

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Robert S. Ross (#023430)
Robert.Ross@tusd1.org
Samuel E. Brown (#027474)
Samuel.Brown@tusd1.org
**TUCSON UNIFIED SCHOOL DISTRICT
LEGAL DEPARTMENT**
1010 East Tenth Street
Tucson, Arizona 85719
Phone: (520) 225-6040

P. Bruce Converse (#005868)
bconverse@dickinsonwright.com
Timothy W. Overton (#025669)
toverton@dickinsonwright.com
DICKINSON WRIGHT PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004-4568
courtdocs@dickinsonwright.com
Phone: (602) 285-5000
Fax: (844) 670-6009

*Attorneys for defendant
Tucson Unified School District No. 1*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.

4:74-cv-0090-DCB
(Lead Case)

4:74-cv-0204 TUC DCB
(Consolidated Case)

**REPLY TO MENDOZA PLAINTIFFS' OBJECTION (ECF 2413) TO TUSD'S
NOTICE AND REPORT OF COMPLIANCE: TWO-WAY DUAL LANGUAGE
(ECF 2401)**

1 The District submitted its Dual Language Action Plan on December 20, 2019
2 (including a Dual Language Inventory and Supplemental Report). Mendoza Plaintiffs
3 filed objections on January 10, 2020. The District hereby replies to those objections.

4 **A. USP Requirements for Building and Expanding Dual Language**

5 The USP requires the District to “build and expand its Dual Language programs
6 in order to provide more students throughout the District with opportunities to enroll in
7 these programs...” (USP §V.C.1, ECF 1713 at 32.) There is no dispute that the District
8 has built and expanded its dual language programs, growing by 283 students over the
9 past five years despite overall losses of enrollment throughout the District (*see* 2018-19
10 DAR, ECF 2298-1 at 79). More students have the opportunity to enroll in dual language
11 programs through a new two-strand program at Bloom ES, and through expansions of
12 TWDL strands and grades at McCorkle and Hollinger K-8 schools. (Id. at 80.)

13 The USP also requires the District to encourage “new and current certificated
14 staff with dual language certifications to teach in such programs and by focusing
15 recruitment efforts on appropriately certified teachers.” (USP §V.C.1, ECF 1713 at 32-
16 33.) District efforts to recruit and retain certificated dual language staff have been
17 effective. In previous years, the parties and the Court identified TWDL vacancies as a
18 major obstacle to building and expanding dual language in TUSD. By 2018-19, due to
19 TUSD efforts, there were no TWDL vacancies. (*see* 2018-19 DAR, ECF 2298-1 at 82.)

20 **B. Issues Raised by the Court Related to Two-Way Dual Language**

21 Having addressed fulfillment of its USP obligations here and in its recent petition¹,
22 the District turns to the issues raised by the Court’s September 30, 2019 Order: “the
23 potential success of TWDL to improve academic achievement and the risk of program
24 isolation.” (Order of 09/30/19, ECF 2295 at 5.) The Supplemental Report addressed the
25 program isolation issue.² The Mendoza Plaintiff objection is silent on this issue.

26
27 ¹ *See* Supplemental Unitary Petition, ECF 2406 at 58-59.

28 ² In the Supplemental Report, Ms. Molina clarified that her “references to cohort or program isolation were not directed towards racial or ethnic isolation of students,” but to “cohort

1 The Court also raised the issue of the *potential success* of TWDL to improve
2 academic achievement, related specifically to TUSD’s ability to attain linguistically-
3 balanced classrooms and to improve academic achievement. Mendoza Plaintiffs assert
4 that unitary status should be denied based on an alleged failure to attain widespread
5 linguistically-balanced classrooms in the first year of state-permitted flexibility to enroll
6 native Spanish-speaking English Learners (ELs) in TWDL K-1 classrooms.

7 As described in section C.1 below, the District has not only created the conditions
8 necessary to reach the requisite linguistic balancing in the near future (as outlined in the
9 Inventory and Supplemental Report), but TUSD has also made significant progress
10 creating linguistically-balanced classrooms now, in year 1 of the application of relaxed
11 regulations for qualifying ELs to enroll into TUSD’s TWDL classrooms in grades K-1.

12 **C. Issues Raised by the Mendoza Objection**

13 In 2016, Rosa Molina made more than 20 recommendations to build and expand
14 the District’s TWDL program. In her 2019 report, Ms. Molina found TUSD had
15 “implemented all of the recommendations from the first report and completed most of
16 them.” (ECF 2401-3 at 2.) The Mendoza Plaintiff objection, however, focuses solely on
17 three narrow issues: teacher certification; linguistic-balancing; and Spanish achievement.

18 Mendoza Plaintiffs request more information related to teacher certification; such
19 information is provided in section C.3, below. The other two issues are integrally
20 connected as linguistically-balanced classrooms lead to improved academic achievement
21 in both languages. As the Mendoza Plaintiffs and their expert Dr. Arias are well aware,
22 Arizona Laws requiring four hours of English instruction for ELs (and related guidelines
23 from the Arizona Department of Education), have been the primary obstacle to achieving
24 linguistically-balanced classrooms and to improving Spanish achievement because both
25 rely on the ability to place native Spanish-speaking ELs in TWDL classes in grades K-1.

26 _____
27 isolation.” (ECF 2401-3 at 8). The Supplemental Report also highlights how TUSD has utilized
28 TWDL programs to *create integrated schools* at Davis ES and Bloom ES and to *reduce racial*
concentration at Roskrige (ECF 2401 at 4-5), in response to the Court’s concern that “whole-
school TWDLs have the potential to create segregated schools” (ECF 2295 at 3).

1 In Arizona, TUSD is a recognized leader in the area of dual-language education
2 and its accomplishments *despite* state law obstacles have been well-documented:

- 3 • a districtwide TWDL Program Framework and Plan
- 4 • site-level TWDL handbooks for staff and parents
- 5 • annual cycle of professional learning
- 6 • teacher stipends/certification programs to staff more than 100 teaching positions
- 7 • a K-12 programmatic pathway towards the Arizona State Seal of Biliteracy
- 8 • enrollment policies and increases in TWDL enrollment
- 9 • program evaluations based on the Guiding Principles of Dual Language, including
- 10 academic assessments in both languages
- 11 • TWDL program curricula in both languages
- 12 • expansion of the middle school grades and of double-strand programs
- 13 • expansion of the Bloom ES TWDL program; and creating an integrated school
- 14 • converting Davis ES TWDL from a racially concentrated to an integrated school
- 15 • TWDL students scoring higher on state exams than their non-TWDL peers
- 16 • ongoing advocacy for the past three years on behalf of English Learners (ELs)
- 17 with the Arizona Department of Education, the State Board of Education, and the
- 18 State Legislature to relax or to eliminate restrictions to enrolling native Spanish-
- 19 speaking ELs into dual language programs – resulting in the development of
- 20 alternate assessments and waivers that TUSD has used to enroll close to 100 ELs
- 21 into its TWDL programs in SY2019-20 (discussed in detail below).

22 In addition, TUSD staff has advocated tirelessly over the past four years on behalf
23 of ELs and on behalf of its TWDL program to eliminate or mitigate Arizona law
24 prohibiting ELs from participating in dual language programs.

25 In 2016, Ms. Molina recognized that Arizona law “*severely restric[ted] the*
26 *development of viable TWDL programs by not allowing Native Spanish speakers access*
27 *to the TWDL classrooms...*” (ECF 2401-1 at 19). She noted TUSD efforts in 2017-18
28 to propose “an alternate model for the TWDL program to linguistically balance their

1 TWDL classrooms” to the State Board of Education. (ECF 2401-3 at 3), followed by
2 efforts in 2018-19 to work with the Arizona Department of Education (ADE) “regarding
3 the use of an alternative assessment to qualify kindergarteners for a Bilingual Waiver
4 Type 1.” (Id.) The resulting collaboration with ADE led to relaxed regulations allowing
5 “TUSD to include more Spanish-speaking students to enter the TWDL program at the
6 primary level” for SY2019-20 (Id.) – close to 100 students as described below.

7 Throughout SY2018-19 and into the current school year, TUSD staff served on
8 the ADE subcommittee charged with developing procedures to operationalize SB1014, a
9 proposal passed in 2018 that would allow more native Spanish-speaking ELs to
10 participate in dual-language programs.³

11 TUSD staff is also playing an instrumental role in advocating for a proposal to
12 repeal the mandated four-hour block (Proposition 203) and allow Arizona school districts
13 to offer dual language immersion programs for ELs. If passed, ELs could participate
14 fully in TWDL programs in TUSD and statewide without having to first qualify for a
15 waiver. See Exhibit 1, ADE Publication, “Understanding HCR2001.” TUSD’s
16 Language Acquisition staff members are at the forefront of this effort, and have been
17 specifically requested to provide expert testimony to state legislators *today*, January 27th,
18 in the House Education Committee. See Exhibit 2, Pena Email re Update – HCR2001.

19 All of the above-cited efforts were designed and implemented towards creating
20 the conditions necessary for linguistically-balanced classrooms to thrive, and for TWDL
21 students to achieve at high levels in both languages. *None* of these efforts are discussed,
22 and are rarely mentioned at all, in the Mendoza Plaintiff objection and in Dr. Arias’s
23 report. The District has faithfully executed its USP and Court-ordered obligations to
24 build and expand its dual language program to the greatest extent practicable given prior
25 and existing state law obstacles and should be awarded unitary status in this area.

26
27 ³ The genesis of this proposal was TUSD’s work in 2016-17 and 2017-18 developing and
28 proposing to the State Board an alternative model for EL instruction – TWDL – that captured the
attention of state legislators and sparked a movement to relax regulations prohibiting ELs from
participating in dual-language programs.

1 Below, the District responds to each of the three Mendoza Plaintiff objections.

2 **1. The District has significantly improved the linguistic balance of its**
3 **classrooms to the extent practicable given state law**

4 In 2015, the Mendoza plaintiff expert, Dr. Beatrice Arias, published a white paper
5 with other scholars in which she recognized that Arizona’s state law restricted the ability
6 of Arizona school districts to place native Spanish speakers in dual language programs,
7 effectively prohibiting such programs from reaching the requisite linguistic balance:

8 Today, ELs have inherited a legal framework which maintains their rights
9 to access the core curriculum and to understand the language of instruction,
10 yet, depending upon the state in which they reside, teachers may or may
11 not be allowed to use students’ native language in instruction. In Arizona,
12 Massachusetts, and California, legislation has been passed, requiring all
instruction to be in English.

13 T. Wiley, B. Arias, J. Renn, S. Bhalla, *“Language and the Fulfillment of the Potential*
14 *of All Americans”* (Cambridge, Mass.: American Academy of Arts and Sciences and
15 the Center for Applied Linguistics, 2015).⁴ This paper follows from an entire book
16 devoted to this topic by Dr. Arias in 2012, *“Implementing Educational Language Policy*
17 *in Arizona”*⁵ It is surprising that with Dr. Arias’s expertise about the statutory
18 limitations prohibiting linguistically-balanced classrooms, her report is virtually silent
19 on such limitations as applied to TUSD’s efforts to linguistically balance its classrooms
20 with native Spanish-speaking ELs. Instead, Dr. Arias finds the District’s “inability to
21 attain the desired classroom composition” is “not acceptable” and that TUSD must
22 simply “improve its efforts” – as though laws limiting linguistically-balanced
23 classrooms do not exist. Dr. Arias’s expert report only cursorily mentions relaxed state
24 criteria. Her opinion that a “more aggressive effort” is needed fails to mention more

25 _____
26 ⁴ Available at [https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/CAL-](https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/CAL-AAASWhitePaper-LanguagePotentialAmericans.pdf)
27 [AAASWhitePaper-LanguagePotentialAmericans.pdf](https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/CAL-AAASWhitePaper-LanguagePotentialAmericans.pdf)

28 ⁵ Arias, M. Beatriz, and Christian Faltis, *“Implementing Educational Language Policy in Arizona: Legal, Historical and Current Practices in SEI.”* (Bristol: Multilingual Matters, 2012).

1 than four years of TUSD’s documented “aggressive efforts,” detailed above, in TUSD
2 annual reports, and in the Supplemental Report, to affect state laws and regulations
3 affecting dual language classroom composition, suggesting that she did not form a
4 proper factual basis upon which to provide an opinion regarding the need for a “more
5 aggressive effort” as a requirement for an award of unitary status.

6 Mendoza plaintiffs argue, “Notwithstanding the changes in Arizona law...the
7 District was able to achieve linguistic balance in only two of its 14 kindergarten TWDL
8 classrooms in 2019-20.” (ECF 2413 at 4).⁶ The change in regulations went into effect
9 for the 2018-19 school year. Within one month of the start of the 2018-19 school year,
10 TUSD had applied for and obtained a waiver to place more native Spanish-speaking ELs
11 into TWDL classes using the alternative assessment (*see* ECF 2401-2, Att. 2 at 18).

12 Contrary to the objection, the alleged “disappointing results” and “lack of
13 linguistic balance” are not due to TUSD’s failure to implement its plan, but by TUSD’s
14 adherence to state law. Moreover, the results are far from disappointing, and there is no
15 evidence of a lack of linguistic balance given the current year’s enrollment data.

16 Mendoza Plaintiffs argue that TUSD can obtain unitary status once it has
17 demonstrated “that its plans to increase linguistic balance in the TWDL classrooms are
18 working...” TUSD plans and efforts to increase linguistic balance are currently working.

19 The District has advocated for changes in state laws and regulations, developed
20 systems (through professional learning, a TWDL framework, school handbooks,
21 curriculum in both languages, etc.), and enacted policies (applications for ADE waivers
22 and screeners) to facilitate the requisite linguistic balance in TWDL classrooms.

23 In SY2018-19, using the alternate assessment to enroll students for SY2019-20,
24 TUSD qualified and enrolled an additional **92** native Spanish-speaking ELs into its
25

26 ⁶ In the TWDL Inventory, the District stated that “its efforts to linguistically balance TWDL
27 classrooms [have] been stymied by the state law...” and that “...the State now allows flexibility
28 in language ability assessment and Kindergarten placement.” (ECF 2401-2 at 1). The District
reference to “the State” allowing more flexibility refers to the Arizona Department of
Education’s relaxed regulations interpreting state law, not a change to Arizona law itself.

1 TWDL programs. The TWDL Inventory identified **four K-1 TWDL classrooms** that
2 had reached the 33 percent linguistic balance. (*see* ECF 2401-2 at 13-16). These four
3 classrooms enrolled only a fraction of the total **92** students enrolled through TUSD efforts
4 in all 30 of its TWDL K-1 classrooms.

5 The District achieved a proportion of native Spanish-speaking ELs or bilingual
6 students between 20 percent and 32 percent in an **additional 15** classrooms. These 15
7 classrooms were all between one and three students from meeting the 33 percent
8 linguistic balance. Though they did not reach the ideal proportion of 33 percent, they did
9 increase linguistic balance that serves to provide TWDL students with peer-to-peer
10 learning that increase English and Spanish proficiency and academic achievement for all
11 TWDL students in a total of 30 TWDL K-1 classrooms.

12 In a single year, the District has significantly increased linguistic balance in almost
13 two-thirds of its TWDL K-1 classrooms (19 of 30 classrooms). As described in its
14 Supplemental Report, the District is currently implementing strategies to further increase
15 such linguistic balance for SY2020-21. There is *zero risk* that after advocating for the
16 past four years with ADE, the State Board of Education, and the State Legislature to
17 enroll ELs in its TWDL programs *in order to obtain the requisite linguistic balance*, that
18 the District will suddenly change course and fail to continue to implement its plans to
19 obtain such balance in all of its TWDL classrooms now that state obstacles have been
20 removed or mitigated. The Mendoza request for further Court supervision over this area
21 should be denied.

22 **2. The District has taken steps to improve Spanish proficiency and achievement**

23 As with linguistic balancing, Ms. Molina has long recognized that the primary
24 obstacle to improving Spanish proficiency in TUSD's TWDL program has been state law
25 restricting access for native Spanish speakers which negatively impacts Spanish language
26 learning for both native Spanish and native English speakers:

27 "In not forming classes that are linguistically balanced, English speakers
28 are left to study the target language (Spanish) in a classroom of students

1 who are also English dominant and bereft of native speakers who help
2 supply the oral language practice, vocabulary, pronunciation, and the
3 cultural norms of the target language. Native speakers of Spanish are also
4 not permitted to fully develop their first language base and study in an
5 integrated language setting that supports their literacy development both
6 languages. The end result of following this statute is that TWDL programs
7 serve only English-speaking (ESS) students and the Native Speakers (NSS)
8 of the target language are not able to access these programs during the early
9 and critical stage of literacy development (K-2nd). These programs become
10 closer to One-Way Immersion programs that are designed to serve English
11 speakers exclusively and not Two-Way Dual Language programs that
12 benefit both groups of students. It is important to note that the full
13 implementation of Proposition 203 has been problematic throughout the
14 state...

15 (TWDL Plan, ECF 2401-1 at 19.). Again, the Mendoza objection and expert report are
16 silent as to the *primary obstacle* faced by TUSD in improving Spanish proficiency:
17 balancing. Still, in the face of this obstacle, the District has taken many steps to improve
18 linguistic balancing: achieving significant linguistic balance in two-thirds of its entry-
19 level TWDL classrooms.

20 TUSD has also implemented additional efforts to improve Spanish language
21 attainment and academic achievement in Spanish, as is evident in its Plan and in Ms.
22 Molina's Supplemental Report. In addition to developing and implementing a TWDL
23 Plan and Framework, and school-level TWDL handbooks, the District has taken the
24 following steps:

- 25 • Enacted an annual cycle of professional learning for TWDL teachers (*see* ECF
26 2401-3 at 5)
- 27 • Implemented academic assessments in both English and Spanish (*see* *Id.* at 7)
- 28 • Developed and implemented a new Spanish Language Arts (SLA) curriculum (*see*
Id. at 9)

The Mendoza request to deny unitary status until TUSD demonstrate "that it has
taken steps to improve the Spanish language attainment of its TWDL students" is without
merit given that the record reflects such steps have already been taken. Now that the

1 primary obstacle, linguistic balancing, has been mitigated, there is *zero risk* that the
2 District will fail to continue to improve Spanish language proficiency and academic
3 achievement for TWDL students. The Mendoza request should be denied.

4 **3. TUSD’s TWDL program is fully staffed with bilingual endorsed teachers**

5 Teacher shortages nationwide are widely known; as are shortages for endorsed
6 dual language teachers. Dr. Arias’s discussion of bilingual teacher certification in TUSD
7 is devoid of any mention of this well-known circumstance of which Dr. Arias has written
8 and published: “The American Association for Employment in Education, a professional
9 organization for teachers and school administrators, concludes that there is a
10 ‘considerable shortage’ of bilingual teachers” Ibid., “*Language and the Fulfillment*
11 *of the Potential of All Americans*” at p. 15 (emphasis added).

12 The Mendoza objection seeks more information about TUSD’s TWDL teacher
13 endorsement. The requested information is included in Exhibit 3, TWDL Teacher
14 Endorsements, attached. Exhibit 3 reveals that the District’s TWDL program is fully
15 staffed, despite what the Mendoza plaintiff expert acknowledges as a “considerable
16 shortage” of bilingual teachers. Of 106 current TUSD TWDL teachers, 83 teachers have
17 full bilingual endorsements. Of the remaining 23 teachers, all have provisional
18 endorsements and more than half (12) are currently enrolled in the District’s Make-the-
19 Move program and working towards full endorsement. Of the 11 teachers not enrolled
20 in the Make-the-Move program, nine are teaching at the middle school or high school
21 level (grades 6-12) where they teach sections of TWDL but do not teach a full day of
22 TWDL. The two elementary level teachers without full endorsements are being replaced
23 for SY2020-21.

24 This is an area for which the facts and evidence reflect that TUSD has made
25 tremendous strides. Teachers have high mobility rates, generally, so there will likely
26 *always* be some small proportion of TWDL teachers working towards full endorsement.
27 That twenty percent of its teachers have *yet* to become fully endorsed – and half of those
28 are enrolled in a program to become fully endorsed – is not a bar to unitary status.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Conclusion

This Court found the “USP is about doing which necessarily requires planning, but the unitary status decision must be based on both: what the District is doing and planning to do in the future.” (ECF 2295 at 7).

As relates to linguistically-balanced classrooms which serve to improve academic achievement, the District has successfully advocated to the State Legislature, to the State Board of Education, and to Arizona Department of Education for changes in state laws and regulations to allow more flexibility for placing Kindergarten and 1st grade English Learners into its TWDL programs. As a result, TUSD placed **92** ELs in its TWDL K-1 classrooms in SY2019-20, resulting in four classrooms reaching the 33 percent linguistic balance, and fifteen additional classrooms reaching a linguistic balance between 20-32 percent. TUSD is developing, planning, and implementing systems to incorporate even more ELs for SY2020-21 to double or triple the number of K-1 classrooms that meet the 33 percent goal, including strategies outlined in the Supplemental Report.

As relates to the teacher certification objections, the District has filled all of its TWDL teaching positions with provisionally- or fully-endorsed bilingual teachers despite what the Mendoza expert acknowledges as a considerable shortage of bilingual teachers nationwide. For the 20 or so provisionally-endorsed teachers, the District is assisting, and plans to continue to assist, the 20 or so provisionally-endorsed teachers in obtaining full endorsements. There may always be some handful of teachers willing to teach in TWDL who are moving through the process of becoming fully-endorsed. This fact should not weigh against granting unitary status in this area.

The District has addressed, is addressing, and has developed plans to continue to address all of the issues raised by the Court’s September 2019 Order, and those raised in the Mendoza Plaintiff objection. Accordingly, the District respectfully requests the Court reject the Mendoza Plaintiff request to continue Court supervision, acknowledge the good faith efforts of TUSD in complying with the USP mandate to build and expand its dual-language programs, and grant partial unitary status in this area.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted on January 27, 2019.

**TUCSON UNIFIED SCHOOL
DISTRICT LEGAL DEPARTMENT**

/s/Samuel E. Brown
Robert S. Ross
Samuel E. Brown
*Attorneys for Tucson Unified School
District No. 1*

P. Bruce Converse
Timothy W. Overton
DICKINSON WRIGHT, PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004-4568
*Attorneys for Tucson Unified School
District No. 1*

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January 2020, I electronically transmitted the attached foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to all CM/ECF registrants.

/s/ Samuel E. Brown

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28