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United States District Court, D. Arizona.

Roy and Josie FISHER, et al., Plaintiffs  
and  
United States of America, Plaintiff-Intervenor,  
v.  
TUCSON UNIFIED SCHOOL DISTRICT, et al.,  
Defendants,  
and  
Sidney L. Sutton, et al., Defendants-Intervenors,  
Maria Mendoza, et al., Plaintiffs,  
and  
United States of America, Plaintiff-Intervenor,  
v.  
Tucson Unified School District, et al. Defendants.

No. CV-74-00090-TUC-DCB (Lead Case)

No. CV-74-0204-TUC-DCB (Consolidated Case)

Signed 06/19/2020

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#### ORDER

David C. Bury, United States District Judge

#### Two Way Dual Language USP § V.C

\*1 The Court finds that the District's Notice of Compliance: Two Way Dual Language (TWDL), as supplemented, reflects the completion by the District of the directives issued by this Court in its September 6, 2018, Order. The District has answered the questions raised then and questions raised by the Court in its September 30, 2019, Order, denying the NARA to make the TWDL Roskrige K-8 Magnet a no boundary school. Before then, the Court had denied unitary status for § V.C., Dual Language Programs, in the Unitary Status Plan (USP) because the District had not presented a comprehensive TWDL program, including future plans for TWDL post-unitary status. (Order (Doc. 2123) at 101.) The District presents evidence now that convinces the Court that the TWDL is a solid academic program aimed at improving student achievement, especially for English Learner (EL)<sup>1</sup> students and that the District has been and is committed to its implementation, growth, and success now and in the future.

The Court stands corrected regarding its misunderstanding of the segregative nature of TWDL,<sup>2</sup> which is the District's dual language program. "TW[DL] programs throughout the United States are created to help ethnically balance a school through the vehicle of second language opportunities for all students. (Molina Progress Report (Doc. 2401-3) at 8.) " 'Student integration is central to TW[DL] programs for sociocultural and

linguistic reasons. Student integration contributes to the development of positive intergroup relationships between language minority and language majority students. It can break down stereotypes and develop positive attitudes towards both languages and language groups.’ ” *Id.* (quoting *Howard, 2003; Lambert & Cazabon, 1994; Lindholm 1994; Lindholm-Lery & Borsato, 2001*). The Court was in part confused regarding the reason for the two-classroom TWDL structure to prevent program isolation,<sup>3</sup> but mostly the Court was confused that the TWDL focus on Spanish-speaking students would be to the exclusion of English-speaking students causing TWDL schools in TUSD to be dominantly Latino Spanish-speaking students.

The Court now recognizes that the TWDL model requires equal numbers of Spanish-speaking, English-speaking, and bilingual students,<sup>4</sup> which addresses the Court’s concern that courses become dominated by Spanish-speaking students. Latino students in TUSD are not necessarily Spanish-speaking students, but Spanish-speaking students are dominantly Latino. This is an integration issue, and regardless of the Court’s confusion, it remains true that the 33% linguistic mix naturally trends towards increased numbers of Latino students at a TWDL school. There are 11 TWDL schools, with two being Integrated; eight being Racially Concentrated, and one being neither Racially Concentrated nor Integrated. (TWDL Expansion (Doc. 2401-1) at 101 n.1 (identifying Davis Bilingual Magnet ES (I), Roskrige Bilingual Magnet K-8 (RC), Bloom ES (I), Grijalva ES (RC), Hollinger K-8 (RC), Van Buskirk ES (RC), Mission View ES (RC), White ES, McCorkle K-8 (RC), Pistor MS 6-8 (RC), and Pueblo HS (RC); (Notice: 40<sup>th</sup> Day Enrollment (Doc. 2470-1) at 2-4.)

<sup>\*2</sup> The USP did not, however, devise TWDL to address integration issues even though it is a tool which can be used to promote integration and, in fact, Davis TWDL Magnet School and Bloom ES are Integrated.<sup>5</sup> The USP called for dual language programs to be “positive and academically rigorous programs designed to contribute significantly to the academic achievement of all students who participate in them and which provide learning experiences comparable to the [ALE].”<sup>6</sup> (USP § V.C (Doc. 1713) at 32.) The USP required the District to “build and expand its dual language programs in order to provide more students throughout the District with opportunities to enroll in these programs, including by encouraging new and current certificated staff and dual language certifications to teach in such programs and by focusing recruitment efforts on appropriately certified teachers.”

(USP § V.C (Doc. 1713) at 32-33.) The District has done this. It has also presented a plan for expanding TWDL Programs now and in the future (Doc. 2401-1 at 101), which is responsive to the Court’s directives issued on September 6, 2018.

In Arizona, the critical 33% linguistic mix for successful TWDL programs is hampered by state law, Proposition 203, which requires instruction to be in English only and which, in concert with a State mandated Structured English Immersion (SEI) curriculum, has essentially barred EL students from TWDL programs. *See* (2018-19 District Annual Report (DAR) (Doc. 2298-1) at 77-78 (summarizing SEI and Office of English Language Acquisition Services-Arizona Department of Education (OELAS) laws, regulations and standards). While the Mendoza Plaintiffs ask the Court to order the District to take more aggressive measures to attain the 33% linguistic balance in TWDL, the District has obtained a waiver from the State to allow native Spanish-speaking ELs to enroll in grades K-1 for SY 2019-20,<sup>7</sup> which resulted in adding approximately 100 Spanish-speaking students and moving the District decisively towards the requisite 33% proportions for Spanish-speaking students.<sup>8</sup> District staff is actively working with an Arizona Department of Education (ADE) subcommittee to operationalize SB 1014, legislation passed in 2018, which relaxed regulations prohibiting EL students from participating in TWDL programs. The Mendoza Plaintiffs do not suggest, and the Court cannot imagine, a more persistently aggressive stance from the District.

<sup>\*3</sup> The TWDL Progress Report<sup>9</sup> reflects “that TUSD has implemented all of the recommendations from the first report and completed most of them.” (Molina Progress Report (Doc. 2401-3) at 2.) It is undisputed that TWDL, developed and implemented under the USP, has increased student access to a far better dual language program than existed in 2013.<sup>10</sup> The TWDL program serves a larger number of students, and more importantly it is improving student achievement for EL students enrolled in TWDL. There is no need for the Court to make a record where there is no dispute of the facts and the data is clearly and easily found in the record.<sup>11</sup> Nevertheless, the Court does summarize the degree of success experienced under the USP § V.C, Dual Language Programs.

In 2016, the District secured the expertise of Rosa Molina, Executive Director of the Association of TWDL (ATWDL), who evaluated the then existing dual language program and advised the District regarding the requisite components needed to create an effective TWDL

program. ((Doc. 2401-1) at 12-11.) The District developed the TWDL Framework to adopt and implement those recommendation. ((Doc. 2401-1) at 38-100.) In its Order issued September 6, 2018, the Court ordered the District to include a plan for expansion, if any. The District filed the TWDL Expansion Plan, ((Doc. 2401-1) at 101-104), which the Court ordered the District to have reviewed by Rosa Molina and for her to add a status report regarding her original recommendations, (Doc. 2401-3).<sup>12</sup>

The District's plan for expanding TWDL is clear. The District has made program cost assessments and determined the most cost-effective and logical expansion to begin from the bottom up by adding classes and students to existing programs. After the assessment made in 2016 in the original Molina Report, the District added a new TWDL program at Bloom, which is currently a K-3 program with plans to add grades 4 and 5.<sup>13</sup> The District plans to complete expansion of the first strand at McCorkle by adding grade 8 and by adding a second (double) strand with a second-grade class. Over the next five years, the District plans to expand a double strand TWDL program at Grijalva and White elementary schools, and within seven years, future expansion is prioritized for a TWDL program in all grades at Magee Middle School. The District is currently implementing a short-term program, Language Academies, at TWDL elementary schools to develop and qualify PHLOTE students for enrollment in TWDL programs. (TWDL Expansion (Doc. 2401-1) at 101.)

The District reports that in 2018-19, there were approximately 4,100 EL students and 14,000 PHLOTE students in TUSD. There are now approximately 2,446 students in TWDL courses.<sup>14</sup> In 2013-14, there were approximately 2,188 students attending dual language programs in TUSD. The number remained relatively consistent until this year when it jumped by approximately 300 students, with approximately 100 students being attributed to the successful change in state law and policies allowing EL students to participate in TWDL. The Court agrees with the District: "There is *zero risk* that after advocating for the past four years with ADE, the State Board of Education, and the State Legislature to enroll ELs in its TWDL programs *in order to obtain the requisite linguistic balance*, that the District will suddenly change course and fail to continue to implement its plans to obtain such balance in all of its TWDL classrooms now that state obstacles have been removed or mitigated." (TUSD Reply (Doc. 2417) at 8.) The Court finds the District is fully committed to, and

now well positioned to, attain and maintain the 33% linguistic balance necessary for a successful TWDL program.

\*4 This leaves two areas of concern, as noted by the Mendoza Plaintiffs, the poor academic performance of TWDL students in Spanish and the qualifications of TWDL teachers. The two are related because qualified teachers are needed to ensure student success in core course material taught in Spanish. This is important because in the first years of TWDL the bulk of core instruction is in Spanish, with the bulk of core instruction shifting to English by middle and high school.<sup>15</sup> There is a direct correlation between the overall academic achievement of TWDL students and their academic performance in Spanish. (TWDL Expansion, Ex. B, Inventory (2401-2) at 5-7.) It is undisputed that TWDL students fall below grade level performance and below national percentiles in Spanish literacy and Spanish Language Arts. *Id.* at 6, 27-33. Students in TWDL schools, however, scored higher in AZMerit in English Language Arts in 2018-19 than their non-TWDL cohorts and about the same or somewhat higher than TUSD students, generally. *Id.*<sup>16</sup>

What this means is that the District must have an aggressive plan to improve Spanish proficiency and academic achievement at its TWDL schools. And, it does. First, Spanish proficiency will be improved by the addition of native Spanish speakers to attain the requisite 33% linguistic classroom mix. The lack of EL and PHLOTE students has negatively impacted Spanish language learning for both native Spanish and native English speakers. (TUSD Reply (Doc. 2417) at 8.) The District obtained a waiver from the State to use an oral evaluation instead of AZELLA to test Spanish proficiency in K-1 TWDL programs (TWDL Expansion, Ex. B, Inventory (2401-2) at 1.) It created and implemented a TWDL screener program to assess Spanish proficiency for students entering TWDL after the first grade. *Id.* at 3. Failing to screen out late entry applicants, who lack foundational skills necessary to access grade level academic content in either Spanish or English, has a negative impact on an entire TWDL class. By using screeners, the District is addressing point of entry issues.

It has developed and implemented a viable TWDL Spanish K-8 curriculum. It reports seeing improvement in Spanish achievement at Bloom, Davis, Hollinger, and Van Buskirk. (TWDL Expansion, Ex. B, Inventory (2401-2) at 6.) Additionally, the District has enacted an annual cycle of professional learning for TWDL teachers

to ensure classroom implementation of the recently developed academic assessments of students in both English and Spanish and the new Spanish Language Arts curriculum. (TUSD Reply (Doc. 2417) at 9 (citing Molina Progress Report (Doc. 2401-3) at 5, 7, 9); (TWDL Expansion, Ex. B, Inventory (2401-2) at 5-8).<sup>17</sup>

The Mendoza Plaintiffs point out that if TWDL is to be successful it is imperative that these programs be fully staffed with bilingual endorsed teachers. The District lumped together certified bilingual teachers with those who hold only a provisional bilingual endorsement. The Mendoza Plaintiffs point out that there is a significant difference between the two and only certified bilingual teachers should be teaching TWDL. (Mendoza Response (Doc. 2413) at 6.)

**\*5** The District appears to agree and in Reply provides the requested information, which reflects the following:

[T]he District's TWDL program is fully staffed, despite what the Mendoza Plaintiffs' expert acknowledges as a "considerable shortage" of bilingual teachers. Of 106 current TUSD TWDL teachers, 83 teachers have full bilingual endorsements. Of the remaining 23 teachers, all have provisional endorsements and more than half (12) are currently enrolled in the District's Make-the-Move program and working towards full endorsement. Of the 11 teachers not enrolled in the Make-the-Move program, nine are teaching at the middle school or high school level (grades 6-12) where they teach sections of TWDL but do not teach a full day of TWDL. The two elementary level teachers without full endorsements are being replaced for SY2020-21.

(TUSD Reply (Doc. 2417) at 10.)

This has been accomplished despite recognized national teacher shortages, including shortages for endorsed dual language teachers. It has been done, pursuant to the

District's Grow-Your-Own program offering a \$5000 tuition reimbursement for teachers who attend higher learning institutions to receive their bilingual endorsement and a University of Arizona tuition reduction program. In exchange, the teachers make a four-year commitment for a TWDL classroom designation. The District has budgeted to support five current teachers along this path at any given time. The District also has a Spanish-speaking paraprofessional tuition incentive program. (TWDL Expansion (Doc. 2401-1) at 104.) The District has succeeded in growing its certified teaching staff from having nine vacancies in SY 15-16, five in SY 16-17, and two in 17-18 to filling all the TWDL positions in SY 18-19. *Id.*

The District submits that it has addressed or is addressing all the issues raised by the Court "and those raised in the Mendoza Plaintiff objection." The Court, therefore, adopts the professional development components suggested by the Mendoza Plaintiffs, which the District is apparently already adhering to, for its TWDL teachers to have full bilingual endorsements, and teachers, who only have provisional endorsements to be enrolled in the District's Make-the-Move program and working towards full endorsement. For its middle or high school teachers, who are not enrolled in the Make-the-Move program and are not teaching full day TWDL, the District shall develop an instructional component in its professional training program focused on developing these teacher's proficiency in the target language, Spanish. The District shall revise the evaluation instrument for TWDL teachers to the extent necessary to include language proficiency.

The Court rejects the Plaintiffs' argument that the District cannot attain unitary status in the context of TWDL until it attains the requisite 33% linguistic balance in its classrooms and shows academic improvement in Spanish. The Court does not agree. The Court finds, as noted in the TWDL Progress Report, that the District developed a well-defined TWDL program, "built a strong professional plan to build the capacity of the school leaders and the TWDL teachers. They completed a TWDL Program Framework to serve as the roadmap for the present and future development of these programs. They worked on establishing policies for staffing, enrollment, student monitoring, parent engagement, marketing, community outreach, etc." (Molina Progress Report (Doc. 2401-3) at 16.) "Very importantly," the District understands that oversight of these programs is an integral component to ensuring successful practices." *Id.* at 16. It has formed a Dual Language Advisory Committee (TWDL Advisory Committee), comprised of teachers, Language

Acquisition Department (LAD) staff, and members of the planning task force. The committee is responsible for overseeing the implementation of the TWDL Framework, including all the elements relating to TWDL programs and initiatives. (2016 Molina Report (Doc. 2401-1) at 6-7.) The District reports implementation of the TWDL Advisory Committee in SY 2019-20. (Molina Progress Report (Doc. 2401-3) at 10.)

\*6 The Court finds that the District has executed its responsibilities under the USP and Court-ordered obligations to build and expand the dual language program. The Court finds the District has exhibited a strong commitment to TWDL, a dual language program designed to improve academic achievement for Spanish-speaking students, including EL students, to the maximum extent practicable. The District has chosen a dual language program with two important goals: “higher cognitive development in two languages and stronger student engagement in schooling.” (Molina Progress Report (Doc. 2401-3) at 16.) If implemented with fidelity, it addresses “issues of performance gaps in minority students and equal protection under the law for all students, especially for students who formerly were underserved students, with a rigorous and well-defined educational program option.” *Id.* The District has exhibited a fidelity to the TWDL program through a comprehensive and multiprong approach as described above and implementation of the TWDL Advisory Committee. The Court finds that the District is building momentum in TWDL schooling for students by growing these programs over the normal course of TWDL students’ matriculation from the primary to secondary grades. To retain jurisdiction until the actual fruition of these endeavors would mean extending this Court’s jurisdiction over TUSD operations well beyond any time envisioned by the USP, which did not require success but only required sincere endeavors to succeed.

The District shall continue to report progress made regarding the TWDL dual language program in its annual report and include the following: linguistic imbalances broken out for Spanish-speakers, English-speakers, and bilingual students by classrooms and schools; affirm that staffing provisions for certified bilingual teachers continue to be met in the TWDL classrooms, and identify and explain when it is not met; data reflecting academic achievement in both Spanish and English for TWDL students and schools, and begin tracking the percentages for White, Black and Hispanic student enrollment for students at these schools dating back to SY 2013-14 to

reflect improved integration, if any.

### Conclusion

The Court finds that the District has to the extent practicable, especially in light of State law and policy obstacles, developed positive and academically rigorous programs designed to contribute significantly to the academic achievement of all students who participate in them. The District has done this by moving forward at a deliberate pace since the adoption of the USP. Especially since 2016, the District has complied with the provisions of the USP in good faith, as outlined in the 2016 Molina Report and pursuant to the TWDL plan as adopted by the District in the TWDL Framework.

### **Accordingly,**

**IT IS ORDERED** that the Court finds the District has completed the work assigned pursuant to USP § V.C, Dual Language Programs, and the Court’s directives in the unitary status Order, issued September 6, 2018.

**IT IS FURTHER ORDERED** that the District shall implement the role of the TWDL Advisory Committee in SY 2019-20 to review and make TWDL program recommendations.

**IT IS FURTHER ORDERED** that the District shall continue to report progress made regarding the TWDL dual language program in the DAR and include the following: linguistic imbalances broken out for Spanish-speakers, English-speakers, and bilingual students by classrooms and schools; affirm that staffing provisions for certified bilingual teachers continue to be met in the TWDL classrooms, and identify and explain when it is not met; data reflecting academic achievement in both Spanish and English for TWDL students and schools, and begin tracking the percentages for White, Black and Hispanic student enrollment for students at these schools dating back to SY 2013-14 to reflect improved integration, if any.

### **All Citations**

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### Footnotes

<sup>1</sup> Acronym was ELL (English Language Learners).

<sup>2</sup> Also referred to as Two-Way Bilingual Immersion (TWBI) or TWI.

<sup>3</sup> The Court understands that the two-strand TWDL structure addresses cohort isolation by allowing TWDL students to move between the strands as they matriculate through grades at a school, instead of being isolated within the same student body for the duration of their academic experience at a school.

<sup>4</sup> “The ideal ratio of Spanish speakers to English speakers is 50:50, but to stay within the program design, the recommendation of many practitioners is that the ratio should never go below 33 percent for either language group.” (TWDL FAQ (Doc 2401-1) at 94.)

<sup>5</sup> Under the USP, Davis ES has gone from a Racially Concentrated school, (Order (Doc. 2130) at 22) to an Integrated School and Bloom ES has gone from not being either Racially Concentrated or Integrated, *id.* at 98, 99, to being Integrated. Racial concentration at Roskrige has gone from 85% to 81%. (Notice of Compliance (NC): TWDL (supplement) (Doc. 2401) at 5.) The District did not provide historical data representing changes in integration for these schools.

<sup>6</sup> While the Court has found that the TWDL program is not an ALE, it based this determination on the contours of GATE, including the requirement for gifted certified teachers, which is dissimilar to the TWDL, including its requirement for bilingual certified teachers. The District has established a GATE TWDL at Hollinger K-8 and the Davis TWDL Magnet school is an exemplary school, with an AZMerit grade of A. TWDL elementary schools Van Buskirk and White are AZMerit grade B schools. There is nothing innate to TWDL that relegates it to lesser academic standards; it is the opposite because TWDL affords improved academic achievement. Pistor MS and Mission View ES, which both have AZMerit grades of D, are non-magnet Racially Concentrated and, pursuant to this Court’s 3-Year PIP: CMP Order, will be the subject of academic improvement plans. As noted herein, the District is actively working towards improving Grijalva ES. The Court finds that TWDL is not an ALE but provides comparable learning experiences.

<sup>7</sup> This has been a several-year undertaking, beginning in 2013 with the adoption of USP Section V.B, OELAS Extension, and continuing pursuant to recommendations in the 2016 Molina Report (Doc. 2401-1) at 31.

<sup>8</sup> The District did not provide the percentage numbers for Spanish-speakers, English-speakers, and bilingual students by TWDL classroom, which would have been preferred. Instead, the District reported it “achieved a proportion of native Spanish-speaking ELs or bilingual students between 20 and 32 percent in an additional 15 classrooms.” (TUSD

Reply (Doc. 2417) at 8. Accordingly, it reported four linguistically balanced classrooms out of 112. (TWDL Expansion, Ex. B (Doc. 2401-2) at 13-16.)

- <sup>9</sup> On September 30, 2019, when the Court denied, without prejudice to it being reurged, the NARA to make Roskrug a “no boundary” dual strand TWDL, the Court ordered the District to secure an update of the 2016 Molina Report, which is attached to the NC: TWDL (supplement) as the TWDL Progress Report. (Molina Progress Report) (Doc. 2401-3) at 1-16.)
- <sup>10</sup> TWDL was adopted by the District to be the dual language program, pursuant to USP § V.C, without objection and with the support of the Mendoza Plaintiffs.
- <sup>11</sup> See NC: TWDL (supplement) (Doc. 2401), including TUSD Action Plan: TWDL Framework, Plan for TWDL Expansion, and TWDL Progress Report; DAR 2018-19 (Doc. 2298-1) at 77-84.
- <sup>12</sup> These documents were filed on December 20, 2019, as NC: TWDL (supplement) (Doc. 2401).
- <sup>13</sup> The Special Master reports that the program at Bloom failed to fill its third-grade class, and it remains to be seen whether there is enough demand in the District to populate additional programs, especially if the District adheres to the balanced classroom requirement for TWDL. (R&R (Doc. 2468). This is an issue which should be addressed by the TWDL Advisory Committee based on SY 2019-20 data.
- <sup>14</sup> 2018-19 DAR (Doc. 2298-1) at 79.
- <sup>15</sup> “In a 90:10 model the amount of the target language decreases yearly as English increases until there is a 50:50 balance of the languages in grade 5. In middle school, students will take on content area in the target language and will also have the opportunity to continue to take a Spanish language arts class. In high school, students will be able to take AP Spanish classes much earlier than students who are not enrolled in the program.” (TWDL FAQ (Doc. 2401-1) at 94.)
- <sup>16</sup> The District notes the exception at Grijalva ES, which it attributes to turnover in TWDL staff in 2015-16, no dual-language teacher in Kindergarten and a long-term substitute teacher for first grade. The District submits that in SY 2018-19, Grijalva is fully staffed with TWDL teachers and is currently showing consistent growth in proficiency on AzMerit 4-5 grade scores. (TWDL Expansion, Ex. B, Inventory (2401-2) at 4.)

- <sup>17</sup> It does not provide any academic achievement data to support this assertion in the DAR or the NC: TWDL. Going forward, data for academic achievement for both Spanish and English for TWDL students and schools shall be reported in the DAR.
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