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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Miriam Flores, et al.,
Plaintiffs,

vs.

State of Arizona, et al.,
Defendants.

No. 92-CV-596-TUC-RCC

ORDER

A group of English Language Learner (ELL) students and their parents (Plaintiffs) filed a class action suit, alleging that Arizona, its State Board of Education, and the Superintendent of Public Instruction (Defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires states to take “appropriate action to overcome language barriers” in schools, 20 U.S.C. § 1703(f). In 2000, this Court entered a declaratory judgment, finding an EEOA violation in Nogales because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual costs of ELL instruction in Nogales. This Court subsequently extended this relief statewide. In 2006, defendants filed a 60(b)(5) motion for relief from the Court’s 2005 judgment. Following an evidentiary hearing, the Court denied the motion. Defendants appealed to the Ninth Circuit and then to the United States Supreme Court. The Supreme Court remanded the case to this Court for a new 60(b)(5) hearing, ordering the Court to employ a more flexible standard in evaluating defendants’ 60(b)(5) motion. After a three-week evidentiary hearing on defendants’ 60(b)(5) motion, the Court took the matter under advisement.

1 Having conducted an evidentiary hearing of the pending motion for relief under Rule
2 60(b)(5) over 22 days, beginning September 1, 2010, and ending January 11, 2011, and
3 having weighed the testimony and considered the hearing exhibits, the Court makes the
4 following findings of fact and conclusions of law. To the extent these Findings of Fact are
5 also deemed to be conclusions of law, they are hereby incorporated into the Conclusions of
6 Law that follow. To the extent any of these Conclusions of Law contain findings of fact, they
7 are hereby incorporated into the Findings of Fact above.

8 I. FINDINGS OF FACT

9 1. Plaintiffs are a certified class of “all minority ‘at-risk’ and limited English
10 proficient children, now or hereafter enrolled in Nogales Unified School District, as well
11 as their parents or guardians.” (Doc. 105.)

12 2. In its January 2000 judgment, this Court held that the Defendants were in
13 violation of the “appropriate action” provision contained in § 1703(f) of the Equal
14 Educational Opportunities Act (“EEOA”) because “the State’s arbitrary and capricious Lau
15 appropriation [was] not reasonably calculated to effectively implement the Lau educational
16 theory which it approved, and NUSD adopted.” *Flores v. Arizona*, 172 F.Supp.2d 1225, 1239
17 (D. Ariz. 2000).

18 3. Post-judgment proceedings over the ensuing years focused on issues
19 concerning appropriate funding for ELL instruction. This Court’s 2000 judgment, and the
20 subsequent injunctions, did not address whether the EEOA is violated by Arizona’s
21 implementation of the Task Force Model.

22 4. In March 2006, shortly after HB 2064 became law, the Superintendent
23 requested an evidentiary hearing on the new legislation, and Intervenor, joined by the
24 Superintendent, moved for Rule 60(b)(5) relief from the underlying judgment, alleging that
25 a variety of changed circumstances warranted relief from the 2000 judgment. (Docs. 380,
26 422, 433.).

27 5. Following two evidentiary hearings, two consolidated appeals to the Ninth
28 Circuit, and an appeal to the United States Supreme Court, the case was again remanded to

1 this Court “to determine whether, in accordance with the standards set out [by the Supreme
2 Court], petitioners should be granted [Rule 60(b)(5)] relief from the judgment.” *Horne v.*
3 *Flores*, 129 S.Ct. 2579, 2607 (2009).

4 6. The Supreme Court directed this Court to determine whether it was appropriate
5 to grant statewide relief in this case.

6 7. The Supreme Court also directed this Court to consider whether changed
7 circumstances exist that would justify suspending the current injunction in this case.

8 8. Plaintiffs originally alleged three statewide violations of the EEOA, but have
9 since decided not to pursue two of their arguments.¹

10 9. Now, Plaintiffs’ sole basis for statewide violation of the EEOA is Defendants’
11 implementation of the Four Hour Model across the state. Defendants contend that the
12 Nogales Plaintiffs lack standing to bring statewide claims because the Four Hour Model is
13 not implemented in the same manner across school districts, and because implementation
14 also varies across individual schools within the same district. For example, Defendants allege
15 some schools teach the four hours consecutively while others break the four hours up into
16 smaller increments and place them throughout the school day.

17 10. In setting the scope of the Rule 60(b)(5) evidentiary hearing, the Court stated
18 that it would examine “at least four factual and legal changes that may warrant Defendants’
19 relief from the Court’s 2000 Order.” (Doc. 888).

20 11. These changed circumstances include the adoption of the Structured English
21 Immersion methodology, the enactment of the No Child Left Behind Act, various structural
22 and management reforms being implemented in Nogales, and an increase in overall education
23 funding.

24 12. Arizona voters approved Proposition 203 in 2000. In 2006 the Legislature
25

26 ¹ In addition to the implementation of the four hour model, Plaintiffs’ original
27 allegations of statewide EEOA violations included Defendants’ test of English proficiency
28 through the Arizona English Language Learner Assessment (AZELLA) and Defendants’
identification of ELL students.

1 passed House Bill 2064, 2006 ARIZ. SESS. LAWS (2d Reg. sess.) Ch. *Codified at* A.R.S.
2 §§ 15-241, 15-756 through 15-756.13, 15-910, and 41-1279.03 (“HB 2064”), and the Task
3 Force developed and promulgated the four hour models and the Discrete Skills Inventory
4 (“DSI”) in 2007.

5 13. Proposition 203’s intent was to change the primary method of English
6 Language Development (“ELD”) in Arizona from bilingual education to Structured English
7 Immersion (“SEI”).

8 14. Codified at A.R.S. §§ 15-751 through 15-755, Proposition 203 makes SEI
9 Arizona’s predominant method of ELD, sets a one-year goal for ELLs to become proficient,
10 and requires annual testing and monitoring of the program.

11 15. Proposition 203 required all ELL students to be taught through SEI strategies,
12 which meant that all ELL students would be placed in English language classrooms and
13 taught in English.

14 16. Proposition 203 initially left its implementation to the individual school
15 districts, and did not prescribe a particular model for implementation of SEI. That came later
16 with HB 2064.

17 17. On September 21, 2006, the Arizona legislature passed HB 2064, which
18 established the ELL Task Force.

19 18. The Task Force was instructed to develop a research-based model of ELL
20 instruction in SEI methodologies, including a minimum of four hours of daily instruction in
21 English language development.

22 19. Codified primarily at A.R.S. §§ 15-756 through 15-756.13, HB 2064 made
23 substantial reforms in the method of ELD in Arizona.

24 20. It delegated the duty of identifying ELLs to the Superintendent of Public
25 Instruction. A.R.S. § 15-756.

26 21. It created the Task Force, assigned it the task of developing the models, and
27 reaffirmed the goal of attaining proficiency in one year. A.R.S. § 15-756.01(C).

28 22. It set parameters for the four-hour models, which included a minimum of four-
hours of ELD per day in the first year, with the Task Force to determine the number of hours

1 in each year thereafter. A.R.S. § 15-756.01(C).

2 23. It required that the models be research-based, and that they take into
3 consideration such factors as “the size of the school, the location of the school, the grade
4 levels at the school, the number of English language learners and the percentage of English
5 language learners.” *Id.*

6 24. It assigned the Task Force the responsibility of developing the most “cost-
7 efficient models” meeting all state and federal requirements. A.R.S. § 15-756.01(D). It also
8 allowed room for districts to request approval of alternative models (although it appears that
9 approval is rarely granted). A.R.S. § 15-756.02(B).

10 25. All school districts were required to adopt the Task Force’s model or submit
11 an alternative model for Task Force approval.

12 26. HB 2064 also mandated a uniform method of assessing and reclassifying
13 ELL students and provided for mandatory monitoring of reclassified students for two years
14 after exiting the program.

15 27. HB 2064 provided for at least annual testing of ELLs to determine whether
16 they should be reclassified as proficient, A.R.S. § 15-756.05, and called for follow-up
17 monitoring of students who had become fully-English proficient (“FEP”) to assess whether
18 they had lost any proficiency skills. A.R.S. § 15-756.06.

19 28. HB 2064 created the Office of English Language Acquisition Services
20 (“OELAS”), A.R.S. § 15-756.07, and tasked OELAS with the responsibility of monitoring
21 school-district implementation of the models and ongoing compliance with them. A.R.S. §
22 15-756.08.

23 29. It instructed the Department to issue a report to each monitored district, and
24 directed each monitored district to submit a corrective action plan if it were found out of
25 compliance. A.R.S. § 15-756.08.

26 30. OELAS is responsible for monitoring districts across the state and providing
27 technical assistance and training to teachers and administrators.

28 31. Consistent with the No Child Left Behind Act (“NCLB”), HB 2064 adopted

1 reporting responsibilities both for the districts and OELAS. A.R.S. § 15-756.10.

2 32. HB 2064 set forth a self-correcting mechanism, and required the Task Force
3 yearly to refine the models as experience proved necessary:

4 The task force shall review research based models of
5 structured English immersion annually and delete, add or
6 modify the existing models. When adopting or modifying
7 English language learner programs, the task force shall
8 review and consider the information and data obtained as
9 a result of the department of education's monitoring of
10 English language learner programs pursuant to section
11 15-756.08.

8 A.R.S. § 15-756.01(G). However, the Court is unaware of any meaningful modifications
9 made by the Task Force.

10 33. The Task Force completed its work and adopted the models on September 13,
11 2007, just short of a year after commencement.

12 34. During this time period, the Task Force met a total of 31 times.

13 35. At its meeting of June 14, 2007, the Task Force accepted drafts of proposed
14 models. Proposed amendments were also accepted.

15 36. Public hearings were held in Tucson and Phoenix.

16 37. Final adoption took place on September 13, 2007.

17 38. The models have sought to bring about a uniform method of four hours of
18 ELD to all ELL students in all districts in Arizona.

19 39. The models adopted by the Task Force require that four hours of daily
20 English language development be provided to all ELL students. Exhibit 711, Models Tab at
21 ADE 000014.

22 40. According to the models, ELD means English language development and
23 the teaching of English language skills to students who are in the process of learning English.
24 It is distinguished from other types of instruction, e.g., math, science, or social science, in
25 that the content of ELD emphasizes the English language itself. The models further provide
26 that ELD instruction focuses on phonology (pronunciation – the sound system of a language),
27 morphology (the internal structure and forms of words, syntax) (English word order rules),
28

1 lexicon (vocabulary), and semantics (how to use English in different situations and contexts).

2 *Id.*

3 41. Academic content in other subject areas is not the focus in ELD. In the four
4 hours of ELD, it is the English language proficiency standards that are taught to ELL
5 students. As the Arizona Department of Education repeatedly emphasizes, it is English
6 language development that is the driver in the four hour model and which remains the focus
7 of instruction. Academic content can be used as a vehicle for delivering ELD but the
8 objective of ELD is to teach English, not math, science, social studies or other academic
9 content. Day 2 at 91, 98.

10 42. The objective of the SEI classroom is to teach one or more specific identified
11 skills within the Discrete Skills Inventory appropriate for the English proficiency levels of
12 students in the class. Exhibit 708, Models Tab at ADE 000013. Class textbooks, materials
13 and assessments used in an SEI classroom must be aligned to the Arizona K-12 English
14 Language Learner Proficiency Standards and the Discrete Skills Inventory. *Id.* at ADE
15 000018. Classroom materials used in an ELD class may reflect content from a variety of
16 academic disciplines. *Id.*

17 43. The models require that for elementary school, ELL students at the
18 pre-emergent and emergent levels receive four hours of ELD instruction divided into the
19 following specific areas: oral English and conversation instruction, 45 minutes; grammar
20 instruction, 60 minutes; reading instruction, 60 minutes; vocabulary instruction, 60 minutes;
21 and, pre-writing instruction, 15 minutes. Exhibit 708, Models Tab at ADE 000016. Students
22 at the basic proficiency level receive four hours of ELD divided into the following specific
23 areas: oral English and conversation instruction, 30 minutes; grammar instruction, 60
24 minutes; reading instruction, 60 minutes; vocabulary instruction, 60 minutes; and, writing
25 instruction, 30 minutes. *Id.* at ADE 000017. Students at the intermediate proficiency level
26 receive four hours of ELD divided into the following specific areas: oral English and
27 conversation instruction, 15 minutes; grammar instruction, 60 minutes; reading instruction,
28 60 minutes; vocabulary instruction, 60 minutes; and, writing instruction, 45 minutes. *Id.*

1 44. The discrete time blocks do not have to be sequential but they must sum to
2 four hours of ELD instruction each day. Exhibit 708, Models Tab at ADE 000016.

3 45. In middle school and high school, pre-emergent, emergent and basic ELL
4 students generally receive daily a one hour ELD class in conversational English and
5 academic vocabulary, a one hour ELD class in English reading, a one hour ELD class in
6 English writing and a one hour ELD class in English grammar. *Id.* at ADE 000017.

7 46. Students at the intermediate level in middle and high school are required to
8 receive two hours daily of English language arts aligned to the Arizona language arts
9 academic standards, a one hour ELD class titled Academic English Reading and one hour
10 ELD class titled Academic English Writing and Grammar. *Id.* In their second or subsequent
11 years as ELLs, intermediate students who have scored proficient on the reading subtest of
12 AZELLA may be excused from the one hour ELD academic English reading class and
13 intermediate students who have scored proficient on the total writing sub-test may be excused
14 from one hour ELD academic English writing and grammar class. *Id.*

15 47. It is an unfortunate fact that students from an impoverished background start
16 school behind their peers academically. Educating students with a language barrier who are
17 also from an impoverished background is a daunting challenge. Day 7 at 76-71.

18 48. Mr. Maguire testified that he believes that the law in Arizona prefers
19 sequential not simultaneous learning of the English language with academic content. Day
20 13 at 166. He thought it was impossible for ELLs to be taught science and social studies
21 because they were ELL students and were not English proficient. Day 13 at 169. He
22 acknowledged that social studies and science could be taught to ELL students if the content
23 was adjusted to their level of proficiency. Day 13 at 170. He also acknowledged that SIOP
24 could be used to assist ELLs to learn academic content outside of the four hours of English
25 language development. Day 13 at 173.

26 49. State law requires that “compensatory instruction” be provided to ELL
27
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1 students only for English language development. A.R.S. § 15-756.11(G). Compensatory
2 instruction does not include providing instruction to ELL students in academic content areas
3 that they may have missed as a result of participating in the four hour model. Day 14 at 222.

4 50. The models provide that students whose AZELLA composite proficiency
5 level scores are pre-emergent, emergent, basic, or intermediate shall be grouped in SEI
6 classrooms. Exhibit 708, Models Tab at ADE 000014. The AZELLA test is the sole,
7 exclusive means of determining whether a student is identified as an ELL and is the only
8 way a student, once identified, can reclassify as proficient. The mantra of the Arizona
9 Department of Education is “AZELLA in, AZELLA out.” Day 1 at 27.

10 51. The models require that ELL students be grouped by proficiency level
11 within grade if possible. If not possible, then ELL students may be grouped by proficiency
12 level and within grade. If that is not possible, then ELL students across grade levels may be
13 grouped together into an SEI classroom. Exhibit 708, Models Tab at ADE 000015.

14 52. The Arizona Department of Education requires that ELL students be
15 placed into self-contained classrooms for four hours of daily English language development.
16 Exhibit 510; Exhibit 529 at 3. Adela Santa Cruz, Director of the Department’s Office of
17 English Language Acquisition services, testified that she believed the Task Force models
18 require segregation of the ELL students. Day 14 at 188-191, 194.

19 53 The extent to which ELL students in the four hours of ELD are exposed to
20 academic content can vary from school district to district and from school to school within
21 a school district. However, even at school districts that claim to teach academic content as
22 part of the four hours of ELD, the witnesses acknowledge that the academic content provided
23 to ELL students is not the same, and is less than, what is provided to English proficient
24 students. Day 15 at 54-58; Day 8 at 170; Day 9 at 135-136.

25 54. It is possible that ELL students will pick up some academic content since
26 academic content is used as a vehicle to deliver ELP standards but the teachers do not
27 explicitly address academic standards in their instruction. Day 17 at 35.

28 55. The state does not prescribe the kind of academic content that should be

1 used as a vehicle for delivering English Language Development at various grade levels and
2 the teachers have the flexibility to use the materials that they want. Day 17 at 35.

3 56. The state does not require school districts to provide ELL students with an
4 opportunity to recover the academic content that they missed while they were in the four hour
5 model and makes no effort to determine whether ELL students have been deprived of
6 academic content as a result of being placed in four hours of ELD. Day 14 at 149-150.

7 57. Under the No Child Left Behind Act (NCLB), Arizona was required to draft
8 and adopt English Language Performance (ELP) standards to be used as specific guides in
9 developing the curriculum used for ELL students.

10 58. The ELP standards set specific language objectives that students must achieve
11 before being reclassified as English proficient.

12 59. Arizona's ELP standards were approved by the Department of Justice in 2004.

13 60. NCLB also provided additional funding to public schools specifically for
14 assisting ELL students enrolled in language remediation programs.

15 61. As a result, Nogales has received an increase in its Title I funding, as well as
16 Title III funding which was specifically earmarked for ELL students.

17 62. Under NCLB, Nogales must track the progress and reclassification of its ELL
18 students on an annual basis.

19 63. In 2009, Nogales met its Annual Yearly Progress (AYP) requirement as
20 required by NCLB by reclassifying more than 15% of its ELL students.

21 64. The No Child Left Behind Act, Pub.L. 107-110, 115 Stat. 1425, ("NCLB") has
22 made four major changes to the delivery of ELD in Nogales and throughout Arizona: (A) the
23 development of the ELP, (B) the adoption of Annual Measurable Achievement Objectives
24 ("AMAOs"), (C) accountability for failure to achieve AMAOs, and (D) increased funding.

25 65. NCLB intensifies focus on the educational achievement of language
26 minorities. It required the Arizona Department of Education to develop and adopt the ELP.
27 Day 1, 09.01.10, Stollar testimony, at 49:13-16. See NCLB § 1111(b)(1) (requiring the
28 adoption of "challenging academic standards.").

1 66. The federal government approved the ELP, and they have been disseminated
2 to every district in Arizona.

3 67. NCLB requires Arizona and its school districts to develop AMAOs. Day 2,
4 09.02.10, Stollar testimony, at 22:3-23:14.

5 68. The AMAO must set (1) a certain percentage of ELLs who make progress in
6 language development, (2) a certain percentage that need to be reclassified, and (3) a certain
7 percentage of ELLs that need to pass AIMS. *Id.*

8 69. In this context, making progress means moving from one level to another;
9 from pre-emergent to emergent, from emergent to basic, and so on. *Id.*, at 23:6-14.

10 70. The federally approved rate for 2008-09 for making progress, reclassification,
11 and passing AIMS was 15%. *Id.*, at 23:15-4.

12 71. In 2009-10, it went up to 17%. *Id.*, at 8-10.

13 72. NCLB requires annual assessments of pupils in grades 3 to 8 and grade 10,
14 NCLB § 1111(b)(3)(C)(vii), and specifically requires assessments for English language
15 proficiency. NCLB § 1111(b)(7).

16 73. It provides for annual report cards for both the State as a whole, the district as
17 a whole, and each school. NCLB § 1111 (h).

18 74. It devises an elaborate accountability structure for a district's failure to achieve
19 AMAOs, including the requirement of corrective action, NCLB § 1116(b)(7), and sanctions
20 starting at decreased funding and culminating in a takeover of failing schools. NCLB §
21 1116(b)(8).

22 75. Beginning with Superintendent Cooper and continuing with Superintendent
23 McCollough, Nogales has implemented substantial structural and management reforms that
24 have significantly elevated its performance.

25 76. The Superintendent estimated classroom sizes on average at 25 pupils per
26 room at the elementary and middle grades, and less at high school.

27 77. Nogales is now able to draw and keep experienced teachers.

28 78. It pays a sign up bonus to all teachers, existing and new hires, of \$5000.00.

 79. Its teacher salaries are competitive within Arizona, and very competitive

1 within its region. *Id.*, at 175:19-177:1.

2 80. The Court previously found Nogales to have inadequate teaching materials
3 for both content and ESL classes *Flores*, 172 F.Supp.2d at 1239. That no longer is the case.

4 81. Superintendent Cooper, McCullough's predecessor, created a centralized
5 textbook adoption program, which addressed the Court's concerns regarding the adequacy
6 of teaching materials.

7 82. Nogales has also established various compensatory education programs
8 including summer school and after-school tutoring.

9 83. The last of the discrete factors this Court identified was teacher aides.
10 Teacher aides were more important under the bilingual and ESL programs Nogales had in
11 place when the Court rendered its judgment. Nogales has made a deliberate decision to
12 eliminate aides and to devote their funding to increase teacher salaries.

13 84. According to its Superintendent, Nogales financially "is in a much better
14 position than it was two and a half years ago, and . . . comparatively speaking to other
15 districts in the state of Arizona, probably pretty good." Day 4, 09.07.10, McCollough
16 testimony, at 161:12-19.

17 85. Arizona funds local education by several income streams. These include: (A)
18 capital funding for land, buildings, and structures, through the state facilities board, Day
19 7, 09.14.11, Valdivia testimony, at 152:10-153:7; (B) for maintenance and operations
20 ("MO"), a combination of the local property tax levy, and state equalization aid, set by
21 statutory formula per student, to bring all districts up to a statutory cap and "to make sure
22 all districts are playing on a level playing field," *id.*, at 153:10-155:13; (C) Proposition 301,
23 a statewide sales tax distributed to each district according to a statutory formula that takes
24 into consideration enrollment figures and other factors, *id.*, at 155:14-157:2; (D) Indian
25 gaming proceeds, *id.*, at 157:3-158:9; and (E) local overrides approved by a District's
26 voters. *Id.*, at 158:10-23.

27 86. The Legislature also has authorized funding specifically for ELD. Such
28 funding includes the compensatory education fund, *id.*, at 148:2-149:3; the Group B weight,
id., 149:13-151:17; and funding 24 ½ positions at OELAS. *Id.*, at 151:18-152:5.

1 87. Apart from state and local funding, Congress appropriates enormous sums to
2 states and local districts by means of NCLB and the Elementary and Secondary Education
3 Act of 1965 (“ESEA”), as amended and renewed periodically since the Johnson
4 administration. Such federal funds are distributed by means of Titles I, II, and III of the
5 ESEA. *Id.*, at 149:4-10.

6 88. Statewide equalization funding, set by a statutory formula to bring all districts
7 up to a statutory cap and make sure all districts are on a level playing field, increased from
8 \$3.413 billion in 2000 to \$5.776 billion in 2010.

9 89. Per pupil MO funding increased from \$4,084 in FY 2000 to \$5,523 in FY
10 2010.

11 90. Proposition 301 funding increased from \$235,346,200 in FY 2000 to
12 \$381,081,000 in 2010, with a peak at \$603,713,200 in FY 2008, before bad times and
13 resulting drops in sales taxes set in.

14 91. Despite the bad economy, state funding per pupil dropped only \$17 from FY
15 2009 to FY 2010. Day 7, 09.14.11, Valdivia testimony, at 159:18-25.

16 92. Federal funding also increased significantly over the last ten years, especially
17 with the fillip coming from NCLB.

18 93. Arizona’s share of Title I funding went from \$359,247,997 in FY 2000, to
19 \$582,931,537 in FY 2010.

20 94. All federal sources of education funding to Arizona, excepting the Recovery
21 Act, increased from \$503,955,180 in FY 2003 to \$787,492,346 in FY 2010.

22 95. For its part, the Recovery Act sent to Arizona education \$1.0 billion in
23 economic stabilization funding, an additional \$195 million in increased Title I funding, \$185
24 million in special education funding, and increased Title II-D, homeless, and food and
25 nutrition money. Day 7, 09.14.11, Valdivia testimony, at 169:1-22.

26 96. For Arizona alone, the Recovery Act sent about one and a half billion dollars
27 in FY 2010 for education purposes.

28 97. Bringing the funding increases home to Nogales, the district did not have an
override in place when the Court issued its judgment in 2000. *Flores*, 172 F.Supp.2d at
1230.

1 98. The Nogales voters approved an override in 2000, and the funds it has
2 generated have increased from \$895,891 in FY 2001 to \$1,750,825 in FY 2010.

3 99. The combined MO and override funding saw an increase in available MO
4 funding at Nogales per pupil from \$3,675 in 2000 to \$5,306 in FY 2010, a 44% increase
5 over the last decade.

6 100. Nogales has experienced increases in funding at both the state and federal
7 levels.

8 101. Due to decreased enrollment in Nogales since 2000, the per student funding
9 has increased from \$3,675 in 2000, to \$5,306 in 2010.

10 102. At the federal level, Nogales received increased Title I and Title III funding
11 as well as funding from the American Recovery and Reinvestment Act. Title I funding,
12 excluding the Recovery Act, went from \$274 per pupil in 2000 to \$528 in 2010, and with
13 the Recovery Act, to \$940 per pupil in 2010. Title III funding went from \$67 in 2003 to
14 \$252 in 2010. As a result, federal funding per ELL in Nogales, counting Title I and III
15 and the Recovery Act, stands at \$1192 in 2010.

16 103. Since 2002, Nogales has carried over unused federal funds each schoolyear,
17 which is not unusual considering when the district actually received these funds from the
18 government..

19 104. Specifically, in 2007, 2008, and 2009, Nogales carried over \$49,696,
20 \$121,832, and \$45,380, respectively, of its Title III funding, which is earmarked for ELL
21 students pursuant to the NCLB.

22 105. Nogales has an effective ELD program. Its FEP-2s rank higher on AIMS
23 reading, writing, and mathematics at all elementary and middle grades.

24 106. Its reclassification rates consistently have placed at the top or near the top of
25 nine sister districts at the border.

26 **II. CONCLUSIONS OF LAW**

27 1. In order to make a statewide claim, Plaintiffs must present evidence that the
28 EEOA is being violated in every Arizona school district and in the same manner. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

2. Rule 60(b)(5) provides relief from a final judgment when the “judgment has

1 been satisfied, released, or discharged, or a prior judgment upon which it is based has been
2 reversed or otherwise vacated, or it is no longer equitable that the judgment should have
3 prospective application.” Rule 60(b)(5), Fed.R.Civ.P.

4 3. A party seeking dissolution of an injunction may meet its initial burden by
5 demonstrating “a significant change either in factual conditions or in law.” *Rufo v. Inmates*
6 *of Suffolk County Jail*, 502 U.S. 367, 384, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); *see Sharp*
7 *v. Weston*, 233 F.3d 1166, 1170 (9th Cir.2000) (“A party seeking modification or dissolution
8 of an injunction bears the burden of establishing that a significant change in facts or law
9 warrants revision or dissolution of the injunction”); *Univ. of Haw. Prof'l Assembly v.*
10 *Cayetano*, 125 F.Supp.2d 1237, 1240 (D.Haw.2000) (“[C]ourts have continuing jurisdiction
11 to terminate, dissolve, vacate, or modify an injunction or an interlocutory order in the event
12 that changed circumstances require it.”) (citing *United States v. Oregon*, 769 F.2d 1410,
13 1416 (9th Cir.1985) and *In re Detroit Auto Dealers Ass'n, Inc.*, 84 F.3d 787, 789 (6th
14 Cir.1996)).

15 4. “A significant change is one that pertains to the underlying reasons for the
16 injunction.” *Moon v. GMAC Mortgage Corp*, 2008 WL 4741492, at *2 (W.D.Wash. Oct.24,
17 2008) (citing *United States v. Swift & Co.*, 189 F.Supp. 885, 905 (D.Ill.1960), *aff'd per*
18 *curium*, 367 U.S. 909, 81 S.Ct. 1918, 6 L.Ed.2d 1249 (1961)).

19 5. The Supreme Court defined the broad scope of the remand as follows:

20 For these reasons, a critical question in this Rule 60(b)(5)
21 inquiry is whether the objective of the District Court’s
22 2000 declaratory judgment order — *i.e.*, satisfaction of
23 the EEOA’s appropriate action standard — has been
24 achieved. If a durable remedy has been implemented,
25 continued enforcement of the order is not only
26 unnecessary, but improper.

27 *Horne v. Flores*, 129 S.Ct. 2579, 2595 (2009).

28 6. With respect to Nogales, the Supreme Court focused the remand
on the following four specific factors:

[T]hese cases must be remanded for a proper
examination of at least four important factual and legal

1 changes that may warrant the granting of relief from the
2 judgment: [1] the State's adoption of a new ELL
3 instructional methodology, [2] Congress' enactment of
NCLB, [3] structural and management reforms in
Nogales, and [4] increased overall education funding.

4 *Id.* at 2600.

5 7. The Supreme Court stated the following regarding the statewide
6 injunction granted by this Court:

7 We turn, finally, to the District Court's entry of statewide
8 relief. The Nogales district, which is situated along the
9 Mexican border, is one of 239 school districts in the State
10 of Arizona. Nogales students make up about one-half of
11 one per cent of the entire State's school population. The
12 record contains no factual findings or evidence that any
13 school district other than Nogales failed (much less
14 continues to fail) to provide equal educational
opportunities to ELL students. Nor have respondents
15 explained how the EEOA could justify a statewide
16 injunction when the only violation claimed or proven
17 was limited to a single district. It is not even clear that
18 the District Court had jurisdiction to issue a statewide
19 injunction when it is not apparent that plaintiffs - a class
20 of Nogales students and their parents - had standing to
21 seek such relief.

22 *Horne*, 129 S. Ct. at 2606.

23 8. The Supreme Court rejected the Attorney General's argument that
24 the general-and-uniform-public-school-system clause of ARIZ. CONST. art. 11, § 1(A),
25 required a statewide extension of relief, "This concern did not provide a valid basis for a
26 statewide *federal* injunction." *Horne*, 129 S. Ct. at 2607 (emphasis in original).

27 9. After the parties' briefing and argument of the issue of whether continued
28 statewide relief was appropriate, by order dated December 21, 2009, (doc. 883), this Court
granted Plaintiffs leave to advance three statewide issues at the evidentiary hearing, two of
which Plaintiffs later withdrew.

10 10. Thus, the one and only statewide issue tried at the evidentiary hearing was
11 whether Defendant's implementation of the four hour model constituted a statewide EEOA
12 violation.

13 11. When ELL students test proficient in English on language assessments, they

1 are “reclassified.” Over the past 10 years, the state has utilized different assessments to test
2 ELL students’ proficiency. In 2003-2004 and 2004-2005, the SELP (“Stanford English
3 Language Proficiency”) test was used. In 2006-2007, 2007-2008 and 2008-2009,
4 the AZELLA1 test was used. In 2009-2010 the AZELLA2 test was used. Exhibit 742.

5 197. Statewide reclassification rates for the last five years are shown below:

6	<u>2005-06</u>	<u>2006-07</u>	<u>2007-08</u>	<u>2008-09</u>	<u>2009-10</u>
7	15%	12%	22%	29%	30%

8 Exhibit 752; Day 15 at 121.

9 12. Department witnesses acknowledge that the increase in the reclassification
10 rates on a statewide basis from 12% in 2006-2007 to 22% in 2007-2008 was attributable at
11 least in part to the change in testing for kindergarteners. Day 16 at 90-91, 92; Day 14 at 164.

12 203. In the Nogales Unified School District, the reclassification rates for ELL
13 students for the last five years were as follows:

14	<u>2005-06</u>	<u>2006-07</u>	<u>2007-08</u>	<u>2008-09</u>	<u>2009-10</u>
15	34%	15%	35%	39%	36%

16 Exhibit 771; Day 16 at 88.

17 13. In 2005-2006, the reclassification rate was 34% using the SELP test. Day 16
18 at 88.

19 14. In 2006-2007 the reclassification rate decreased to 15% when the AZELLA1
20 test was first administered. Day 16 at 88. The fact that the AZELLA1 was a brand new test
21 accounted for the decline in the reclassification rate in 2006-2007. Day 16 at 89.

22 15. In 2007-2008, the reclassification rate increased to 35%. Day 16 at 89. The
23 fact that kindergartners were tested twice for the first time accounted at least in part for the
24 increase in the 2007-2008 school year. Day 16 at 89.

25 16. In 2008-2009, the reclassification rate increased to 39%. This increase in
26 reclassification rates in Nogales between the 2007-2008 school year and the 2008-2009
27 school year, which was the first year the four hour model was implemented, was not
28 attributable to the implementation of the four hour model. Day 16 at 98. Rather the

1 increased rates for some schools were due to the Reading First Program. Day 16 at 98.

2 17. The reclassification rate in Nogales for 2009-2010 was approximately 36%.
3 Day 16 at 8. In 2009-2010, the AZELLA2 test was used for the first time. Day 16 at 92. As
4 a result, the reclassification rate in Nogales declined compared to the 2008-2009 school
5 year. Day 16 at 93.

6 18. In general, reclassification rates for ELL students declined at the elementary
7 school level from 2008-2009 to 2009-2010 and increased at the high school level for the
8 same period. Day 17 at 72.

9 19. In each year under consideration, both before and after implementation of
10 the four hour model, the reclassification rates in Nogales exceeded the statewide
11 reclassification rates for ELL students. Since the four hour model was implemented in
12 Nogales, reclassification rates have fluctuated at schools within the district. Some have
13 increased and some have decreased. Exhibit 772; Day 16 at 95-98.

14 20. The Department of Education was unable to provide the Court with
15 information regarding the average length of time it takes for ELL students to test proficient
16 on the language assessment test. Ms. Santa Cruz was uncertain whether ADE's data system
17 is capable of calculating the average length of time it takes for an ELL student to reclassify.
18 Day 14 at 160-161.

19 21. The Task Force exercised the discretion vested in it by law, and made its
20 decisions on each of the policy choices framed by the foregoing issues, after substantial
21 consideration, discussion, deliberation, and debate.

22 22. Based on the record before it, the Court will defer to the Task Force's
23 judgment and accept its determinations.

24 23. Arizona law has vested exclusive authority in the Task Force to develop a
25 statewide program of ELD, A.R.S. § 15-756.01(C), and the Task Force has done so,
26 publishing the four hour models in September 2007.

27 24. Plaintiffs have failed in their proof regarding the lone statewide issue.

28 25. On the issue of implementation of the four hour model, Plaintiffs only

1 presented evidence from a few school districts. This was not sufficient to establish standing
2 to bring a statewide claim.

3 26. Plaintiffs' newly asserted claims are not "statewide" in nature, but rather
4 depend on specific implementation choices made at the district level, thus requiring a
5 district-by-district analysis.

6 27. Because these implementation decisions vary from district to district,
7 plaintiffs have not established any "statewide" violation.

8 28. The Court will therefore dismiss Plaintiffs' statewide claims and limit its
9 review of the 60(b)(5) motion to Nogales.

10 29. The Supreme Court made clear that the State has tremendous discretion and
11 flexibility to design programs that meet local needs.

12 30. Therefore, to the extent Plaintiffs allege that under § 1703(a) of the EEOA,
13 the four hour model results in unlawful segregation during the first year, such claim fails, as
14 Plaintiffs have failed to prove that Defendants' implementation of the four hour model was
15 driven by a deliberate intent to discriminate on the basis of race, color, or national origin.

16 31. The EEOA leaves it to state or local authorities to determine whether to
17 adopt sequential (immersion) or simultaneous (bilingual) ELD programs:

18 We also believe, however, that § 1703(f) leaves schools
19 free to determine whether they wish to discharge these
20 obligations simultaneously, by implementing a program
21 designed to keep limited English speaking students at
22 grade level in other areas of the curriculum by providing
23 instruction in their native language at the same time that
24 an English language development effort is pursued, or to
25 address these problems in sequence, by focusing first on
26 the development of English language skills and then later
27 providing students with compensatory and supplemental
28 education to remedy deficiencies in other areas which
they may develop during this period. In short, § 1703(f)
leaves schools free to determine the sequence and
manner in which limited English speaking students tackle
this dual challenge so long as the schools design
programs which are reasonably calculated to enable these
students to attain parity of participation in the standard
instructional program within a reasonable length of time
after they enter the school system.

28 *Castaneda v. Pickard*, 648 F.2d 989, 1009, 1011 (5th Cir. 1981)

1
2 32. Routinely the Nogales FEPs have scored higher than their mainstream
3 counterparts in the elementary and middle grades. Day 4, 09.07.10, McCollough testimony,
4 at 202:24-203:5.

5 33. In determining whether Nogales' language remediation program is based
6 upon a sound educational theory, this Court is not tasked with "establishing the ideal program
7 or choosing between competing theories." *Teresa*, 724 F.Supp. at 713; *see Castaneda*, 648
8 F.2d at 1009 (noting that it is not the court's duty to "discern[] the relative merits of sound
9 but competing bodies of expert education opinion"); *see also Keyes*, 576 F.Supp. at 1516
10 ("The defendant district has a freedom of choice among several educational theories which
11 experts have recognized as valid strategies for language remediation in public schools.").

12 34. These duties are best "left to the educators and public officials charged with
13 responsibility for directing the educational policy of school system." *Castaneda*, 648 F.2d
14 at 1009.

15 35. The Court's responsibility, insofar as educational theory is concerned, "is only
16 to ascertain that a school system is pursuing a program informed by an educational theory
17 recognized as sound by some experts in the field or, at least, deemed a legitimate
18 experimental strategy." *Id.*

19 36. By not defining the term "appropriate action," Congress refrained from
20 prescribing any particular type of language remediation program, and instead left the "state
21 and local educational authorities a substantial amount of latitude in choosing the programs
22 and techniques they would use to meet their obligations under the EEOA." *Id.* at 1009 ("The
23 state of the art in the area of language remediation may well be such that respected
24 authorities legitimately differ as to the type of educational program for limited English
25 speaking students and we do not believe that Congress . . . intended to make the resolution
26 of these differences the province of federal courts.").

27 37. Section 1703(f) of the EEOA, leaves schools free to determine whether they
28

1 wish to discharge these obligations simultaneously, by implementing a program designed to
2 keep limited English speaking student at grade level in other areas of the curriculum by
3 providing instruction in their native language at the same time that an English language
4 development effort is pursued, or to address these problems in sequence, by focusing first on
5 the development of English language skills and then later providing students with
6 compensatory and supplemental education to remedy deficiencies in other areas which they
7 may develop during this period. *Id.* at 1011.

8 38. In light of the evidence presented, the Court finds that the SEI Method and
9 the four hour model are valid educational theories.

10 39. The Court must also consider whether Nogales has “made a genuine and good
11 faith effort, consistent with local circumstances and resources, to remedy the language
12 deficiencies of [its] students[.]” *Id.* at 1009. It has.

13 40. Based on the evidence, it appears that Nogales has made a good faith effort
14 to remedy the language barriers faced by ELL students.

15 41. Enormous changes have occurred in the method by which Arizona delivers
16 English language instruction since judgment was entered in this case in 2000.

17 42. Plaintiffs have never challenged the four hour models in the first year of
18 instruction.

19 43. Plaintiffs have not proven that the Task Force Model is anything more than
20 ability-based grouping of students, a technique that is permissible under the EEOA. *Holton*
21 *v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1346-47 (11th Cir. 2005) (ability grouping
22 not unconstitutional when it “is not based on the present results of past segregation or will
23 remedy such results through better educational opportunities.”) (quoting *McNeal v. Tate*
24 *County Sch. Dist.*, 508 F.2d 1017, 1020 (5th Cir. 1975)); *Castaneda*, 648 F.2d at 994 (“ability
25 grouping is not per se unconstitutional”).

26 44. Grouping by proficiency is not segregation. *Castaneda*, 648 F.2d at 1009.
27 *Compare Mumid v. Abraham Lincoln High School*, 618 F.3d 789, 795 (8th Cir. 2010) (“A
28 policy that treats students with limited English proficiency differently than other students in

1 the district does not facially discriminate based on national origin.”), and *Holton*, 425 F.3d
2 at 1346-47 (ability grouping is not unconstitutional when it “is not based on the present
3 results of past segregation or will remedy such results through better educational
4 opportunities.”) (quoting *McNeal v. Tate County Sch. Dist.*, 508 F.2d 1017, 1020 (5th Cir.
5 1975)), with *Parents Involved in Community Schools v. Seattle Dist. No.*, 551 U.S. 701, 749
6 (2007) (Justice Thomas concurring).

7 45. The EEOA does not require schools to prove that no other ELL program exists
8 that could produce similar results with fewer hours of ELD instruction.

9 46. On this record, the Court finds Nogales in compliance with the EEOA, and
10 finds the Four-Hour models do not violate the EEOA.

11 47. The Court holds that Defendants’ initial implementation of the four-hour model
12 does not violate the EEOA.

13 48. Further, the Court holds that the declaratory judgment previously entered in
14 this case has been satisfied, or at the very least, that prospective application of the judgment
15 is no longer equitable in light of the changed factual and legal circumstances described
16 above.

17 49. Most of the credit for the success that the Nogales school district has
18 experienced is due to the actions taken by the district itself, and not those taken by the state.

19 50. There are a lot of changes that have occurred since this lawsuit was filed in
20 1992. To name a few, there has been the advent of No Child Left Behind, The AIMS Test,
21 and “AZELLA in, AZELLA out.” Also since that time, the state has seen the election of a
22 new Governor, a new Superintendent of Schools, and a new Attorney General. Further, the
23 state legislature has experienced numerous changes in its membership since this suit was
24 originally filed.

25 51. Education in this state is under enormous pressure because of lack of funding
26 at all levels. It appears that the state has made a choice in how it wants to spend funds on
27 teaching students the English language. It may turn out to be penny wise and pound foolish,
28 as at the end of the day, speaking English, and not having other educational gains in science,

1 math, etc. will still leave some children behind. However, this lawsuit is no longer the
2 vehicle to pursue the myriad of educational issues in this state.

3 52. Accordingly, the Court grants Defendants' request for relief under Rule
4 60(b)(5), and releases jurisdiction of this case.

5 **IT IS HEREBY ORDERED:**

6 (1) **Granting** Defendant's Motion to Dismiss Statewide Claims (Doc. 955).

7 (2) **Denying** Plaintiff's Motion for Further Relief (Doc. 731).

8 (3) **Denying** the following motions as **moot**: Doc. 957, Doc. 959, Doc. 960, Doc.
9 1004, Doc. 1029, Doc. 1031.

10 (4) **Denying** Intervenor-Defendant's Motion in Limine re Exclude evidence relating
11 to the four-hour models in the first year (Doc. 958).

12 (5) Defendant's Motion to Strike Status Report (Doc. 1076) is **denied**.

13 (6) The January 24, 2000 judgment (Doc. 197) entered by this Court is **hereby**
14 **vacated**.

15 (7) The Clerk shall enter judgment in favor of Defendants and close its file in this
16 matter.

17 DATED this 28th day of March, 2013.

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20 

21 **Raner C. Collins**
22 **United States District Judge**