 Education, are you aware of any other occasions on which
 15 Governor Davis had vetoed funding for the Department of
 16 Education?
 17 MS. ALTAMIRANO: Objection. Vague and
 18 ambiguous. Calls for speculation.
 19 THE WITNESS: I can't answer that question.
 20 BY MR. AFFELDT:
 21 Q Why not?
 22 A Because the Department is very large and we
 23 have many different programs for which I have no
 24 responsibility. I really don't know or can recall
 25 whatever vetoes, if any, that are made.

1 Q Well, that was my question. I understand it's
 2 a big department, but do you recall sitting here today
 3 other occasions on which the governor has used his line
 4 item veto authority to delete funding for the Department
 5 of Education?
 6 MR. HERRON: Objection. Vague and ambiguous.
 7 Calls for speculation. Calls for a legal conclusion.
 8 Assumes facts not in evidence.
 9 You may respond.
 10 THE WITNESS: I -- honestly I cannot recall
 11 what veto that he's made to the Department.
 12 BY MR. AFFELDT:
 13 Q Based on your knowledge and experience in your
 14 various positions, can you tell us whether you think
 15 there's a teacher shortage for special education
 16 students in California?
 17 MR. HERRON: Objection. Vague and ambiguous.
 18 Calls for speculation. Calls for an expert witness
 19 opinion, which on this particular topic this individual
 20 is not able to render.
 21 MS. ALTAMIRANO: I object to relevance
 22 specifically on the part of this lawsuit.
 23 MR. AFFELDT: What was that last objection?
 24 MS. ALTAMIRANO: Objection that you're asking
 25 questions about special education which is not part of

1 this lawsuit.
 2 MR. HERRON: We've understood it until today.
 3 MS. ALTAMIRANO: If there's a difference, can
 4 you tell us today?
 5 THE WITNESS: Can you ask your question again?
 6 BY MR. AFFELDT:
 7 Q Based on your knowledge and experience, is
 8 there a shortage of credential teachers for special
 9 education in California?
 10 MR. HERRON: Same objections.
 11 THE WITNESS: I believe that there's a shortage
 12 of credential special ed teachers.
 13 BY MR. AFFELDT:
 14 Q Do you know how long that shortage has been
 15 going on in California?
 16 A No.
 17 Q Has there been a shortage during your time at
 18 the Department of Education?
 19 MR. HERRON: All the same objections that
 20 I posed to that question two questions before.
 21 MS. ALTAMIRANO: Same objections.
 22 THE WITNESS: The question was, what, during
 23 the time that I've been with the Department?
 24 BY MR. AFFELDT:
 25 Q Correct. Have there been a shortage of

1 credential special education teachers?
 2 A I believe -- during the time that I was there,
 3 I was informed or told that there was a shortage of
 4 credential special ed teachers.
 5 Q What about with respect to textbooks and
 6 curriculum materials, has there been a shortage of text
 7 books and curriculum materials for special education
 8 students in California?
 9 MR. HERRON: Objection. Vague as to time.
 10 Vague and ambiguous as phrased. Calls for speculation.
 11 Ask him to testify for which on this particular item he
 12 is not capable of doing. It is irrelevant to any issue
 13 in the case.
 14 THE WITNESS: That I don't know if there's been
 15 a shortage or not.
 16 BY MR. AFFELDT:
 17 Q Are you familiar with the Sunset Review Report
 18 that the Department of Education delivers to the
 19 legislature from time to time on special education?
 20 A You would have to show me a copy of the report
 21 that you're referring to for me to comment.
 22 Q My question is, on your own knowledge as the
 23 deputy superintendent of a division that oversees
 24 special education, are you familiar with the existence
 25 of such a report?

1 MR. HERRON: A report entitled what?
 2 MR. AFFELDT: "Sunset Review Report to the
 3 Legislature."
 4 THE WITNESS: You know, when I was deputy
 5 superintendent we forwarded several reports to the
 6 legislature so I would have to look at -- you would have
 7 to specify the report by name and subject, I mean
 8 specific subject within special ed, as to whether I've
 9 seen it or did not see it.
 10 BY MR. AFFELDT:
 11 Q And without my so specifying, you're not
 12 sitting here recollecting a Sunset Review Report that
 13 was annually submitted to the legislature?
 14 A I don't recall. Because when you say "Sunset,"
 15 is Sunset referenced to what? To what law? Usually
 16 when a law is Sunset, for it to be Sunset, there's a
 17 call for a report of Sunset legislation.
 18 Q And without my --
 19 Is there some notes that you're passing to
 20 Mr. Der?
 21 MS. ALTAMIRANO: No, I'm not passing him a
 22 note.
 23 MR. AFFELDT: I thought I saw you pointing to
 24 something.
 25 MS. ALTAMIRANO: Yes.

1 BY MR. AFFELDT:
 2 Q So are you familiar with -- without more it
 3 sounds like you're not familiar with a Sunset Report
 4 with respect to special education?
 5 MR. HERRON: He just answered the question,
 6 John.
 7 THE WITNESS: No, not unless you show me the
 8 report.
 9 BY MR. AFFELDT:
 10 Q Okay. Thank you.
 11 Are you familiar with any Sunset Provisions
 12 surrounding special education in California?
 13 MR. HERRON: Objection. Vague and ambiguous as
 14 to time. Vague and ambiguous as phrased. Calls for
 15 speculation. Calls for a legal conclusion.
 16 MS. ALTAMIRANO: John, if you have a particular
 17 report in mind, it might be valuable to present it now
 18 and discuss it directly.
 19 MR. AFFELDT: Thank you.
 20 MS. ALTAMIRANO: Just in case.
 21 MR. AFFELDT: Right. Yeah, I'm trying to probe
 22 his personal knowledge at this point on his position on
 23 stuff he should know.
 24 MR. HERRON: What he's asking you is when you
 25 were deputy superintendent, did you have knowledge of

1 that provision?
 2 MR. AFFELDT: Of any Sunset Provisions
 3 regarding the special education program in California.
 4 THE WITNESS: When I was deputy superintendent,
 5 there was state law that Sunset Special Ed, the state
 6 special ed program. And there was a Sunset Provision,
 7 but I can't recall more than that. There was a Sunset
 8 Provision to state special or the state special ed
 9 program.
 10 BY MR. AFFELDT:
 11 Q As part of your duties at the Department of
 12 Education, did you ever attend conferences and make
 13 speeches at conferences?
 14 MS. ALTAMIRANO: Objection. It's quite vague.
 15 MS. KAATZ: And compound.
 16 THE WITNESS: Do you want to ask the question
 17 again?
 18 BY MR. AFFELDT:
 19 Q Sure. As part of your duties at the Department
 20 of Education, were you ever called upon to deliver
 21 speeches at conferences on education topics?
 22 A Yes.
 23 Q Do you recall how often that would occur?
 24 A Not really. It depends on who invited me to
 25 speak.

1 Q Are you familiar with the academic performance
 2 index that the Department of Education has developed?
 3 A Yes.
 4 Q Based on your training and experience, what is
 5 your opinion of the validity of the academic performance
 6 index for ranking public schools in California?
 7 MR. HERRON: Objection. Vague and ambiguous as
 8 phrased and in the use of the term "validity." Calls
 9 for speculation. Calls for him to testify as an expert
 10 on a manner in which you've already taken testimony over
 11 the people who actually deal with this on a day-to-day
 12 basis. It's inappropriate. It's overbroad. A waste of
 13 time.
 14 You may respond.
 15 THE WITNESS: Can you ask your question again?
 16 MR. AFFELDT: Can you read the question?
 17 (Record read as follows:
 18 "Question: Based on your training and
 19 experience, what is your opinion on the
 20 validity of the academic performance
 21 index for ranking public schools in
 22 California?")
 23 MR. HERRON: Also assumes familiarity not in
 24 evidence that he's had training and experience in terms
 25 of administering a test or determining the validity of

1 that test, and then applying that training and
 2 experience to the determining of whether or not it
 3 appropriately ranks schools in California over which he
 4 has no responsibility in his official duties for the
 5 state.
 6 You may respond.
 7 THE WITNESS: My understanding is that the
 8 academic performance index is based on students'
 9 performance on the SAT 9 tests on the various components
 10 on the SAT 9 test, English, language art and math.
 11 BY MR. AFFELDT:
 12 Q Do you think the academic performance index is
 13 an appropriate measure by which to rank schools in
 14 California?
 15 MR. HERRON: All the same objections as to the
 16 last two questions.
 17 THE WITNESS: Well, it's state law.
 18 BY MR. AFFELDT:
 19 Q My question was, for your personal opinion
 20 based on your training and experience whether you
 21 thought it was an appropriate measure by which to rank
 22 schools in California.
 23 MR. HERRON: All the same objections.
 24 MS. ALTAMIRANO: There's been no establishment
 25 that he has training and experience to form his opinion.

1 MR. HERRON: Are you asking for his personal
 2 opinion outside of his official duties for the State of
 3 California?
 4 MR. AFFELDT: I'm asking him based on all his
 5 training and experience, which includes everything he's
 6 done to date in the education area.
 7 MR. HERRON: But you're asking for his personal
 8 opinion, is the way you phrased the question.
 9 MR. AFFELDT: Uh-huh.
 10 MR. HERRON: So in your personal capacity,
 11 what's your view on that is what he's asking.
 12 THE WITNESS: My personal capacity? How I feel
 13 about it?
 14 BY MR. AFFELDT:
 15 Q Yes, let's start there.
 16 A Well, the academic performance index is based
 17 on SAT 9 scores, but the legislation envision more than
 18 just test scores. They envision other indicators. But
 19 to date, other indicators have not been included in the
 20 construction of the API, Academic Performance Index.
 21 BY MR. AFFELDT:
 22 Q And my question was: What is your opinion on
 23 the appropriateness of the API to rank schools in
 24 California?
 25 MR. HERRON: All the objections that I

1 interposed for the first question that was asserted in
2 this line of questioning.

3 MS. ALTAMIRANO: I believe the question has
4 changed. The question has changed from the validity to
5 appropriateness.

6 THE WITNESS: Well, my personal feelings about
7 the API, not in my capacity as deputy superintendent, my
8 personal take on the API, it's based on a standardized
9 normal reference test and such tests tend to reflect --
10 such tests and the performance of students on such test
11 tend to reflect the socioeconomic status of the
12 students. They tend to reflect the English or non
13 English speaking ability of the student.

14 BY MR. AFFELDT:

15 Q Would it -- I'm going to hand you Exhibit 51-A
16 and ask if you can identify that.

17 (Plaintiff's Exhibit 51-A was marked for
18 identification by the court reporter.)

19 BY MR. AFFELDT:

20 Q Have you had a chance to review the exhibit?

21 MR. HERRON: John, I haven't quite. Can we
22 take just a minute more?

23 MR. AFFELDT: Sure.

24 MR. HERRON: Thanks.

25 BY MR. AFFELDT:

1 A Freshman admission into Lowell High School is
2 based on students' performance on course work and also
3 on students' performance on standardized, you know,
4 standardized normal reference test. Historically the --
5 San Francisco has used CTBS tests which is similar to
6 the SAT 9. And as such, because it's a norm reference
7 test, there will always be 50 percent of the students
8 will be above the 50 percentile and 50 percent will be
9 below 50 percentile. There's always a top and a bottom.

10 Low income kids tend to not to do as well on
11 standardized norm reference test as non poor students.
12 English Language learners tend to not do well on the
13 test relative to native English speakers.

14 And to the extent that Lowell High School
15 selects -- makes its freshman admission based on
16 students' performance on standardized norm reference
17 testing, it has a negative impact on English Language
18 Learners and poor students, immigrant students.

19 Q And with the academic performance index is used
20 to rank Lowell High School and, indeed, all schools in
21 California; isn't that correct?

22 MR. HERRON: Objection. Calls for speculation.

23 THE WITNESS: Yes.

24 BY MR. AFFELDT:

25 Q And when the academic performance index serves

1 Q Exhibit 51-A purports to be a news article
2 dated March 29, 2000 from Asian Week. And reporting on
3 a March 17th APA Educational Summit meeting, took place
4 at Golden Gate Club in the Presidio in the year 2000.
5 Do you recall attending such an APA summit meeting on
6 that day?

7 A Yes.

8 Q And then the second page it identifies you as
9 the keynote speaker, state deputy superintendent of
10 public instruction. Were you the keynote at that
11 event?

12 A I guess I was.

13 Q And it quotes you as criticizing the academic
14 performance index, as a quote, Index of family wealth,
15 end quote. Is that an accurate quote of your statements
16 on March 17, 2000?

17 MR. HERRON: Objection. Vague and ambiguous.
18 Calls for speculation.

19 THE WITNESS: In the context of Lowell High
20 School.

21 BY MR. AFFELDT:

22 Q Can you explain that, that last statement?

23 A About Lowell High School?

24 Q Yeah, what you meant in the context of Lowell
25 High School.

1 as an index of family wealth, does it serve that way
2 only with respect to Lowell High School or with respect
3 to all schools which are being ranked by API?

4 MR. HERRON: Objection. Calls for speculation.
5 You're asking him to speak as an expert on this issue
6 which he's not able to do. Vague and ambiguous as
7 phrased. Vastly overbroad.

8 MS. ALTAMIRANO: Misstates his testimony. He
9 was talking about CTBS testing in relation to Lowell
10 High School.

11 BY MR. AFFELDT:

12 Q You can answer.

13 A As I stated, my personal belief is whenever an
14 admission system uses test results from a standardized
15 normal reference testing, there's going to be an
16 advantage for certain kind of kids over others, and
17 I personally believe that any system that used
18 standardized norm reference results will reflect that
19 difference.

20 Q That difference being socioeconomic difference?

21 A Uh-huh.

22 Q And here in this article on page 2, it's not
23 talking about CTBS or admissions, but quoting you as
24 referring to the academic performance index ranking. Is
25 that an accurate description of the topic you were

1 discussing on March 17th, 2000?
 2 MR. HERRON: Asked and answered. Vague and
 3 ambiguous.
 4 THE WITNESS: I mean if I recall, prior to your
 5 showing it to me, I have not read this article, but what
 6 I recollect from my presentation was really a major
 7 discussion about Lowell High School and Asian students
 8 in general in San Francisco Unified School District
 9 because the attendees at this particular conference were
 10 all San Francisco educators and community
 11 representatives. And, you know, I have a view about
 12 Lowell High School in how they select freshman students.
 13 MRS. ALTAMIRANO: Would it be possible to take
 14 a break?
 15 MR. AFFELDT: Yeah, sure in a couple of
 16 minutes, sure. I will make it quick.
 17 Q Did you also discuss the academic performance
 18 index rankings on March 17th, 2000?
 19 MR. HERRON: Objection. Asked and answered.
 20 Calls for speculation.
 21 THE WITNESS: I can't recall to what extent
 22 I discussed the API, but my general recollection of my
 23 presentation was people need parents, Asian parents,
 24 especially of middle class -- as this article
 25 suggested -- middle class Asian parents need to look at

1 more than API index ranking or they need to look at more
 2 than how students' perform on standardized test.
 3 MR. AFFELDT: Why don't we take a break.
 4 (Short recess taken.)
 5 BY MR. AFFELDT:
 6 Q Mr. Der, were you attending the March 17th,
 7 2000 conference as part of your duties at the Department
 8 of Education?
 9 A The conference attendees invited me. They know
 10 what my position is at the Department. But when I'm
 11 invited and I speak, I express my personal opinions,
 12 unless I specify this is the Department of Ed's position
 13 and so and so's position because I have spoken at
 14 conferences prior to going to the Department of Ed. And
 15 often times, people will ask me to speak because of my
 16 history in the community and working in public policy
 17 issues.
 18 Q I understand. But were you on company time, as
 19 it were, or were you taking a vacation day?
 20 MS. ALTAMIRANO: Objection. Compound.
 21 MR. HERRON: He's asking if you were speaking
 22 in your official capacity on behalf of the Department of
 23 Education when you gave the speech referencing Exhibit
 24 51-A. Is that right?
 25 MR. AFFELDT: We can ask that question.

1 THE WITNESS: What was your question?
 2 BY MR. AFFELDT:
 3 Q Were you speaking in your official capacity as
 4 the deputy superintendent of public instruction?
 5 A No, I was not speaking on behalf of the
 6 department on special ed or adult ed or state school or
 7 for that matter on behalf of our assessment of division
 8 on accountability.
 9 Q I understand you're expressing your personal
 10 opinions. Were you attending the conference in your
 11 official capacity?
 12 MR. HERRON: Objection. Asked and answered.
 13 THE WITNESS: They invited me to speak to
 14 address these issues.
 15 BY MR. AFFELDT:
 16 Q Did you take the day off at work to go to the
 17 conference?
 18 MR. HERRON: Objection. Relevance. Calls for
 19 an awfully good memory.
 20 THE WITNESS: Under state law one can set one's
 21 own schedule during the day and because I was a 4-C, I'm
 22 a 4-C employee, as long as you get all your work done
 23 within the day, you're considered to have worked the
 24 day. And in this capacity they did not invite the state
 25 superintendent to speak. And if they had invited the

1 state superintendent to speak and she couldn't go, she
 2 would then ask me to speak on her behalf. I was
 3 speaking on my own behalf when I was speaking at this
 4 conference.
 5 MR. AFFELDT: Can you read back the last answer
 6 before we took a break.
 7 (Record read.)
 8 BY MR. AFFELDT:
 9 Q Is it your personal opinion based on your
 10 training and experience that the API would be a better
 11 instrument for ranking schools if it included more
 12 factors than a single standardized test score?
 13 MR. HERRON: Objection. Assumes facts not in
 14 evidence. Vague and ambiguous as phrased. Calls for
 15 speculation. Calls for him to testify as an expert.
 16 Calls for testimony outside the scope of his
 17 responsibilities with and for the Department of
 18 Education and the State.
 19 You may respond.
 20 THE WITNESS: My personal feeling is if there
 21 are other indicators used to rank schools, it would give
 22 a more accurate picture of what a school is doing or not
 23 doing for its students. And having said that, then one
 24 has to consider how you weigh these indicators or how
 25 they are considered in whatever formula that is used for

1 the API. You know, I've expressed my personal feelings
2 to people within the Department about API. What I've
3 stated here. They know.

4 BY MR. AFFELDT:

5 Q You have made your views on standardized
6 testing known within the Department?

7 A Yes, but they don't listen to me.

8 Q And do you believe that it's appropriate to
9 rank schools based on a single standardized test score?

10 MR. HERRON: Objection. Asked and answered.
11 And all the other objections that I interposed to the
12 question one or two before.

13 THE WITNESS: You know the law calls for
14 multiple indicators. And to date there are none.
15 Multiple indicators are not part of the API.

16 BY MR. AFFELDT:

17 Q To date there's a single indicator, the SAT 9?

18 A (Witness nods head.) To date.

19 Q Is it your opinion that that is not an
20 appropriate measure to rank schools based on a single
21 standardized test score?

22 MR. HERRON: Objection. Asked and answered.
23 And all the same objections interposed previously.

24 THE WITNESS: Well, personally I would not just
25 base it on standardized test results.

1 analytical skills, and create an environment in the
2 classroom where the student is engaged with the subject
3 matter or engaged with the process of learning.

4 My own children, our two girls, went to George
5 Washington High School. That's not a high school --
6 George Washington High School in San Francisco is not
7 ranked as high as Lowell High School. In fact, the
8 average percentile score of George Washington is in 50
9 percentile. It reflects the bell shaped curve. And as
10 I stated in this conference, a lot of Asian parents
11 especially middle income parents, would never think of
12 having their children go to George Washington High
13 School because they have a low percentile rank.

14 Their rank is lower than Lowell High School,
15 but my wife and I decided our daughters are not to
16 attend Lowell High School and we don't regret that for
17 one moment. In fact I believe that our daughters
18 received a better education at Washington than at Lowell
19 because they -- our daughters had some really excellent
20 teachers at George Washington.

21 BY MR. AFFELDT:

22 Q How would you measure teacher quality as part
23 of an academic performance index?

24 A Well, it is -- I mean, I stated it's very hard.
25 I don't know.

1 BY MR. AFFELDT:

2 Q What other factors do you think would be
3 appropriate to include within your ideal API?

4 MS. ALTAMIRANO: Objection. He's already
5 testified about the --

6 MR. HERRON: And all the same objections
7 interposed to the previous question.

8 THE WITNESS: What was your question again?

9 BY MR. AFFELDT:

10 Q What other factors would you include in your
11 ideal API to rank schools?

12 MR. HERRON: Again, all the same objections.

13 THE WITNESS: That's a difficult question to
14 answer. You know, based on my experience with my own
15 children, one thing I would probably look at is teacher
16 quality, but how do you measure teacher quality is up
17 for debate. Different people have different views about
18 teacher quality.

19 BY MR. AFFELDT:

20 Q How would you measure it?

21 MR. HERRON: He's asking you for purposes of
22 your children.

23 THE WITNESS: Yeah. Teacher quality? A good
24 teacher is an individual who can motivate children to
25 learn, to give them -- develop certain academic skills,

1 MR. HERRON: All the same objections.

2 THE WITNESS: It's very hard. You want a
3 teacher to motivate the kids, you want to make sure that
4 they teach to the standards, give them homework, that
5 they can correct homework, give feedback to students,
6 create a learning environment in the classroom where
7 students will learn from each other. I mean it's not
8 easy to quantitatively measure these elements.

9 That's why ranking is not as easy as what
10 people think it might be because what value you place --
11 I mean, people in the Asian community rank below number
12 one, bar none. But my personal feeling is based on
13 standardized test score ranking, the kids who get into
14 Lowell are scoring in the 90 percentile. Otherwise,
15 they don't get into Lowell, but then you have to ask the
16 question, if these kids are so high ranking going into
17 Lowell, why aren't all of them eligible to be admitted
18 to the UC system. Not every kid who applies from Lowell
19 to UC makes it into a UC, so I think Lowell is doing
20 something wrong. And Asian parents don't understand
21 that. Actually, Lowell High School is not for every
22 Asian kid.

23 BY MR. AFFELDT:

24 Q Other than teacher quality, what other factors
25 would you include in a multi-factor API?

1 MR. HERRON: All the same objections.

2 Misconstrues prior testimony.

3 When I say "All the same objections," I'm going
4 back to the objections that are posed to the questions
5 that started this line of inquiry.

6 THE WITNESS: Well, I think you would want to
7 look at, you know, students' attendance. You want to
8 probably look at socioeconomic status of the students.
9 You would want to look at whether the mother of the
10 student is educated or not educated. Once you have that
11 information, you would figure out how does this student
12 perform given those set of factors.

13 I don't think ranking schools is an easy task.
14 I think it's very difficult. And I'm not an expert, and
15 I don't purport to know exactly how you would want to do
16 it in a comprehensive way.

17 As I've expressed this morning, what we have
18 currently in the API, I have some questions about the
19 construction of it. Whether it tells us everything that
20 we need to know about the schools or whether -- yeah,
21 whether it tells us everything we need to know about a
22 school.

23 BY MR. AFFELDT:

24 Q Do you question the wisdom of even trying to
25 rank schools based on academic performance --

1 Q And I don't need for you to review the entire
2 document, but it does list you as a panelist there at
3 the bottom of page one carrying over to the top of page
4 two. Do you see that?

5 MR. HERRON: I object to the use of this
6 Exhibit 52-A for the same reason indicated with respect
7 to Exhibit 50-A. I also object to the use of Exhibit
8 51-A for the same reason.

9 You may respond.

10 THE WITNESS: Yes, I recall participating.

11 BY MR. AFFELDT:

12 Q And on page four of five at the bottom it
13 purports to summarize comments made by you in the last
14 paragraph. If you could review that and let me know
15 when you're done.

16 A Yes.

17 Q Are you done?

18 A Uh-huh.

19 Q Do those -- does that summary fairly
20 characterize comments that you recall making at the
21 conference on May 1st, '99?

22 MR. HERRON: Objection. Calls for speculation.

23 THE WITNESS: From what I can recollect and
24 what I read here in this summary, it generally reflects
25 what I stated with the exception of the last phrase

1 MR. HERRON: Same objections.

2 BY MR. AFFELDT:

3 Q -- as part of an accountability system?

4 A Well, my personal feeling is the voters of
5 California want the accountability in a public education
6 system and I think they deserve to have accountability
7 because teachers are paid by public funds and
8 administrators are paid by public funds so we need to be
9 held accountable for what we do.

10 But how you measure students' success or
11 student outcome is really up for debate. There are a
12 lot of factors that come into that that contribute to
13 student success.

14 Q I'm going to hand you what will be marked as
15 Plaintiffs' Exhibit 52-A.

16 (Plaintiff's Exhibit 52-A was marked for
17 identification by the court reporter.)

18 BY MR. AFFELDT:

19 Q This is purportedly a summary of a conference
20 entitled "Making Education Standards Work For All
21 Students, A Community Conversation." It's dated -- the
22 date of the conference is May 1st, 1999 University of
23 San Francisco Kirschwin Theater. Do you recall
24 attending that conference?

25 A Yes.

1 there, "Question the possible meaning of administering a
2 high school exit exam to ninth graders." I'm not sure
3 what this summary is specifically reference or what it
4 thinks I said because my view about the exit exam at
5 that time is not in sync with what they summarized.

6 That was over two years ago, this session, May 1, 1999.

7 BY MR. AFFELDT:

8 Q In the second sentence where it says, quote,
9 "He said that California assessment tests are not
10 necessarily measuring what children are learning,"
11 unquote, what did you mean by that comment?

12 A It states what -- accurately reflects what I
13 probably stated that California SAT 9 doesn't
14 necessarily measure what all our children are learning.

15 Q Why do you believe that to be the case?

16 MR. HERRON: Objection. Vague as to time.
17 This was two and a half years ago are you asking him now
18 or are you asking him then, what he thought then, what
19 he's thinking now, based on when he said that?

20 BY MR. AFFELDT:

21 Q Do you believe that as still currently the
22 case?

23 MR. HERRON: Objection. Calls for speculation.
24 Calls for expert opinion.

25 THE WITNESS: In terms of I made that statement

1 then and whether this is still --

2 BY MR. AFFELDT:

3 Q Do you believe it is still currently the case
4 that the SAT 9 is not necessarily measuring what
5 children are learning?

6 MR. HERRON: Same objections. Vague and
7 ambiguous. Asked and answered.

8 THE WITNESS: The SAT 9 doesn't measure
9 everything that the kids are learning especially for
10 English Language Learners.

11 BY MR. AFFELDT:

12 Q And you believe that is still the case?

13 MR. HERRON: Same objections.

14 THE WITNESS: Well, that question has to --
15 that question has to be -- understand the context that
16 we are now -- the state is transitioning into the
17 California Standards Test that is part of the Star
18 Testing Program. And the SAT 9, I understand, I don't
19 know this to be sure, will still be administered in some
20 shape or form. And how the California Standards Test
21 results and the SAT 9 results, how they will combine
22 together and constitute the API, I don't know how it's
23 going to be weighted and how it will be done
24 technically.

25 BY MR. AFFELDT:

1 Q In the third sentence you are quoted or
2 paraphrased rather, as pointing out that there is no
3 alignment between the entrance requirements for
4 University of California and the California State
5 University system and the current California assessment
6 program. Is that still your view?

7 MR. HERRON: Objection. Vague and ambiguous.
8 Vague and ambiguous as phrased. Document speaks for
9 itself. Vague in its use of the term "current
10 California assessment program." Vague in terms of
11 entrance requirements. Calls for speculation. Asking
12 him to speak as an expert.

13 You may respond.

14 THE WITNESS: In a freshman admission
15 requirements for UC, specifies student enrollment in the
16 A through F courses and a requisite GPA, those
17 requirements have nothing to do with how well or how not
18 well a student performs on the SAT 9 tests. And it's
19 been my long held belief that we need to make an
20 education system -- we need to create and administer
21 education system that makes sense to our students.

22 They are under a lot of pressure especially in
23 high school. High school students today not only have
24 to take the SAT 9 test, they take the Golden State Exam,
25 they take PSAT, the SAT, they take AP tests if they're

1 Q But with respect to the SAT 9 portion of the
2 exam, is it still your view that the test is not
3 measuring what children are learning?

4 MR. HERRON: Objection. Vague and ambiguous.
5 Vague as to time. Vague and ambiguous as phrased.
6 Calls for speculation. Ask for him to testify as an
7 expert on a topic that's unrelated to any duty he held
8 at the Department of Education or for the state of
9 California.

10 You may respond.

11 THE WITNESS: I believe that -- as I stated
12 previously, I don't believe that it measures everything
13 that a child is learning in the classroom.

14 BY MR. AFFELDT:

15 Q What is it not measuring?

16 MR. HERRON: All the same objections.

17 THE WITNESS: I guess one example would be how
18 a child learns to work with other students in problem
19 solving. I mean in the real world, we all have to work
20 together and solve problems and whatever the work place.
21 And we try to promote those kinds of skills in the
22 classroom or in college, not in every class, but that is
23 a very effective teaching strategy. And that's not
24 measured in the standardized test.

25 BY MR. AFFELDT:

1 enrolled in AP classes. And then on top of that,
2 teachers give tests in the end of the semester or mid
3 terms.

4 And even after a student is admitted into UC,
5 depending on he or she scored on the SAT verbal or the
6 SAT 2 English or the SAT 2 writing, that student might
7 have to take a writing proficiency exam for placement
8 purposes within the UC system. There's a lot of tests
9 along the roadway and they just aren't aligned between
10 what UC, CSU requires and what is happening in our high
11 school.

12 BY MR. AFFELDT:

13 Q What about the California standards portions of
14 the Star Test, is that aligned with UC and CSU entrance
15 requirement?

16 MR. HERRON: All the same objections. Lacks
17 foundation. Assumes facts not in evidence.

18 THE WITNESS: I don't believe that they are
19 aligned because UC has given no indication that they are
20 going to accept the California standard test results for
21 purposes of freshman admission consideration. They have
22 not changed essentially the A through F requirements.
23 It's going to be called the A through G requirement
24 because they are going to add that one year of foreign
25 language. Students are still required at present to

1 take the SAT 1 and SAT 2.

2 BY MR. AFFELDT:

3 Q The first part of the last sentence in the
4 paragraph we're looking at, paraphrasing you as asking
5 "What tools are being provided to teachers so that their
6 students can achieve high standards." What did you mean
7 by that?

8 A Generally teachers need to be aware of the
9 standard and if they aren't aware of the standards, they
10 need to receive professional development opportunities
11 to do so. And they need to understand both contents and
12 teaching strategies for subject matters that they are
13 responsible for.

14 Q Is it your view that the teachers in California
15 have been trained in the content standards?

16 MS. ALTAMIRANO: Objection. There's no basis
17 for establishing that he has any background in this
18 area.

19 MR. HERRON: Calls for speculation. Vague and
20 ambiguous. Calls for him to testify as an expert.
21 Asking him to speak to an item there is no evidence he
22 had anything to do with in regard to his duties for the
23 Department of Education or behalf of the SPI.

24 Ask away. I think you're wasting your time
25 here, John. This is the day to conclude his depo.

1 exam, are you aware of any system by which the state
2 insures whether or not teachers in classrooms have
3 received professional development training to teach
4 those content standards?

5 MR. HERRON: Objection. Calls for speculation.
6 Vague and ambiguous as phrased. Vague as to time.
7 Asking him to testify as an expert. Asking him to
8 testify beyond the scope of his duties and beyond the
9 scope of his duties related to education.

10 THE WITNESS: The state content standards are
11 not mandatory. It's still up to the local school
12 district to adopt standards. Now the California
13 Standards Test is based on California standards, but
14 technically you don't -- a local school board does not
15 have to adopt the state standards. They can get to the
16 California Standard Test in a different way or different
17 route. That was the theory behind the legislation that
18 created the state content standards.

19 BY MR. AFFELDT:

20 Q I'm not asking you for your understanding as to
21 the mandatory or non mandatory nature of the California
22 contents standard. I'm asking you whether you're aware
23 of the state having any system that would ensure the
24 professional development and training for teachers that
25 teach the state's content standard.

1 I suppose you can spend your time however you like.

2 You may respond.

3 THE WITNESS: Can you ask your question again.

4 BY MR. AFFELDT:

5 Q Do you have an opinion on whether or not the
6 teachers in California have received the professional
7 development that will enable them to teach the content
8 standards?

9 MR. HERRON: Focus your attention on Los
10 Angeles Unified School District. Do you have an opinion
11 there?

12 THE WITNESS: It's difficult to answer that
13 question because it's really a local decision as to --
14 because local school districts hire their teachers and
15 it's up to the local school board and local
16 administration to monitor and to make sure that whatever
17 standards the local school board adopts, that their
18 teachers are teaching to those standards. And if they
19 are not teaching to the standards, they should probably
20 look at intervention assistance, professional training,
21 professional development for such teachers.

22 BY MR. AFFELDT:

23 Q In looking at the state contents standards that
24 the State Board of Education has adopted and
25 incorporated into the Star Exam and the high school exit

1 MR. HERRON: All the same objections.

2 THE WITNESS: No, I am not.

3 BY MR. AFFELDT:

4 Q Do you ever testify in front of Congress as
5 part of your duties at the Department of Education?

6 A Yes.

7 Q Approximately, how many times did that occur?

8 A I can only recall once.

9 Q Do you remember when that was?

10 A No.

11 Q Did you apply to be director of the Peace Corp?

12 A I was asked -- I mean I was interviewed for it.

13 Q I'm going to hand you what we will mark as
14 Exhibit 53-A. If you could review that and let me know
15 when you're done.

16 A Okay.

17 (Plaintiff's Exhibit 53-A was marked
18 for identification by the court reporter.)

19 MR. AFFELDT: Are you still reviewing it,
20 David?

21 MR. HERRON: Everyone is too fast for me. Just
22 a minute.

23 BY MR. AFFELDT:

24 Q Have you had a chance to review the document?

25 A Yes, I have.

1 Q Is this the testimony that you delivered to
2 Congress on January 28th, 1998?
3 A Yes, it appears so.
4 Q Were you speaking in your official capacity?
5 A As the document shows, I was speaking on behalf
6 of the state superintendent.
7 Q In the testimony you delivered, you state
8 that -- and what's marked as page 156, which is page 2
9 of the exhibit, "State and local governments --
10 MR. HERRON: Where are you?
11 MR. AFFELDT: Two-thirds of the way down,
12 paragraph beginning with "such progress have occurred
13 without the federal role," it's the second page.
14 MR. HERRON: Right here.
15 BY MR. AFFELDT:
16 Q "State and local governments over this 40-year
17 period have a relatively poor record of dealing with
18 equity issues." Do you see that?
19 A Uh-huh.
20 Q Could you explain what you are referring to
21 there. What's that statement?
22 MR. HERRON: Objection. Calls for an awfully
23 good recollection inasmuch as this testimony was
24 delivered three years and ten months ago. Calls for
25 speculation. Calls for a narrative of 40 years of U.S.

1 history.
2 THE WITNESS: The statement was made in the
3 context of an unequal funding among local jurisdictions
4 or state or public education and also in the context of
5 the effects and the lingering effects of segregated
6 schools and also within the context of adequately
7 serving English Language Learners, newcomers, immigrant
8 students and students with special needs, students with
9 disability. And it is the belief of the state
10 superintendent that the targeting that it's part of
11 federal funding for education in targeting through
12 categorical programs that have been an effective
13 strategy to address inequities in terms of how these
14 identify population, student population groups are
15 served or are not served in our public schools across
16 the nation.
17 MR. HERRON: We've now reached 12:05. May I
18 suggest we take our lunch break at this point.
19 MR. AFFELDT: I've got a few more questions on
20 this exhibit then we can go to lunch.
21 Q How do you see the effect of Proposition 13 as
22 having ravaged the quality of education in California?
23 MR. HERRON: Objection. Calls for speculation.
24 Vague and ambiguous. The term "ravaged" assume facts
25 not in evidence. You're asking him to testify as an

1 expert on this particular topic.
2 To the extent, Mr. Der, you have a personal
3 opinion, you may certainly express it.
4 THE WITNESS: I voted against Proposition 13.
5 MR. HERRON: I don't think he's asking for that
6 personal information.
7 THE WITNESS: I am giving personal opinion.
8 I voted against Proposition 13. It changed the ability
9 of local governments, school board and others to tax
10 their state in terms of how we tax our citizens for
11 public service and as a result of Prop 13, the governor
12 in the state they play a more central role in funding of
13 education services in the state of California.
14 BY MR. AFFELDT:
15 Q Do you see at the bottom of the same page we
16 are looking at you refer to Prop 13 as "Ravishing the
17 quality of public education in California"?
18 MR. HERRON: Objection. Misconstrues the
19 document which talks about -- coupled with the state's
20 floundering economy.
21 BY MR. AFFELDT:
22 Q Do you see the reference to the phrase we're
23 talking about, Mr. Der?
24 A Yeah, I see it's the last -- second to the last
25 sentence in that bottom paragraph.

1 Q Okay. Let me ask you this, according to the
2 document, it's page 158, the fourth page of Exhibit
3 53-A, the third paragraph down, beginning "In addition,"
4 you state that "The U.S. Department of Education
5 provides Congress with vital data on program
6 effectiveness and ask how can this Congress know whether
7 the goals of various programs are being achieved without
8 having the data available." Is it your view that data
9 on program effectiveness is a critical part of -- for a
10 government to monitor the effectiveness of its
11 educational system?
12 MR. HERRON: Objection. Incomplete, improper
13 hypothetical. Calls for speculation. Vague and
14 ambiguous as phrased. Vague and ambiguous in terms of
15 "program effectiveness." You're asking him to speculate
16 in addition as to something here, programs, U.S.
17 department programs to governments generally without
18 specifying what governments. Asking him to testify as
19 an expert. The question is not good.
20 THE WITNESS: Can you ask your question again.
21 MS. ALTAMIRANO: Could you repeat, I'm sorry.
22 MR. AFFELDT: Sure.
23 MS. ALTAMIRANO: Could you tell the reporter to
24 please read.
25 MR. AFFELDT: No, I'm going to rephrase it.

1 Q Let me ask you this, what did you mean by your
2 sentence that providing -- what did you mean by stating
3 that data was vital to determine program effectiveness?

4 MR. HERRON: Objection. Misconstrues the
5 document.

6 THE WITNESS: If I recall this testimony
7 correctly, it has been the state superintendent's view
8 that it is a federal role in public education. And that
9 the U.S. Department of Education serves an important
10 function in getting report or data from the state as
11 to -- in terms of students outcome or how their dollars
12 have been spent. This particular comment was made
13 because at that time in Congress, there was still a move
14 to do away with the U.S. Department of Education or to
15 consolidate programs to the point that they would give
16 money out on a block grant basis. And she was somewhat
17 concerned that all this funding would go to the block
18 grant and we wouldn't know how effective the programs
19 had been or how the money was being spent. And that
20 really was the content of this particular comment in
21 here.

22 It didn't give all the background, but that was
23 one of the issues that was being raised because back in
24 '97, '98 congressman Hoffstra of Michigan said, "Oh,
25 there are 268 federally funded programs. There are so

1 speculation. Vague as to the word "shortage."

2 THE WITNESS: You know, when I assumed my
3 responsibilities as deputy sup in the education equity
4 area, I was informed that there was a shortage of
5 special ed teachers generally in the state.

6 BY MR. AFFELDT:

7 Q Did you ever review reports or other
8 information detailing the extent of the shortage?

9 MR. HERRON: During his tenure at the
10 department?

11 MR. HERRON: Yes.

12 THE WITNESS: I don't have any recollection of
13 reviewing a report like that.

14 BY MR. AFFELDT:

15 Q Is it fair to say that it wasn't a regular part
16 of your duties to review reports on the shortage of
17 credential special ed teachers as part of your duties?

18 A No.

19 Q No, it's not fair to say that, or no, you did
20 not regularly engage in it?

21 A No, I did not regularly review reports on
22 that -- on the matter of the number of credential
23 special ed teachers.

24 Q Was information ever provided to you regarding
25 the shortage of textbooks and other curriculum

1 many of them we just need to do away with it put
2 everything in one or two pots." And as this testimony
3 indicated, you know, can there be a streamlining of
4 these programs, absolutely yes, but streamlining is very
5 different from abolishing the programs or the program
6 goals.

7 MR. AFFELDT: Why don't we take a lunch break
8 now.

9 MS. ALTAMIRANO: Thank you.

10 MR. HERRON: Great.

11 (Lunch recess taken.)

12 BY MR. AFFELDT:

13 Q Mr. Der, what steps, if any, has the Department
14 of Education taken to reduce the teacher shortage with
15 respect to special education teachers?

16 MR. HERRON: Objection. Calls for speculation.
17 Assumes facts not in evidence.

18 THE WITNESS: I'm not --

19 MR. HERRON: Vague as to time.

20 THE WITNESS: I'm not aware of any.

21 BY MR. AFFELDT:

22 Q How long have you been aware of the existence
23 of a shortage of special education credential teachers?

24 MS. ALTAMIRANO: Asked and answered.

25 MR. HERRON: Vague and ambiguous. Calls for

1 instructional materials?

2 MR. HERRON: Objection. Assumes fact not in
3 evidence. Calls for speculation. Vague and ambiguous
4 as phrased.

5 THE WITNESS: Shortage of -- can you specify
6 your question? Shortage of textbooks at a particular
7 district or for all districts?

8 BY MR. AFFELDT:

9 Q Any shortage of textbooks or curriculum
10 materials regarding special education at any place in
11 the state public school system.

12 MR. HERRON: Same objections. Overbroad.

13 THE WITNESS: I don't recall receiving reports
14 about shortage of textbooks for special ed students.

15 BY MR. AFFELDT:

16 Q Are you aware of any system in place to
17 determine whether there is a shortage of textbooks for
18 special ed students in California?

19 A No.

20 Q Are you aware of any steps that the State has
21 taken outside the Department of Education -- which
22 you've already answered -- are you aware of any steps
23 that the State has taken to reduce the shortage of
24 credential special ed teachers in California?

25 MR. HERRON: Objection. Vague and ambiguous.

1 Incomplete, improper hypothetical. Calls for
 2 speculation. Are you asking him beyond funding issues
 3 or are you including that?
 4 You can go ahead and answer the question.
 5 THE WITNESS: I didn't quite understand. You
 6 said, above and beyond the Department of Ed meaning the
 7 branch responsibilities or above and beyond the
 8 department as a whole?
 9 BY MR. AFFELDT:
 10 Q I asked you earlier about the Department,
 11 whether the Department of Ed had taken any steps as a
 12 whole. And you said you weren't aware of any. So now
 13 I'm asking outside of any actions taken by the
 14 Department of Education, are you aware of any action
 15 taken by any other state entity to reduce the shortage
 16 of credential special ed teachers in the State of
 17 California?
 18 MR. HERRON: Objection. Calls for speculation.
 19 Vague and ambiguous as phrased. Assumes facts not in
 20 evidence.
 21 THE WITNESS: I just have general knowledge of
 22 the governor as being supportive, you know, raising the
 23 beginning salary for teachers as a way of encouraging
 24 more individuals to go into the teaching profession.
 25 And also I just have not followed up the issue of

1 credential teachers. That is not an area of
 2 responsibility that I had at the Department of
 3 Education.
 4 BY MR. AFFELDT:
 5 Q So you did not consider it within your area of
 6 responsibility to address this shortage of credential
 7 teachers in the special ed program in California?
 8 MR. HERRON: Objection. Assumes facts not in
 9 evidence. Vague and ambiguous. Calls for speculation.
 10 Calls for a legal conclusion.
 11 You may respond.
 12 THE WITNESS: Is your question generally
 13 speaking or specific to a district?
 14 BY MR. AFFELDT:
 15 Q My question is relating to the teacher --
 16 reducing any teacher shortage that you are aware of with
 17 respect to credential special ed teachers in California.
 18 MS. ALTAMIRANO: Objection. I'm going to ask
 19 you to clarify your question. Your previous question
 20 was, was it part of your duties and I would like to find
 21 out exactly which question you're asking him so it's
 22 clear.
 23 MR. AFFELDT: Can you please read the previous
 24 question.
 25 THE REPORTER: Sure.

1 (Record read as follows:
 2 "Question: Are you aware of any
 3 action taken by any other state entity to
 4 reduce the shortage of credential special
 5 ed teachers in the State of California?")
 6 MS ALTAMIRANO: Is that the question you're
 7 asking now?
 8 MR. AFFELDT: Yes.
 9 MR. HERRON: All the same objections.
 10 THE WITNESS: It would depend on the context in
 11 which the issue was raised that might cause me to
 12 address it or not address it.
 13 BY MR. AFFELDT:
 14 Q So what -- maybe you can explain that to me.
 15 What do you mean by depending on context would cause you
 16 to act or to address the shortage?
 17 MR. HERRON: Objection. Calls for a narrative.
 18 Vague and ambiguous.
 19 THE WITNESS: The special ed division has the
 20 responsibility to monitor compliance by school districts
 21 with federal law. And to the extent that our special ed
 22 division monitored a specific district and our
 23 monitoring activities identified students are or not
 24 receiving services specified in their IEPs, there might
 25 be an issue that a student is not getting the counseling

1 that was called in by IEP. And that student is not
 2 getting counseling or psychological services. That
 3 district would not be in compliance with regard to that
 4 student and that student's IEP.
 5 And if that's identified as a compliance issue,
 6 we would -- and if there are a series of issues where
 7 they are not in compliance with the Department of Ed,
 8 Special Ed Division would develop a corrective action
 9 plan for that district to address the specific issues of
 10 non compliance identified in the compliance review.
 11 BY MR. AFFELDT:
 12 Q Did you ever develop corrective action plans
 13 that require districts to hire more credential special
 14 ed teachers?
 15 MR. HERRON: Objection. Calls for speculation.
 16 Vague and ambiguous in terms of the word "you."
 17 THE WITNESS: Can you ask the question again.
 18 MR. AFFELDT: Did your division, which you
 19 oversaw dealing with special ed, ever develop as a
 20 corrective action plan a requirement that a district
 21 hire more credential teachers?
 22 MR. HERRON: Same objections.
 23 THE WITNESS: As deputy superintendent, I did
 24 not have the day-to-day assignments to develop
 25 corrective action plans. The development of those

1 corrective action plans resided with professional staff
2 and with administrative staff within the Special Ed
3 Division.

4 What I would get a report on is whether the
5 district was or was not in compliance. And if they
6 weren't, how soon would they get into compliance because
7 we have to make sure that non compliance issues were
8 addressed in a manner that also was responsive to
9 whatever special conditions and ongoing responsibilities
10 the Department of Ed had as a state education agency.
11 I did not, let's say, Monterrey School District had a
12 specific non compliance issue that may need more
13 credentialed teachers, it was really up to staff to
14 develop the corrective action plan.

15 BY MR. AFFELDT:

16 Q Is it a grounds for non compliance to not have
17 a sufficient number of credential special ed teachers in
18 the district?

19 MS. ALTAMIRANO: Objection. Vague and
20 ambiguous.

21 MR. HERRON: Calls for speculation. Calls for
22 a legal conclusion.

23 THE WITNESS: It depends on what is called for
24 in a student's IEP. I mean the student's individual
25 education program drives what services are and are not

1 to be in compliance?

2 MR. HERRON: Objection. Incomplete improper
3 hypothetical. Calls for speculation. Assumes facts not
4 in evidence. Vague and ambiguous. Calls for a legal
5 conclusion.

6 THE WITNESS: It would depend on -- it would
7 depend on what the IEP stated and I've not as deputy
8 superintendent, I do not read these IEPs that are
9 developed at the local level or at a particular school.

10 BY MR. AFFELDT:

11 Q Let me give you another hypothetical. If a
12 student's IEP indicates that they need to be in a
13 special day class and taught with other special ed
14 students, but the only teacher for that class is someone
15 on an emergency permit, would you consider that district
16 to be out of compliance?

17 MR. HERRON: All the same objections as
18 interposed in the last question. Lack of relevance.

19 MS. ALTAMIRANO: I'm also going to object.

20 THE WITNESS: It would depend on the -- in
21 monitoring and looking at compliance with federal law,
22 special ed staff would go in and look at the type and
23 level of service being provided and hypothetically a
24 teacher may be on an emergency credential, but in fact
25 provide the very service specified in a student's IEP.

1 provided.

2 BY MR. AFFELDT:

3 Q So, for example, an IEP called for so many
4 hours a day for a student to spend with a resource
5 specialists and the district did not have a resource
6 specialist to give to that student, would you find them
7 in non compliance?

8 MR. HERRON: Objection. Incomplete and
9 improper hypothetical. Calls for speculation. Vague
10 and ambiguous.

11 THE WITNESS: You've given a hypothetical
12 situation of a student's IEP calls for services by an
13 RSP teacher over so many hours and over a week's time.
14 If our staff found that those services weren't being
15 provided for the required number of hours per week, we
16 would find them -- find the district not to be in
17 compliance in implementing the IEP.

18 BY MR. AFFELDT:

19 Q You would find them to be not in compliance?

20 A Right, because they did not provide X number of
21 hours of service by an RSP teacher.

22 Q What if they provided the X number of hours of
23 services in an RSP classroom or with an RSP teacher, but
24 that teacher had only an emergency permit and no special
25 education credential, would you find that district not

1 And if those services are being provided, whatever is
2 called for in the IEP, notwithstanding the status of the
3 teacher, whether it's an emergency credential or
4 credential or clear credential or, you know, part-time
5 teacher, full-time teacher, we would look at whether the
6 student received the service that is specified.

7 BY MR. AFFELDT:

8 Q So the compliance or non compliance turns on
9 whether or not the student is receiving the services in
10 the IEP and not the particular credential status of the
11 teacher?

12 MR. HERRON: All the same objections.

13 THE WITNESS: As I stated before, it depends on
14 what the IEP stated. Now, this is a hypothetical. And
15 I don't know if this ever happened. If an IEP specifies
16 that student X will be in teacher Y's classroom for X, Y
17 and Z reasons, then that's what the IEP specifies. Or
18 the IEP might just state this student is only going to
19 get -- will get six hours or three hours of RSP services
20 during the week. It depends on what the IEP states.
21 And IEPs are individual education plans. It's very
22 student specific. IEPs do not deal with other students.
23 It only deals with that student and that student's
24 particular needs.

25 BY MR. AFFELDT:

1 Q And as long as that student gets the number of
2 hours and the types of services prescribed in the IEP,
3 then the department would find the district to be in
4 compliance regardless of the credential status of the
5 particular teachers?

6 MR. HERRON: Objection. Incomplete, improper
7 hypothetical. Calls for speculation. Vague and
8 ambiguous. Calls for a legal conclusion. Asked and
9 answered.

10 THE WITNESS: Compliant with regard to that
11 issue, right?

12 BY MR. AFFELDT:

13 Q Right.

14 A Because there may be other non compliance
15 issues.

16 Q Correct. And your answer for the record?

17 A Again this is hypothetical. If the services
18 are being provided as specified in a student's IEP, we
19 would find at least that element to be in compliance.

20 Q Okay. Are you aware of the Department of
21 Education ever finding a district not to be in
22 compliance because they had too large a number of
23 teachers on emergency programs?

24 MR. HERRON: Objection. Vague and ambiguous as
25 phrased. Incomplete and improper hypothetical. Calls

1 corrective action. If the special ed monitors find
2 that, let's say, 100 special need students were not
3 getting ser- -- let's say, 100 special ed students in
4 the district had in their IEP, you know, RSP services
5 and 99 of them were not getting it, in that situation
6 there's a system problem. And we would have to look at
7 what are the factors that's causing them. Failure to
8 deliver services to the 99 students as specified in the
9 IEPs.

10 BY MR. AFFELDT:

11 Q I understand that your compliance reviews that
12 we've talked about so far proceeds by looking at the
13 IEPs in the district and services that those IEPs might
14 require, aside from that I'm asking whether there's an
15 independent criteria that the Department of Education
16 imposes on districts to have specific numbers of
17 credential special ed teachers in place.

18 MR. HERRON: Objection. Asked and answered.
19 Assumes facts not in evidence. Calls for speculation.
20 Incomplete and improper hypothetical. Vague and
21 ambiguous.

22 THE WITNESS: I am not aware of any other
23 system that would look at whether the district had a
24 specific number of credential teachers in special ed.

25 BY MR. AFFELDT:

1 for speculation. Calls for legal conclusion. Assumes
2 facts not in evidence.

3 THE WITNESS: I'm not aware of any non
4 compliance issue that was based on what you just stated
5 where there are too many emergency credential teachers
6 versus credential teachers.

7 BY MR. AFFELDT:

8 Q Is the requirement to have credential special
9 education teachers in place even one of the criteria
10 upon which district compliance is judged?

11 MR. HERRON: All the same objections as
12 interposed to the last question.

13 THE WITNESS: I don't understand your question.
14 BY MR. AFFELDT:

15 Q Sure. Is it even a criteria upon which to
16 judge compliance or non compliance, the question of
17 whether a district has sufficient numbers of credential
18 special ed teachers in the classrooms?

19 MR. HERRON: All the same objections. Asked
20 and answered.

21 THE WITNESS: I don't know. It depends on what
22 the IEP in that district call for. Hypothetically, it
23 could be just one student who is not getting services,
24 but all the other students are getting it so the Special
25 Ed Division would develop a student specific remedy or

1 Q Do you know if that's part of the CCR review?

2 A I don't know for certain. I have not looked at
3 the CCR document in a while, so I really cannot answer
4 specifically.

5 Q Okay. Are you aware of -- strike that.

6 Based on your experience in the Department of
7 Education, do you believe that special education in
8 California is adequately funded?

9 MR. HERRON: Objection. Vague and ambiguous.
10 Calls for speculation. Vague as to time. Calls for a
11 legal conclusion.

12 THE WITNESS: A number of local districts have
13 complained generally. And it's not complaints just to
14 the department. They've complained generally that they
15 encroach upon their general fund in order to provide
16 services to their special ed students as specified in
17 the respective IEPs. And to the extent that this
18 encroachment occurs, local school districts have
19 regularly charged that special ed is not adequately
20 funded or that the federal government has not covered at
21 least 40 percent of special ed costs that are related to
22 compliance to federal law.

23 BY MR. AFFELDT:

24 Q And in addition to complaining about the Feds
25 not meeting their 40 percent obligations, do the

1 districts complain that the state has not met -- has not
2 also sufficiently funded special education?

3 MR. HERRON: Objection. Calls for speculation.
4 Vague as to time. Vague and ambiguous as phrased.

5 THE WITNESS: I don't really know how to answer
6 your question because most of the complaints are focused
7 on the feds not covering the 40 percent of the cost.
8 And maybe districts have complained they are not getting
9 enough money from the state. I have not really heard
10 that. The prevalent complaint is the feds are not
11 paying 40 percent of the costs.

12 BY MR. AFFELDT:

13 Q Do you know what the current breakdown is
14 between federal and state funding for special ed in
15 California?

16 MR. HERRON: Objection. Vague and ambiguous.
17 Calls for speculation.

18 THE WITNESS: I don't know what the that --
19 what the percent between the two are. I haven't seen
20 the figures. I just don't know.

21 BY MR. AFFELDT:

22 Q As part of your duties as head of the equity
23 branch, did you regularly review information regarding
24 the funding levels of special ed in California?

25 A No.

1 '50s or '60s. And there was a lot of dissatisfaction
2 within the special ed community of how state dollars
3 were being distributed, and so AB602 was made to
4 equalize all the funding.

5 Q My question was, I think, answered by your last
6 statement. Was AB602 passed into law?

7 A Yes, it was passed in 1997 same year as ID 97,
8 that's the only way I can remember it.

9 Q Any other activities you can recall in which
10 the department sought to improve the funding situation
11 for special ed in California?

12 MR. HERRON: Objection. Vague and ambiguous.
13 Calls for speculation.

14 THE WITNESS: The department was aware but was
15 not a major player in settling the Riverside lawsuit
16 against the state for state mandate special ed. And
17 really there were other state players who really engaged
18 quite intensely with the governor and whatever solution
19 they came out with to settle that particular piece of
20 litigation.

21 BY MR. AFFELDT:

22 Q What was the subject of the Riverside lawsuit?

23 MR. HERRON: Same objections.

24 THE WITNESS: That particular lawsuit,
25 I believe, addressed -- I hadn't read it, but I was told

1 Q Are you aware of any -- strike that.

2 What, if any, action are you aware of that the
3 department took to improve the funding of special ed
4 programs in California?

5 MR. HERRON: Objection. Vague and ambiguous.
6 Assumes facts not in evidence.

7 MS. ALTAMIRANO: Calls for speculation.

8 THE WITNESS: I don't recall all the specific
9 legislative efforts made by the department. I know when
10 I served as deputy superintendent in the internal
11 affairs, we support AB602 that sought to equalize
12 special ed funding among the special ed, among the self
13 special ed local planning area.

14 BY MR. AFFELDT:

15 Q What happened to AB602?

16 A I don't recall all the specifics because it's
17 kind of a detail piece of legislation, but generally it
18 equalized -- tried to equalize funding for special ed
19 because from what I was told certain districts or
20 certain services got more money than others in the
21 districts. And it was sort of based on sort of historic
22 patterns of service. And over time, patterns of
23 services and students' needs changed.

24 It was sort of based on a formula that was
25 created, I don't know how many years back, maybe in the

1 encroachment, state mandate encroachment into the
2 general fund and they wanted the state to adequately
3 fund state special ed.

4 BY MR. AFFELDT:

5 Q Who were the plaintiffs in that suit?

6 MR. HERRON: Same objections.

7 THE WITNESS: I think it was Riverside --
8 County of Riverside Unified School District. It was one
9 of the Riverside entities.

10 BY MR. AFFELDT:

11 Q And when was that filed?

12 MR. HERRON: Same objections.

13 MS. ALTAMIRANO: Objection. He already
14 testified that he had heard about this.

15 BY MR. AFFELDT:

16 Q You can answer to the extent you know.

17 A It was some years ago. It could be as much as
18 ten years ago.

19 Q Did it predate your tenure?

20 A Yes, it did.

21 Q Was it settled or resolved by a court ruling?

22 MR. HERRON: Objection. Calls for a legal
23 conclusion. Calls for speculation. Vague and
24 ambiguous.

25 THE WITNESS: I believe it was settled between

1 the parties. And it was settled, and it brought the
2 litigation to the end. I would assume the judge must
3 have signed off on it because the matter was a legal
4 matter.

5 BY MR. AFFELDT:

6 Q And what was your understanding of what this
7 settlement was that you ultimately reached?

8 MR. HERRON: Same objections as interposed in
9 the last question.

10 THE WITNESS: I don't recall the specific
11 dollar amount that was involved in the settlement. The
12 best I can recollect there was a certain amount paid for
13 the year that -- I believe, I guess it was probably this
14 year, the 01/02 school year, a lump sum payment and then
15 there's going to be, I think, 25 million dollars a year
16 for the next ten years. I don't know. I think it's 25
17 or something like that.

18 BY MR. AFFELDT:

19 Q Is that amount only going to Riverside or?

20 A No, it's for school districts across the state.

21 Q So whatever was reached was a general
22 resolution and not specific to Riverside?

23 MR. HERRON: Same objections as interposed to
24 the last question which I objected.

25 BY MR. AFFELDT.

1 the actions of the Department of Education that have
2 sought to improve the level of funding for special ed in
3 California?

4 MR. HERRON: Objection. Vague and ambiguous.
5 Calls for speculation. Assumes facts not in evidence.
6 Calls for a legal conclusion.

7 THE WITNESS: Different states hold their
8 groups, local school district or special ed associations
9 or associations of special ed directors from time to
10 time they'll go back to Washington, D.C. and federally
11 fund a program. They will go back to Washington, D.C.
12 to lobby for full funding or adequate funding of special
13 ed or other programs. And they would go on their own.
14 They wouldn't have to get our permission, or they didn't
15 have to get the permission of the Department of Ed.

16 BY MR. AFFELDT:

17 Q Any other actions by the State to readdress
18 special ed funding issues in California?

19 MR. HERRON: Same objections as to the last
20 question.

21 THE WITNESS: When you say "State," are you
22 talking about the state government or?

23 BY MR. AFFELDT.

24 Q Any state entity. We covered the Department of
25 Ed.

1 Q You are shaking your head. Speak your answer
2 so the reporter can hear you.

3 A Yes, it was a settlement for school districts
4 in the State of California. The handling of that money
5 really is handled in a completely different area than my
6 area.

7 Q And did the settlement discussions predate your
8 tenure in the department?

9 A I don't know.

10 Q Are you aware of any other actions the
11 department has taken to improve the funding situation
12 for special ed in California?

13 MR. HERRON: Objection. Assumes facts not in
14 evidence. Vague and ambiguous. Calls for speculation.
15 Asked and answered.

16 THE WITNESS: Am I aware of other efforts?
17 I don't -- it's possible that the superintendent may
18 have written letters to the legislature at the federal
19 level for funding, but I don't recall any specific
20 letter or specific substance on a particular piece of
21 legislation. I would have to go through the files and
22 see what position we may or may not have taken.

23 BY MR. AFFELDT:

24 Q Okay. Are you aware of any efforts by the
25 state, other than ones you've already mentioned, beyond

1 A I am not aware --

2 Q Okay.

3 A -- other than states legislature going to lobby
4 for money.

5 MR. AFFELDT: I'm going to hand you what will
6 be marked as Plaintiff's Exhibit 54-A and I'm going to
7 ask you to try to help me understand what this document
8 is. It's a rather lengthy document. I think if you'll
9 just read the first page and then if you can let me know
10 when you're done.

11 (Plaintiff's Exhibit 54-A was marked
12 for identification by the court reporter.)

13 MR. HERRON: So your direction is for him to
14 read the first page and see if he recognizes it?

15 MR. AFFELDT: Just let me know when he's done.
16 Take a look at the first page, then, I'll ask him if he
17 recognizes it.

18 THE WITNESS: I have some recollection that we
19 submitted a proposal to the feds and it was eventually
20 approved by the feds with a grant of five million
21 dollars, but this was developed -- I can't remember.
22 This was already in the works before I took on my
23 responsibilities as deputy supervisor for the education
24 of equity, but this was an item that was sort of on its
25 way. I did not have the substantive involvement at this

1 point.

2 BY MR. AFFELDT:

3 Q What is a state improvement plan?

4 A From what I understand, it's an effort to
5 improve our overall system in monitoring compliance,
6 technical assistance, services to LEA, Local Education
7 Agencies. To address how to help, for example, local
8 school districts to address how they communicate with
9 parents, how we communicate with the members of the
10 public, families with special ed students.

11 Q Is that a grant program from the federal
12 government under the IDEA?

13 MR. HERRON: Objection. Vague and ambiguous as
14 to time. Vague and ambiguous as phrased. This document
15 is dated more than three years ago.

16 THE WITNESS: You know, I don't know what was
17 the specific funding source for this state improvement
18 plan.

19 BY MR. AFFELDT:

20 Q Well, I'm looking at the first sentence on the
21 first page which seems to indicate "Was proceeding to
22 obtain money under the IDA," let me know if that
23 refreshes your recollection?

24 A Yes, but I don't know what part it came under.
25 There are a lot of different parts to IDA. I don't know

1 the top right-hand corner.

2 MR. HERRON: Is that '90 or '98?

3 MR. AFFELDT: There's another similar chart on
4 page 7. There's another chart with a similar date.
5 Does any of this refresh your recollection as to when
6 this document was developed?

7 MS. ALTAMIRANO: The question was asked and
8 answered before that he doesn't recollect.

9 MR. AFFELDT: I'm asking if his recollection is
10 being refreshed, which is an appropriate question.

11 THE WITNESS: It says, 1998. As I state,
12 I have some recollection that this matter of state
13 improvement grant, that we have to apply for, surfaced
14 sometime in 1998. And it says it's based on this state
15 improvement plan. I don't recollect the plan right now.
16 I don't recollect the plan -- the date of the plan,
17 I should say.

18 BY MR. AFFELDT.

19 Q But the plan and the grant were submitted after
20 you took office in the equity branch?

21 MR. HERRON: Objection. Calls for speculation.
22 Asked and answered.

23 THE WITNESS: What I generally recollect is the
24 state improvement grant was submitted during that time
25 in 1998 when I was around or shortly after I assumed my

1 what part it came under.

2 Q When did you take over again as deputy
3 superintendent of the equity branch?

4 A February of 1998. No. It was either February
5 or March.

6 Q Of 1998?

7 A I think it was March of 1998 that I literally
8 moved over to the desk for that branch.

9 Q Do you know what the date of this document is?
10 Do you have any idea?

11 A No.

12 MR. HERRON: Mr. Der, let me help you out here.
13 On the first page, fourth paragraph, it talks about will
14 be developing something by October 1, 1998. Does this
15 give you any hint of when this might be produced, and,
16 if not, the answer is obviously no?

17 THE WITNESS: Actually, this is a grant that we
18 applied. For this plan -- I forget when this plan.

19 BY MR. AFFELDT:

20 Q Let me direct you to page 4 which has a chart.
21 Are you on page 4?

22 A Just a second.

23 MS. ALTAMIRANO: You've answered the question.

24 BY MR. AFFELDT:

25 Q The chart is dated, it looks like 9/18/98 on

1 responsibilities.

2 BY MR. AFFELDT:

3 Q I believe you testified that you, the
4 department, received five million dollars?

5 A Some amount like that.

6 Q Okay. The document references a California
7 partnership committee on special education.

8 MS. ALTAMIRANO: Would you please describe what
9 page you're looking at?

10 MR. AFFELDT: I'm looking at page one. The
11 title at the very top says "From the Department of Eds,
12 Special Ed Division and California Partnership Committee
13 on Special Education." And then that committee is also
14 referenced again in the last sentence of the first
15 paragraph.

16 THE WITNESS: The last paragraph.

17 BY MR. AFFELDT:

18 Q The first paragraph.

19 A Okay.

20 Q Do you recollect what that partnership
21 committee on special education was?

22 A Not by that name. What I recollect is Alice
23 convening a stick holder group to work on the grant
24 application, but I wasn't aware of what was the name of
25 that group.

1 Q Okay. And do you recall who was included
2 within those stick holders?

3 A No.

4 MR. AFFELDT: That's all I have.

5 MR. HERRON: State of California will take one
6 copy.

7 MS. ALTAMIRANO: I want a disk and condensed.

8 MS. KAATZ: Copy and condensed version.

9 MR. HAJELA: Make it similar to the previous
10 order.

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I, ASHLEY RESSA, Certified Shorthand Reporter,
of the State of California, do hereby
certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth; that
6 any witnesses in the foregoing proceedings, prior to
7 testifying were placed under oath; that a verbatim record
8 of the proceedings was made by me using machine shorthand
9 which was thereafter transcribed under my direction;
10 further, that the foregoing is an accurate transcription
11 thereof.

12 I further certify that I am neither financially
13 interested in the action nor a relative or employee of
14 any attorney of any of the parties.

15 IN WITNESS WHEREOF, I have this date
16 subscribed my name.

17 Dated: _____

18 _____
19 ASHLEY RESSA, CSR No. 12019

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I, HENRY DER, do hereby declare under
penalty of perjury that I have read the foregoing
transcript of my deposition; that I have made such
corrections as noted herein, in ink, initialed by me,
or attached hereto; that my testimony as contained
Herein, as corrected, is true and correct.

EXECUTED this ____ day of _____,
2001, at _____, _____.
(City) (State)

HENRY DER