

No. 07-15603 and
No. 07-15605 (Consolidated)

United States Court of Appeals

FOR THE

Ninth Circuit

Miriam Flores, individually, and a parent of Miriam Flores,
a minor child, et al., Plaintiffs-Appellees

v.

State of Arizona, et al., Defendants-Appellants.

PLAINTIFFS-APPELLEES' COMBINED ANSWERING BRIEF

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STATEMENT OF JURISDICTION

Plaintiffs-Appellees agree with the Statements of Jurisdiction set forth in the Opening Briefs.

COMBINED STATEMENT OF FACTS AND CASE

Although this case was commenced in 1992, the events leading to the present appeal all occurred after the district court entered its Judgment in this case. That final judgment, entered in early 2000, was not appealed by any of the defendants.

A. The District Court's Judgment and Orders.

On January 24, 2000, the district court held that the state's minimum base level for funding English Language Learner ("ELL") programs violated the Equal Education Opportunities Act ("EEOA") because it was arbitrary and capricious and bore no relation to the actual funding needed to insure that ELL students can achieve mastery of the state's academic standards.

Flores v. State of Arizona, 172 F. Supp. 2d 1225 (D. Ariz. 2000).

Importantly, the court determined that for the state to adopt appropriate practices and adequate resources, "it must first establish minimum standards for providing *Lau* funding and program oversight." *Id.* at 1238. When, over the next seven years, the state failed to respond to the judgment, the district court issued a series of remedial orders designed to promote compliance. The orders have consistently provided that the state must fund

programs for ELL students based upon the cost of implementing those programs. A brief summary of those orders follows.

- June 30, 2000 — The court approved a Consent Order addressing programmatic issues for ELL students and in particular requiring compensatory instruction for ELL students and exited ELL students who fail to make academic progress. Clerk’s Record (“CR”) 206, ¶¶ II(A)(7), IV(B).

- October 12, 2000 — The court ordered that the Defendants “shall prepare a cost study to establish the proper appropriation to effectively implement the state’s *Lau* educational theory.” CR 209 at 6. The court required that the cost study be prepared in a timely fashion so that the legislature could appropriate funding during the upcoming legislative session beginning in January 2001.

- June 25, 2001 — After legislative inaction in the 2001 legislative session, the court ordered that the Defendants “shall comply with the court’s declaratory judgment” and “specifically, the state’s minimum level of funding per LEP student shall not be arbitrary and capricious, but shall bear a rational relationship to the actual funding needed to implement language acquisition programs in Arizona schools so that LEP students may achieve mastery of the state’s specified ‘essential skills.’” CR 226 at 3-4.

- June 12, 2002 — Although it initially rejected an increase in funding for ELL students because it was not based on actual cost, the district court reconsidered and held that although it was not full compliance with the judgment, the state’s action was appropriate to address the directives in this case because the legislature adopted the new funding as an interim measure pending receipt of a further cost study. CR 257.

- January 28, 2005 — The court ordered that the Defendants had until the end of the then pending legislative session or April 30, 2005 to comply with court’s January 2000 order “by appropriately and constitutionally funding the state’s ELL programs taking into account the Court’s previous orders and the parties’ stipulation.” CR 290 at 5.

When the state failed to meet the deadline established by the January 28, 2005 Order, the Plaintiffs filed a Motion for Sanctions. CR 296. On December 15, 2005, the district court granted Plaintiffs’ motion and imposed an escalating schedule of fines designated to begin fifteen days after the beginning of the 2006 legislative session if the Defendants had not complied with the judgment by that time. CR 235 at 13-14.

The 2006 legislative session began on January 9, 2006. No legislation was enacted to address this case within the first fifteen days so the fines ordered by the district court began to be assessed on January 25, 2006. The

legislature finally reacted by passing legislation similar to legislation that had previously been vetoed by the Governor but which also included corporate tuition tax credits for private schools. The Governor vetoed the next legislation and informed legislative leadership that, among other things, it failed to comply with the court's judgment and orders. The legislature tweaked the bill, passed it again, presented it to the Governor, and she vetoed it again. Finally, the legislature removed the corporate tuition tax credits, and the Governor decided to allow the legislation, House Bill 2064 ("HB 2064"), to become law without her signature. At the same time, she told the legislature that it failed to comply with the court's judgment but that with fines accumulating, it was time for the court to deal with the legislation. CR 376, Exhibits A, B.

B. HB 2064

HB 2064 was passed by the legislature on March 2, 2006. On March 3, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064. CR 373. The Defendant State of Arizona also filed a motion requesting expedited consideration of the bill. CR 374; 375. On March 8, 2006, the Speaker of the House and President of the Arizona Senate filed a Motion on behalf of the legislature seeking to

Intervene as defendants along with a Motion to Purge the state of contempt and to dissolve the injunction. CR 382. The Motion to Intervene was granted and the parties were instructed by the district court to submit briefs on whether the bill satisfied the judgment. CR 390. The Intervening Legislative Defendants and the Superintendent of Public Instruction both took the position that HB 2064 satisfied the judgment (hereinafter collectively “Appealing Defendants”) CR 382, 414, 434. The Plaintiffs and defendants, State of Arizona and State Board of Education, all took the position that the bill was fatally flawed and the judgment remained unsatisfied. CR 415, 419.

As noted above, HB 2064 was basically the same legislation that the Governor had vetoed over a year earlier on May 13, 2005. It provided almost exactly the same amount of funding for ELL programs as the previous legislation. Retaining the formulaic funding used by the state, it increased the Group B weight—the additional amount allocated to cover the costs of educating ELL students—from approximately \$355 (now \$365) per ELL student to \$432 per ELL student, or an increase of \$77 per student. That amounted to a total of \$14.3 million. HB 2064, Sec. 13, 47th Leg., 2d Reg. Sess. (Ariz. 2006). The \$14.3 million, however, was not new funding. Rather, it was simply funds that had been previously appropriated, but not

spent, for teacher training in the interim legislation enacted in 2001 (which the district court only approved because it was an interim measure). CR 306, Exhibit 2 at 6. Moreover, this small funding increase in the Group B weight has never been implemented because the appropriation was contingent on the district court's approval of the legislation as sufficient to satisfy the judgment. HB 2064, Sec. 15(A).

The only other funding in HB 2064 that directly supported ELL programs was a \$10 million appropriation for "compensatory instruction." HB 2064, Sec. 9. Once again, that was the identical amount contained in the prior year's legislation that was vetoed by the Governor. "Compensatory instruction" is instruction that is needed by many current and former ELL students and includes programs that are in addition to normal classroom instruction such as individual or small group instruction, extended day classes, or summer school. Under HB 2064, compensatory instruction is "limited to improving the English proficiency of current English language learners and pupils who were English language learners who have been reclassified as English proficient within the previous two years." HB 2064, Sec. 4 (adding Ariz. Rev. Stat. § 15-756.11(G)). Unlike the small formulaic increase, school districts must apply for funding from the compensatory

instruction fund. As of this date, none of the \$10 million has been distributed to school districts. CR 615 at 69-70

The \$77 per ELL student increase in the Group B weight and the compensatory instruction funds were the only monies actually appropriated (but not distributed) for ELL students in HB 2064. The legislation also established an Arizona English Language Learners Task Force (“Task Force”) to develop and adopt research-based models of structured English immersion programs for use by school districts and charter schools. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. §15-756.01(C)). The models are required to take into consideration the size of the school, the school’s location and its grade levels, although there is no reference to the deficiencies identified by the district court like class size, lack of qualified teachers, teacher aides, tutoring and instructional materials. *Id.* The legislation requires that the models be adopted by September 1, 2006, over a year ago. *Id.* Models have not yet been adopted by the Task Force. CR 688, Attachment 1 at 3, ¶6. One member of the Task Force believes that the Task Force will take final action on models by the end of September, 2007, exactly a year after they should have been adopted. *Id.*

The Task Force was charged with establishing a form for school districts and charter schools to determine the budget request amount for

which school districts can apply. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. § 15-756.01(I)). However, school districts can only apply for additional funding after offsetting:

1. That portion of federal Title I and Title II A monies received for students who are also ELL students, an amount calculated by determining the percentage of the qualified population that are also English language learners;

2. All federal Title III monies and any other federal monies designated for the needs of English language learners;

3. That portion of federal impact aid monies received for students who are also ELL students, again calculated based on the percentage of the qualified population that are also English language learners;

4. That portion of desegregation monies levied pursuant to Ariz. Rev. Stat. §15-910 determined by the English language learner population as a percentage of the qualified population; and

5. The ELL support level weight (the \$355 per ELL student).

Id. No budget report forms have been approved by the Task Force even though they were also due a year ago.

If a school district can prove that it needs additional funds after all of the federal and locally generated funds are offset, then the maximum amount

of the budget request for a school district is the difference in its incremental costs of providing ELL programs after subtracting the offsets for federal and locally generated funds. *Id.*, (adding Ariz. Rev. Stat. § 15-756.01(J)).

However, the legislation prohibits school districts and charter schools from including the incremental costs of any student who has been classified as an English language learner for more than two years in the budget request. *Id.* In the case of NUSD, the effect of the two year limitation is to reduce its funding for ELL students by half. CR 638 at 10, ¶18.

The Superintendent of Public Instruction is charged with collecting all the school district and charter school budget requests and submitting them to the legislature for funding from the Arizona Structured English Immersion Fund. *Id.*, (adding Ariz. Rev. Stat. § 15-756.03 (C)). HB 2064 fails to specify whether or not the legislature will actually fund the budget requests or any portion of them. The legislation does not require funding. *Id.*

C. The District Court's First Order Holding that HB 2064 Did Not Satisfy the Judgment.

On April 26, 2006, the district court determined that HB 2064 failed to satisfy the judgment in this case and also failed to comply with federal law. CR 448. The court acknowledged that the landscape with regard to ELL programming had changed since judgment was entered in the case and that some progress had been made in the Nogales Unified School District

with regard to improved academic success for some elementary and junior high school students. *Id.* at 2-3. But, the district court noted, the EEOA had not changed and it was still a requirement that the state provide funding for ELL students that is not arbitrary and capricious. *Id.* at 3. Additionally, the court determined that it is still the law that a state may not consider the use of federal funds to determine the eligibility of a school district or charter school for state funding or the amount of any state aid. *Id.* Finally, the court held that No Child Left Behind (“NCLB”) did not supersede the state’s duty to properly fund ELL programs. *Id.*

The court rejected the Appealing Defendants’ arguments that HB 2064 satisfied applicable federal law and the judgment when the legislation is considered by itself or, alternatively, when considered in combination with the so-called “reforms” of Arizona K-12 education since 2000. *Id.* The court determined that the legislation did not bear any rational relationship to the cost of providing an ELL program. Although state funding for ELL students was increased by \$77 per student in the legislation, it was still \$18 per student short of the “unreliable” cost study done by the state nearly 18 years ago. *Flores*, 172 F. Supp. at 1238-9.

More fundamentally, the court determined that the cost of implementing ELL programs had not been established by the legislation.

CR 448 at 4. Therefore, the court could not determine if the \$77 increase bore any relationship to the actual cost of the ELL programs or if it adequately funded ELL programs. The legislation failed to establish minimum standards for providing funding as required by the judgment, making it impossible for the court to determine whether the funding was rational or adequate. *Id.* The district court noted that the legislation established a task force to develop and adopt “research-based models” of structured English immersion programs for use by school districts and charter schools but was silent on whether or not these models are “standards” to be used by the school districts and charter schools. *Id.* The court observed that if the models are indeed standards, then that would be a step toward an appropriate remedy. The final step would then include a per student cost assessment for implementing these models and a rationally-related funding level appropriated by the legislature. *Id.*

The court noted that the federal funds are to supplement, not supplant, state funds for education and that it is clear the legislation required school districts to use federal funding to finance a state obligation. *Id.* at 5. The district court also determined that the legislation’s attempt to redirect locally generated desegregation funding for ELL purposes was unlawful. *Id.* at 6. The district court held that school districts cannot transfer or use their

desegregation funds as offsets as required by the legislation because it would impair their duty to comply with court-ordered desegregation mandates and requirements in OCR agreements executed with the U. S. Department of Education Office of Civil Rights (“OCR”). *Id.*

Finally, the district court determined that the legislation’s two-year limitation on funding for ELL students violated the EEOA. The court determined that while a two-year period for becoming English proficient might be a laudable goal, the failure of an ELL student to become proficient within two years could not justify termination of funding for that student. The court determined that the EEOA does not impose a time limitation and the state’s funding obligation is a continuing one until students have overcome language barriers that impede their participation. *Id.* at 7-8.

Although the district court determined that the legislation failed to satisfy either the judgment, the court’s orders or federal law, it did not invalidate the legislation but simply referred the parties back to the court’s December 16, 2005 order which directed the state to comply with the judgment. *Id.* at 8.

D. Appeal and Remand

The Appealing Defendants appealed the Court’s April 26, 2006 Order and on August 23, 2006, in a Memorandum Decision, this Court ruled that

the district court “should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original order or otherwise had a bearing on the appropriate remedy.” Memorandum at 7. The Court vacated the April 25, 2006 order rejecting HB 2064 and remanded the case to the district court. *Id.*

In January 2007, the district court held an eight day evidentiary hearing. Over the first five days of the hearing, Appealing Defendants were allowed to call and present testimony from all of the witnesses they requested to call. CR 618 – 20, 622, 615. Likewise, every piece of evidence they offered was admitted without objection by Plaintiffs. CR 613. Plaintiffs offered live testimony and exhibits for three days (CR 616, 617, 621) but because of time constraints, they submitted depositions instead of live testimony for some of their witnesses. CR 621 at 215.

According to the evidence offered by the Appealing Defendants, there are only two sources of funding dedicated for ELLs. Those two funds are the Group B weight for ELL students (\$365 per student) and the \$10 million in compensatory instruction funds (\$74 per ELL student). All of the rest of the funding that Appealing Defendants claim can be used for ELL students is general purpose funding.

The Appealing Defendants' witness who testified about what funding was available for ELL programs could not state how the Group B weight funding was derived or what it is based on. CR 615 at 67. Additionally, he confirmed that the compensatory instruction funds had not been distributed even though HB 2064 has appropriated those funds six months earlier. *Id.* at 69-70. Finally, the Appealing Defendants' witness acknowledged that if the two year limitation on the Group B weight funding for ELLs is taken into account, then Nogales Unified School District would effectively have only \$182 per ELL student or half the amount in the Group B weight. *Id.* at 68-69. That is premised on the assumption that half of Nogales' students take longer than two years to achieve English proficiency, not an unreasonable assumption given Nogales' testimony that it takes three to five years for their students on average to achieve proficiency. CR 638 at 10, ¶22.

To demonstrate that the state's funding for ELL programs is totally inadequate, the Plaintiffs introduced evidence about the components of adequate ELL programs and their costs. That evidence came from two categories. First, Plaintiffs presented detailed evidence about the cost of operating ELL programs from five school districts. Hearing Exs. 7-17. Two of those school districts (Nogales and Glendale) are held up as models for the rest of the state by the Arizona Department of Education. CR 615 at

173-74; 192. Second, the Plaintiffs offered the cost analyses that have been performed since the judgment was entered in this case including the 2000-2001 cost study by the Arizona Department of Education, a legislative staff analysis of that cost study and an independent calculation of the costs for ELL programs, the NCSL cost study and, finally, summary data for 30 school districts from across the state. Hearing Exs. 3, 18, 19, and 20.

Without exception, all of the data offered by Plaintiffs at the hearing proves (even though the burden was on the Appealing Defendants) that state funding for ELL programs is a fraction of what it should be. The evidence introduced by Plaintiffs is summarized in the chart below.

Amount Currently Allocated by State		Cost Study Estimates		Actual Expenditures by School Districts	
Group B weight	\$365	ADE	\$1,200	Nogales Unified	\$1,570
		Baker Report	\$1,527	Glendale Union	\$3,311
		NCSL	\$1,026 – 2,571	Tucson Unified	\$2,749
				Scottsdale Unified	\$3,322
				Murphy Elementary	\$2,837
				Essigs' Survey (average)	\$1,870

Although Appealing Defendants argued that the unsatisfactory conditions in Nogales had been fully addressed, the evidence showed otherwise. Witnesses from the Nogales Unified School District testified that

the District has substantial additional needs for which it has no current funding regardless of the source. Those needs include additional funds for after school tutoring, instructional aids and materials and software. CR 616 at 76-80; Hearing Ex. 7. Additionally, the evidence showed that in a number of schools, class sizes for ELL students in Nogales exceeded the Appealing Defendants' witnesses own standards for what the appropriate class size should be. CR 620 at 100; Hearing Ex. 214 at 2, 5, 7 and 8.

Likewise, there is no question that ELL student performance in Nogales has improved since the judgment was entered in 2000. However, that is only part of the story. Once again, the Appealing Defendants' own evidence belies their claim that ELL students in Nogales or throughout the state of Arizona are performing at acceptable levels. Appealing Defendants contended at the evidentiary hearing that the proper way to view ELL performance was not their scores on the Arizona proficiency exam, the Arizona Instrument to Measure Standards ("AIMS"), but rather examining how ELL students who had been reclassified as proficient performed on the AIMS test. Their witness prepared a schedule showing that out of 628 schools examined statewide, Nogales had elementary schools that ranked in the top ten. CR 615 at 133; Hearing Ex. 216 at 1. However, the same schedule shows that the high school in Nogales ranked 574 out of 628, a fact

that the Appealing Defendants' witness confirmed was not acceptable to the Arizona Department of Education. CR 622 at 60-1; Hearing Ex. 216 at 20.

On March 22, 2007 the district court issued its ruling which included Findings of Fact and Conclusions of Law. CR 638. The district court denied the Legislative-Intervenors' Rule 60(b)(5) Motion for Relief from the judgment. The district court held that neither the changes in education funding nor HB 2064 satisfied the judgment and further found, as it had previously, that HB 2064 violated federal law in multiple respects. The district court ordered the Arizona Legislature to comply with the judgment by the end of the legislative session. *Id.*

ISSUES PRESENTED

1. Whether the district court abused its discretion when, after conducting an eight-day evidentiary hearing and making findings of fact and conclusions of law, it held that funding and programmatic changes that have occurred since the original judgment was entered in this case do not warrant a modification of that judgment or otherwise bear on the appropriate remedy in this case.

2. Whether legislation that includes a minimal increase in funding for ELL programs that is unrelated to the cost of those programs, satisfies the requirements of the unappealed district court's judgment in this case

which held that the state's minimum base level for funding ELL programs was arbitrary and capricious because it bore no relation to the actual cost of programs needed to insure that ELL students can achieve mastery of the state's academic standards.

3. Whether legislation that on its face deducts the federal aid a school district receives to determine eligibility for, and the amount of, state aid for ELL programs violates federal law and unlawfully attempts to use federal funds to supplant the state's legal obligation to adequately fund ELL programs.

4. Whether legislation that limits the base funding for each ELL student to two years, regardless of the student's progress in language acquisition, and similarly limits supplemental funding, violates the Equal Educational Opportunities Act.

5. Whether the No Child Left Behind Act, which expressly provides that it should be construed consistent with civil rights legislation, limits the remedies available under the Equal Educational Opportunities Act.

6. Whether on remand the district court was precluded by this Court's mandate from considering and evaluating the legislation that was enacted with the purported intent to satisfy the judgment, which by its express terms did not become fully effective unless and until approved by

the court, and was among the “changed circumstances” cited by the Appealing Defendants in their motion to purge the judgment and dissolve the injunction.

STANDARD OF REVIEW

Plaintiffs agree that the denial of a Rule 60(b) motion for relief of judgment is reviewed for an abuse of discretion. *S.E.C. v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996). A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. *United States v. ASARCO, Inc.*, 430 F.3d 972, 978 (9th Cir. 2005). Decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Warren*, 25 F.3d 890, 894 (9th Cir. 1994).

SUMMARY OF ARGUMENT

Last year, this Court remanded this case to the district court to hold an evidentiary hearing to determine if changed circumstances warranted modification of dissolution of the judgment in this case. After the submission of pretrial memoranda, consideration of the evidence presented by the parties and post-hearing briefs, the district court concluded that the State of Arizona was still not in compliance with the Equal Educational Opportunities Act. Applying that Act and the judgment in this case, the district court determined that the State’s system of funding programs for

English language learners was arbitrary and inadequate. The district court determined that nothing in the last seven and a half years changes that conclusion.

Although there have been increases in general education funding in Arizona, funding for English language learners has scarcely increased at all. Arizona's funding for ELLs is still based on a wholly arbitrary amount driven not by educational considerations but by political ones. The EEOA and the judgment in this case require that funding be based upon the cost of providing language acquisition programs. The Appealing Defendants introduced no evidence whatsoever to establish that current state funding for ELL programs is based on their costs.

Instead, the Appealing Defendants contend that the inadequate conditions that obtained in Nogales Unified School District at the time the judgment was entered no longer exist and that ELL students in that District are performing better. However, the judgment applied to the State's funding system not just for Nogales but for all school districts. Even if this case was limited to Nogales, that school district still has inadequate funding even though it is spending more than five times what the state provides. And, although students at the lower grade levels are performing better in Nogales, performance for ELL students at the higher grade levels is dismal.

Even though the Appealing Defendants now claim that they had satisfied the judgment prior to the enactment of House Bill 2064, the district court properly reviewed that legislation to determine whether the funding system now in place satisfies the judgment and the EEOA. The new legislation calls for the adoption of language acquisition models by a task force and the funding of those models after deducting substantial federal and local funding. The district court determined that those deductions and the termination of funding after two years are illegal and that the legislation therefore cannot satisfy the requirements of the judgment.

In the meantime, English language learners have attended school in Arizona for another year with a funding system that has been declared unlawful for the last seven years. It is time for this Court to allow the district court to do its job and enforce the judgment so that English language learners will have the same opportunities as their peers to achieve the State's academic standards.

ARGUMENT

A. The District Court Properly Concluded That Changed Circumstances Did Not Warrant Modification of the Judgment and that Seven Years After It Was Entered, The Judgment Remained Unsatisfied.

The Appealing Defendants¹ sought relief under Rule 60(b)(5) which provides relief from final judgments where a “significant change in facts or law warrants revision of the decree.” *Bellevue Manor Assoc. v. U.S.*, 165 F.3d 1249, 1255 (9th Cir. 1999) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). There must be a showing that “it is no longer equitable that the judgment should have prospective application, not when it is no longer convenient to live with [its] terms.” *Rufo*, 502 U.S. at 383. To prevail on a Rule 60(b)(5) motion, the movant must “satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree.” *U.S. v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (citing *Rufo*, 502 U.S. at 384). If the movant meets that burden, it must show that its proposed modification of the decree is

¹ At the outset, Plaintiffs note that there is a substantial question whether the Superintendent and Legislative Intervenors have standing to pursue this appeal. The district court’s order does not require anything of the Superintendent. The mere fact that he is a named defendant is an insufficient basis for him to maintain this appeal. *Gonzales Torres v. Calero Toledo*, 586 F. 2d 858, 860 (1st Cir. 1978). The Legislative Intervenors have recently asserted that they are but two members of the legislature (*See* CR 677) and if that is true, then they also lack standing to pursue this appeal.

“suitably tailored to resolve the problems created by the changed factual or legal conditions.” *Id.* (citing *Rufo* at 391). A movant who cites significantly changed factual conditions must additionally show that the changed conditions make compliance with the consent decree “‘more onerous,’ ‘unworkable,’ or ‘detrimental to the public interest.’” *Id.* (citing *Small v. Hunt*, 98 F.3d 789, 785 (4th Cir. 1996) and *Rufo* at 384).

The district court properly held that the Appealing Defendants did not make the requisite Rule 60(b)(5) showing in this case.

1. The Law Has Not Changed Since the Judgment Was Entered in this Case.

The source of the requirement that the state provide adequate funding for the ELL programs is contained in the Equal Education Opportunities Act. 20 U.S.C. § 1703(f). The EEOA has not changed since the judgment was entered in this case. The relevant provision of the EEOA provides that:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - -

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703(f). Congress failed to define what constitutes “appropriate action” under the EEOA, so it has been left to the courts to interpret.

In *Castaneda v. Pickard*, the Fifth Circuit developed a three-prong test for determining compliance with the EEOA. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). First, the state must adopt a recognized methodology for delivering English acquisition services to ELLs. (The Plaintiffs have never contested the state’s methodology in this case. English immersion was adopted by Arizona voters over six years ago and all of the cost data generated since then has been based on that methodology.) Second, the state must devote the necessary resources to transform the methodology into reality. (That has been the problem in this case.) And, third, the program must produce results indicating that language barriers confronting students are actually being overcome. *Castaneda*, 648 F.2d at 1009-1010. This three-step analysis has been adopted by courts as the principal test for determining what constitutes “appropriate action” under the EEOA. *See, e.g. Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1987); *Teresa P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698 (N. D. Cal. 1989); *Keyes v. School District No. 1, Denver, Colorado*, 576 F. Supp. 1503 (D. Colo. 1983); *Debra P. v. Turlington*, 564 F. Supp. 177 (M.D. Fla. 1983)

Relying on *Castaneda*, the district court entered judgment against the Defendants on January 24, 2000. *Flores v. State of Arizona*, 172 F. Supp.2d 1225 (D. Ariz. 2000). The Court held that:

The state's minimum base level for funding LAU programs is arbitrary and capricious and bears no relation to the actual funding needed to insure that LEP students in NUSD are achieving mastery of its specified "essential skills."

172 F. Supp.2d at 1239. The Court further held that:

Defendants are violating the EEOA because the state has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized LAU program in NUSD, the state has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

Id. The Court squarely placed the responsibility for adequately funding ELL programs on the state.

Nothing has happened in the last seven years that would render the analytical framework set forth in the district court's judgment outmoded. It remains the applicable law binding on the Defendants. The Appealing Defendants, however, are attempting to use Rule 60(b)(5) to relitigate the judgment that they declined to appeal. It is well-established that Rule 60(b)(5) cannot be used to attack the underlying judgment. *Agostini v.*

Felton, 521 U.S. 203, 257 (1997) (Ginsburg, J. dissenting); *Transgo, Inc. v. Ajax Transmission Parts*, 911 F.2d 363 (9th Cir. 1990).

The true motive for invoking Rule 60(b)(5) is revealed by the Appealing Defendants' oft-repeated argument that the test for compliance with the EEOA set out in *Castaneda* more than 25 years ago is "obsolete and unworkable." Legislative Intervenor's Brief ("L.I.B.") at 51. If the Appealing Defendants wanted to contest the viability of *Castaneda*, they should have appealed the judgment back when it was entered in 2000. They chose not to do so and are now bound by that decision.

Moreover, the Appealing Defendants' latest assertion that the No Child Left Behind Act ("NCLB") somehow renders *Castaneda* obsolete has absolutely no merit. L.I.B. at 47. In claiming that the NCLB fills the "gap" recognized in *Castaneda* (L.I.B. at 49-51), the Appealing Defendants confuse the very different purposes of the two statutes.

First adopted in 1974, the EEOA is an anti-discrimination statute. 20 U.S.C. § 1703(f). It is enforceable through a private right of action. 20 U.S.C. § 1706. That section of the EEOA provides that "an individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States against such parties, and *for such relief, as may be appropriate.*" *Id.*

The NCLB on the other hand is directed at schools and the academic success of their students. Every court that has considered the issue has held that there is no private cause of action under the NCLB. *See Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN v. NY City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D. N.Y. 2003); *Stokes v. United States Dept. of Educ.*, 2006 U.S. Dist. LEXIS 46838, 2006 WL 1892242 (D. Mass. July 10, 2006); *Blanchard v. Morton Sch. Dist.*, 2006 U.S. Dist. LEXIS 59417, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Coachella Valley Unified Sch. Dist. v. California*, 2005 U.S. Dist. LEXIS 44825, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

Further, no portion of NCLB prescribes a particular or appropriate remedial language program or provides a remedy in the event such a program is not provided. In fact, Title III, Part A of the NCLB specifically provides, “[n]othing in this part shall be construed -- . . . (2) to require a State or a local educational agency to establish, continue, or eliminate any particular type of instruction program for limited English proficient children . . .” 20 U.S.C. § 6845. So, as long as a school is making “adequate yearly progress,” the NCLB provides no “remedy” whatsoever even if some of the students in the school are being denied their constitutionally guaranteed right to language instruction.

Finally, any doubt that the EEOA and the cases interpreting it remain the controlling law with respect to the state's obligation to provide English language instruction is totally eliminated by the additional provision in the NCLB that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. Thus, rather than replacing *Castaneda* and the other cases that have construed the EEOA, by including this affirmation, the NCLB reinforces their continued applicability.

2. There Are No Factual Changes That Support a Finding that the Judgment is Satisfied or Justify a Modification of the Judgment.

The Appealing Defendants basically make two arguments in support of their claim that the judgment in this case has been satisfied. First, they claim that the educational landscape has materially changed for ELL students and that Arizona is now taking "appropriate action" pursuant to the EEOA. Second, the Appealing Defendants argue that the unsatisfactory conditions at Nogales have been rectified and that the original judgment would not have been issued on the state of facts that now exists. Each of these arguments, however, misses the point. As discussed more fully below, the judgment requires the state to provide funding that is both adequate and

not arbitrary. The evidence adduced at the hearing established that the funding currently provided is neither.

a. The Appealing Defendants Offered No Evidence To Show That The Current Funding Is Any Less Arbitrary Than It Was When The Judgment Was Entered.

The Appealing Defendants argue that Arizona is now taking “appropriate action” for ELL students. Superintendent’s Brief (“ S.B.”) 44-45. They argue that the state has adopted an educational theory, developed English language learner proficiency standards, designed a test that allows school districts to properly identify and place ELL students, developed and implemented English immersion endorsements for teachers and administrators and created a program for professional development for ELL teachers. The Appealing Defendants also claim that the state monitors ELL programs and provides technical assistance to school districts and ensures local accountability for the performance of ELL students pursuant to No Child Left Behind. *Id.*

Putting aside whether *the state* has actually established adequate ELL programs (which as discussed below, Plaintiffs dispute), the Appealing Defendants’ argument wholly misses the point. Nowhere in their claim that the educational landscape has materially changed for ELL students is there evidence that *the state* now provides adequate funding for ELL students that

is not arbitrary. That is what the judgment required. Adequate funding based on actual cost, not an arbitrary amount, is what the judgment requires and the Appealing Defendants presented no evidence at the hearing to establish that state funding is no longer arbitrary and inadequate. The Appealing Defendants simply ignore that part of the judgment.

To the extent the Appealing Defendants imply that the district court has required that they fund whatever a statewide cost study determines is appropriate, they are wrong. Cost studies are simply one way to determine costs and are merely a guide. Nevertheless, in 2001 the Appealing Defendants voluntarily passed legislation that required such a statewide cost study from 2002 to 2004. 2001 Leg. Sess., 3rd sp. sess., HB 2010.

Apparently, the idea that statewide cost studies are “now outdated” is of recent vintage for the Appealing Defendants. The fact is that their objection to statewide cost studies is because they haven’t liked the results of any of the cost studies that they have commissioned. Their rejection of them on other grounds is nothing more than pretext. More importantly, the Plaintiffs have never requested, and the court has never ordered, that funding for ELL programs be rigidly based upon the results of any cost study. The district court has merely required the state to fund ELL programs based on

their actual costs and that is what the Appealing Defendants have refused to do.

The Appealing Defendants generally object to the idea that they must fund the incremental costs of educating ELL students. However, they concede that educating ELL students is more expensive than educating English proficient students. CR 618 at 101. That is why the funding system has provided an additional amount for ELL students over and above the base level funding amount for every student since 1980. The Appealing Defendants argue that if the additional amount is insufficient, as it has been for the last twenty years, school districts can simply get the needed funds from base level funding. If that is true, then there could never be a claim that funding for ELLs is inadequate because a school district's general budget would always be more than sufficient to at least fund ELL programs. There might not be very much left for the other students, but ELL programs would be funded.

The Appealing Defendants cannot have it both ways and claim that the idea of incremental cost for ELL students is outdated but continue to maintain a school finance system where funding is calculated by first establishing a "base funding level" for all students and then allocate additional funds for those students who require more resources to educate,

such as ELL students, gifted students and students with disabilities. Ariz. Rev. Stat. §15-943. It is the state that has adopted the system of incremental costs. The Plaintiffs simply assert that *under this system that the state has adopted* the additional funding allocated for ELL students must be adequate and based on actual cost, not an arbitrary amount.

b. Improvement At Nogales Does Not Satisfy the Judgment; The Judgment Requires a State Funding System That Is Both Adequate and Not Arbitrary.

The Appealing Defendants also submitted evidence demonstrating that some of the unsatisfactory conditions that existed in Nogales at the time judgment was entered have improved, claiming that because of that improvement the judgment is satisfied. But the judgment does not require that the state simply address unsatisfactory conditions in Nogales. The unsatisfactory conditions in Nogales were a result of the arbitrary and inadequate funding system. That is problem that the state must address in order to satisfy the judgment.

In this regard, the Appealing Defendants continue to misunderstand the nature of this case. They confuse the identity of the Plaintiffs with the scope of relief. This is a declaratory judgment action. The fact that it was filed on behalf of a class of parents and children in NUSD does not limit the relief to Nogales when it was the state funding system that was challenged.

A single individual could have pursued statewide relief. In determining whether the judgment has been satisfied, the issue is not whether the needs of ELL students in Nogales have been met but whether the state has established a funding system for ELL students and programs that is not arbitrary and provides adequate funding for those students and programs.

The Superintendent's predecessor obviously understood this fact when he authorized counsel to execute the Consent Order on June 30, 2000. That Consent Order addresses programmatic issues on a statewide basis and imposes various obligations on the Superintendent and the State Board of Education to adopt rules consistent with the requirements of the Consent Order. CR 206.

The original parties' understanding of the scope of this case has repeatedly been reinforced by the district court's orders. On October 12, 2000, the district court stated that it had issued a declaratory judgment against the Defendants for failing to provide limited English proficient children with a program of instruction calculated to make them proficient in speaking, understanding, reading and writing English. CR 209 at 4. The court went on to say that it had held as a matter of law that the state's minimum base level for funding ELL programs bears no relation to the actual funding needed to insure that ELL students are achieving mastery of

the state's specified "essential skills." *Id. citing Lau v. Nichols*, 414 U.S. 563 (1974). Most telling, the Court said it was not surprised by the Defendants' suggestion to continue to delay appropriating "adequate funding for *Lau* programs in Arizona. . ." *Id.* (Emphasis added). Like the judgment, that order was not appealed.

In the intervening years, none of the district court's orders have been limited to the Nogales Unified School District. As recently as December 15, 2005 the district court's description of the original judgment was that "the method used by the state for funding ELL programs bore no rational relationship to the actual cost of providing such programs and was inadequately funded in an arbitrary and capricious manner that was violative of the Equal Education Opportunity Act ("EEOA") of 1974." CR 335 at 2.

Nor have any of the district court's orders limited relief to Nogales. Indeed, quite the opposite is true. Otherwise, there would have been no reason to conduct comprehensive statewide cost studies or to enact legislation in 2001 that increased funding for all ELL programs or even to execute a Consent Order that established statewide programmatic requirements for ELL programs.

The declaratory judgment issued in this case addressed systemic funding issues, not just the effect that those systemic funding issues have

upon students in Nogales. Simply because the evidence presented by the Plaintiffs at the original trial demonstrated the impact of the funding system on students in Nogales does not mean that the declaratory judgment which identified structural defects in the state's funding system is limited to Nogales.

Moreover, even though some conditions in Nogales have improved, no evidence was offered by the Appealing Defendants that *state* funding is the reason or that it is now adequate to address what were the unsatisfactory conditions in Nogales or any other school district in Arizona. Indeed, the evidence established exactly the opposite. The testimony and documentary evidence offered at the hearing established that Nogales has taken funds from other sources to address unsatisfactory conditions in the school district because the state's funding continues to be inadequate for that purpose. Hearing Ex. 7.

Finally, even if it is relevant, the evidence offered by Appealing Defendants did not prove that the problems at NUSD have all been resolved, as they claim. Student performance in Nogales has improved at the elementary school level, due largely to short term federal grants and a local override, but as the evidence established, performance deteriorates as grade level increases. CR 638 at 4-5; Hearing Ex. 216. According to the

Appealing Defendants themselves, ELL student performance at the high school in Nogales is unacceptable. CR 620 at 60-1. The evidence presented at the evidentiary hearing showed that Nogales is now spending almost five times what it was spending in 2001, even though the state's contribution to that amount has not changed significantly. Hearing Ex. 7. Even at that spending level, Nogales continues to have abysmally poor performance at its upper grade levels because it lacks the funds necessary to address those problems. Additionally, Nogales Unified School District still has critical needs for the district's ELL programs that are unmet because of inadequate funding. *Id.*; CR 616 at 76-80.

As the district court observed, successes or failures within an individual district can be transitory. CR 638 at 4. Performance can be up one year and down the next and determining compliance with the judgment on that basis would be a constantly moving target that changes from one year to the next. The only way to assess compliance with the judgment is to determine whether the state has put in place a system of funding for ELL programs that in some way is related to the cost of providing those programs. As discussed more fully below, the hearing established that it has not.

c. The State Must Establish Standards Based Upon The English Proficiency And Academic Achievement Goals and then Fund Those Standards.

The district court previously ordered the state to establish standards for the implementation of its ELL programs and then fund those standards. *Flores v. State of Arizona*, 172 F. Supp 2d 1225 (D. Ariz. 2000); Order dated April 25, 2006 at 8. Not only did the evidentiary hearing reveal that the state has failed to comply with that requirement of the judgment, it was a powerful demonstration of exactly why standards are needed. As the evidence established, the components of an adequate ELL program are numerous. They include smaller classes, endorsed teachers, tutoring, teachers aides, instructional materials, after school programs and many other services that are provided by school districts. *See e.g.* Hearing Ex. 7. However, the state has never identified what it considers the necessary elements for an adequate ELL program. Rather, it has left it to each individual school district to decide which services it will provide.

The State must make decisions about these and many other components that are necessary for adequate ELL programs. While it is possible that the models being developed by the English Language Learner Task Force will address some of these issues, if it does so it will only be by accident because state law does not require the Task Force to establish

standards for ELL programs. It is only by avoiding these decisions that the Department of Education and Appealing Defendants can continue to claim that the state does not know the costs of providing an adequate program and cannot calculate them. That is why standards are so important. Without standards that establish the minimum requirements for an adequate ELL program, it will be impossible to ever identify the costs of educating ELL students. And as long as the costs cannot be identified, the state is free to continue its arbitrary system of funding.

The evidence presented to the district court indisputably showed that state funding for ELL programs is still arbitrary and inadequate. Whether the adverse manifestation of that inadequacy is unsatisfactory conditions or forcing school districts to rob one program to pay for another is of no consequence. By failing to provide adequate funding for ELL instruction, the state has failed to satisfy the judgment.

B. The District Court Properly Found That HB 2064 Also Fails to Comply with the Judgment Because it Does Not Contain Adequate Funding For ELL Programs and Violates Federal Law.

1. House Bill 2064 Unlawfully Relies on Federal Funding To Satisfy the State's Obligations.

a. The Issue of Whether HB 2064 Illegally Allows for the Supplanting of Federal Funds Was Properly Considered by the District Court in its Evaluation of the "Changed Circumstances."

The Appealing Defendants misapprehend the nature of the proceeding before the district court. The issue before the district court was whether the defendants had complied with the district court's judgment and orders. To the extent Appealing Defendants relied upon the passage of HB 2064 in support for their contention that the judgment was satisfied, the validity of that statute was very much at issue. Indeed, as noted above, the legislation expressly provided that the legislation was intended to satisfy the original judgment and that the formula increase for ELL students would not go into effect unless and until the district court ruled that it did so. HB 2064, Section 15(A).

Moreover, the Appealing Defendants are the ones who introduced the legislation into evidence and examined their witnesses about its effect.

Hearing Ex. 210, CR 618 at 17-9; CR 622 at 133-7; CR 615 at 137-41.

They can hardly be heard to complain now that the district court reviewed the legislation particularly when its provisions jeopardize the very federal

funding on which the Appealing Defendants rely to satisfy the state's funding obligation.

As an initial matter, the Appealing Defendants argue that the issue of whether HB 2064 illegally supplants federal funding is not ripe because the statute has not been implemented yet, and even if supplanting does occur, the Plaintiffs do not have standing to raise the issue. They contend that Plaintiffs are not harmed because it is essentially just an accounting issue between the state and federal government. Legislative Intervenor's Brief ("L.I.B.") 56-7. In the words of the Legislative Intervenors, "Plaintiffs will not suffer a concrete and particularized injury if the federal government brings administrative proceedings against Arizona to recoup funding. They still will get their education." *Id.* at 57. This is incorrect for several reasons.

First, HB 2064 *is* being implemented. It is just that portion of the legislation that appropriates the formulaic increase in funds for ELL students that has not become effective. Second, the Appealing Defendants' argument that even if supplanting does occur, Plaintiffs are not injured so long as ELL programs are provided, reveals a fundamental misunderstanding of the supplement not supplant requirement. The plaintiff ELLs are the beneficiaries of federal funding not only because of their status as ELLs but

also for reasons other than their language barriers. The majority of federal funding is provided through Title I and is aimed at the needs of low-income students. A substantial proportion of ELL students are also low-income. If funding that is intended for low-income students is directed to ELL programs, then ELLs will lose the benefit of the different programs that Title I supports for low-income students. As the state's witness Thomas Fagan testified,

[The supplement not supplant requirement is] actually right at the core of Title I. The purpose was to make certain that the kids in high-poverty schools were getting extra services because that was the only thing that was going to give them an opportunity to catch up to their peers.

CR 619 at 166:10-14.

Finally, because of the inclusion of the plainly unlawful provisions in HB 2064, ELL students are denied the minimal benefit that the legislation would otherwise provide them. The legislation conditions the additional state funding it provides upon the district court's approval of the legislation. HB 2064, Sec. 15(A). By including the illegal provisions regarding federal funding, the legislation insured its rejection by the district court and deprived ELL students of whatever assistance the small amount of additional state funding would support.

b. Federal Law Prohibits Using Federal Funds to Determine Eligibility for State Aid

The Appealing Defendants argue at great length about why the provision in HB 2064 regarding the offset of federal funds from a school district's budget request does not contravene federal law. But federal law is quite clear on this point. The applicable provision is 20 U.S.C. § 7902, a statute that Appealing Defendants ignore completely, which provides that:

[A] State shall not take into consideration payments under this Act (other than under Title VIII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children.

20 U.S.C. §7902. This general prohibition statute expressly provides that states may not consider federal funds when determining the amount of state aid that they will provide to public education. Yet, that is exactly what HB 2064 does; it specifically deducts the amount of federal aid a school district receives to determine the amount of aid the state will provide for ELL programs. HB 2064, Sec. 4 (adding Ariz. Rev. Stat. §15-756.01(I)).

The general prohibition contained in 20 U.S.C. § 7902 applies without regard to the specific prohibitions on supplanting state funding that are contained in Titles I, IIA and III of No Child Left Behind and which are discussed below. Therefore, the Court need not even reach the issue of

whether those specific prohibitions apply to House Bill 2064 in light of the overall prohibition contained in 20 U.S.C. § 7902.

c. HB 2064’s Prohibition On Supplanting Does Not Address the Appropriate Concern, Which Is the Use of Federal Funds to Supplant The State’s Obligation under the EEOA.

Appealing Defendants argue that supplanting is not an issue because House Bill 2064 by its very terms forbids supplanting. L.I.B. at 30; S.B. at 21. Both the Superintendent and the Legislative Intervenors point out that the Group B weight funding and the compensatory instruction funding available under HB 2064 are prohibited from being used by school districts to “supplant any federal, state or local monies. . .” Ariz.Rev.Stat. § 15-756.04(F).

This argument regarding supplanting, however, completely misses the point. The issue is not whether state funds are being used to supplant federal funds but whether HB 2064 sanctions the use of federal funds to supplant *the state’s funding obligation*. Appealing Defendants simply have it backwards. They claim that because the Group B weight is paid out without regard to federal funding under No Child Left Behind, the problem of supplanting is avoided. That is not the issue. The issue is whether the Group B weight funding in combination with the compensatory instruction funding constitutes adequate funding for English language learners *without reliance*

on federal funding to fulfill the state’s funding obligation—which as the next section demonstrates, HB 2064 fails to do.

d. HB 2064 Clearly Uses Federal Funding to Supplant the State’s Obligation and Simply Because Funding Has Not Been Reduced Does Not Mean That Supplanting Has Not Occurred.

Appealing Defendants argue that the statutory prohibitions on using federal funds to supplant the state’s obligation only applies where there is a “reduction in effort” on the part of the state. SB at 43-44. The Appealing Defendants assert that HB 2064 merely requires school districts to supplement state funds with federal funds which, they argue, is not supplanting because the state has not reduced its funding. *Id.* The problem with this argument is that it ignores the fact that the state was never funding ELL programs adequately in the first place and therefore whether state funding has been *reduced* is not even a relevant question. The issue is whether the state can refuse to meet a long-standing funding obligation that is established by law and then avoid responsibility altogether by relying on federal funds. Because the answer to this question is unequivocally “no,” Appealing Defendants’ argument fails on both legal and logical grounds.

The relevant statutory language provides that federal funds made available to states for public education are to be used so as to supplement and, to the extent practical, increase the level of funds that “would in the

absence of such federal funds, be made available from non Federal sources . . .” 20 U.S.C. § 6314 (a)(2)(B). There is nothing in the statute that explicitly prohibits a state from reducing its funding effort. Presumably, a state that was more than adequately funding its public schools could reduce its funding effort for programs so long as it was not relying on federal funds to sustain the programs.

What the law prohibits is using federal funds to replace state funding that would have to “be made available from nonfederal sources.” *Id.* That is exactly the situation that has occurred with respect to HB 2064. If there were no federal funding, the state would still be required to fund ELL programs. The fact that the state has not yet complied with the law and made that funding available does not mean the state can supplant its obligation with federal funds.

The Appealing Defendants attempt to bolster their argument by citing cases which involved the recovery of federal funds that had been used to replace, not supplement, the state’s funding obligations. S.B. at 43, citing *Bennett v. Kentucky*, 470 U.S. 656 (1985); *State of Washington v. U.S. Dept. of Educ.*, 905 F. 2d 274 (9th Cir. 1990); *Dept. of Educ., State of Hawaii v. Bell*, 770 F.2d 1409 (9th Cir. 1985); *State of New York v. U.S. Dept. of Educ.*, 903 F. 2d 930 (2nd Cir. 1990). The fact that recovery in those cases was

sought for historical misuse of federal funds as opposed to the prospective misuse of federal funds is of no legal consequence. The anti-supplanting provisions in federal law apply to both the historical and prospective misuse of federal funds.

The Appealing Defendants' theory that supplanting cannot occur if state funding has not been reduced fails as a logical matter as well. If that were true, then no state would provide any funding for ELL programs because it could avoid the supplanting prohibition by simply claiming that it had not reduced its nonexistent effort. The logical fallacy of the Appealing Defendants' position is exacerbated in this case where the state's obligation to provide funding for ELL programs was legally established over seven years ago. According to the Appealing Defendants, they never had to take any action to comply with the district court's judgment because the only thing prohibited by federal law is a reduction in their funding effort. If that is true, then the parties and the courts have wasted enormous amounts of time and effort over the last six years.

Federal law is very clear that federal funds may not be used to provide services that the state was required to make available under other federal, state or local laws. There are no exceptions. This bright line rule is applicable regardless of whether it is Title I, Title IIA or Title III that is

involved. It is only when the educational services involved are not legally required that any relaxation of the general prohibition is permitted and even then under very limited circumstances. *See* <http://whitehouse.gov/omb/circulars/a133-compliance/04/ed.pdf>, Compliance Supplement (“[I]t is presumed that supplanting has occurred” when “[t]he SEA or LEA used federal funds (except Bilingual) to provide services that the SEA or LEA was required to make available under other federal, state or local laws.”)

Therefore, when the state’s funding obligation is legally required as a matter of federal, state or local law, the state itself must supply the funding and cannot rely on federal funding to do so. That is a clear case of supplanting. The so-called exception to which the Appealing Defendants allude for Title I funds only applies when the state is providing “supplemental” funds for discretionary purposes that meet the intent and purposes of Title I. 20 U.S.C. § 6321(d). Otherwise, the so-called exception would swallow the rule and there would be no need to prohibit supplanting.

e. HB 2064 Unlawfully Offsets Impact Aid to Reduce the State’s Obligation for Funding ELL Programs.

The district court determined that the provision of HB 2064 that subtracts Impact Aid in determining a school district’s budget request violates federal law. CR 448 at 4-7. Federal law prohibits states from taking Impact Aid payments into account in determining the amount of state

aid *unless* the state has an equalization program certified by the U.S. Secretary of Education. 20 U.S.C. §7709(a). The state confirmed below that Arizona does not have such a program. CR 415 at 12. That being the case, there is no question that the state is prohibited from considering Impact Aid in determining the amount of state assistance for any purpose in including ELL funding.

Once again, however, Appealing Defendants fail to understand this prohibition and state the rule exactly backward. The Legislative Intervenors assert that the prohibition of 20 U.S.C. §7709 applies only to state equalization programs. L.I.B. at 57-58. They have simply misread the statute. It clearly provides:

- (a) General prohibition. *Except as provided in subsection (b)*, a State may not—
 - (1) consider payments under this title [20 USCS §§ 7701 et seq.] in determining for any fiscal year—
 - (A) the eligibility of a local educational agency for State aid for free public education; or
 - (B) the amount of such aid; or
 - (2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

20 U.S.C. §7709(a)(emphasis added). Subsection b, the provision that excepts a state from this general prohibition, allows a state to consider

payments only where the Secretary determines and certifies that “the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.” 20 U.S.C. §7709(b). Thus, contrary to the Legislative Intervenors’ assertion, the general prohibition does apply to Arizona (and does not apply to state equalization programs—which as noted above, Arizona does not have).

f. The Issue is Whether the State is Relying on Federal Funds to Supplant Its Funding Obligation; Consequently, the Assurances Executed By School Districts, Including Nogales, Have No Relevance.

The Appealing Defendants argue that Nogales Unified School District as well as other school districts in the state are prohibited from supplanting their obligations with federal funds by virtue of assurances they execute each year. S.B. at 44; L.I.B. at 56. The assurance cited by Appealing Defendants states that federal funds will be used to supplement and “not supplant state and local funds expended for educational purposes ...” The statement is accurate but irrelevant. It is not as if Nogales or any other district is using federal funds to replace, or supplant, the small amount of ELL funding provided by the state. In this case, there are virtually no state funds to supplant so it is difficult to see how Nogales or any other school district could be guilty of violating the assurance that federal funds will not be used to supplant state funds. The problem is not that individual school districts

are using federal funds to supplant state funds; the problem is that the state legislature is attempting to use federal funds to avoid its legal obligation to appropriate funds to adequately fund ELL programs.

2. HB 2064 Unlawfully Relies On Desegregation Funding to Satisfy the State’s Funding Obligations.

In addition to offsetting federal funds, HB 2064 also offsets locally generated desegregation funding. HB 2064, Sec. 4 (adding Ariz. Rev. Stat. § 15-756.01(I)(4)). State law permits school districts that are subject to a court order requiring desegregation or have executed compliance agreements with the U.S. Department of Education Office of Civil Rights (OCR) to levy taxes against their local property tax base to generate the funding necessary to comply with the court’s order or the agreement. Ariz. Rev. Stat. § 15-910. In Arizona, there are 19 school districts that levy taxes for desegregation purposes out of a total of 226 school districts in the state. These 19 school districts have substantial populations of ELL students. The district court concluded that school districts could not transfer or offset funds as the legislation requires because it would hamper their duty to comply with court ordered desegregation mandates and requirements in their OCR agreements.

The district court relied upon information submitted by the Arizona School Boards Association, Tucson Unified School District (TUSD) and

Tempe Elementary School District to explain the impact of the funding provisions in the legislation. CR 448 at 6. For example, HB 2064 would require TUSD to subtract 13% of its desegregation monies, or \$8,060,000, from the state's ELL program obligation because 13% of TUSD students are classified as ELL. That single offset equates to more than \$1,100 per district ELL student. That offset coupled with deductions for federal funding completely eliminate the state's obligation to provide any additional funding for TUSD and Tempe Elementary School District.

For those reasons, the district court concluded that the redirection of funding for desegregation programs to funding for ELL programs violated federal law in two ways. First, it jeopardizes the school district's ability to comply with desegregation plans and, second, it ensures that the state will not provide ELL funding to the affected school districts.

The district court did not discuss or determine an additional reason advanced by the Plaintiffs why the use of desegregation funding for ELL programs was unlawful. In Arizona, it is unconstitutional to require some, but not all, school districts to use local taxation to offset the state's funding obligation. Differential taxation of that nature violates Arizona's constitutional requirement that the Legislature establish a "general and uniform" public school system. Ariz. Const., art. 11, § 1. *See Hull v.*

Albrecht, 190 Ariz. 520, 524, 950 P.2d 1141, 1145 (1997)(“The net effect is that the state imposes vastly different tax burdens on citizens in different districts to support a state obligation.”) That is exactly the result produced by HB 2064. Nineteen school districts will impose varying tax rates to fund ELL programs while over 200 school districts will not be required to impose any tax at all.

3. HB 2064 Unlawfully Terminates ELL Funding After Two Years.

What little guaranteed funding that HB 2064 provides is terminated for any ELL student who has been classified as an ELL for more than two years. HB 2064, Sec. 4 (adding Ariz. Rev. Stat. §15-756.01(J)). This provision is directly contrary to federal law which requires that ELL services be provided until the student is proficient in English. The EEOA requires the state to take appropriate action to overcome language barriers that impair equal educational participation by students. 20 U.S.C. § 1703(f). There is no time limitation imposed by the EEOA and the state’s obligation is a continuing one until students have overcome the language barriers that impede their participation. *Lau v. Nichols*, 414 U.S. 563 (1974).

The U.S. Department of Education Office for Civil Rights has been very clear that this obligation to provide services to ELL students continues until they become proficient. OCR has stated that:

Lau requires that LEP students who need alternative language instruction in order to receive meaningful access to the district's mainstream educational program, be provided those services until an individualized determination is made that a student no longer needs the services in order to participate meaningfully in the district's educational program. *Some children may reach this level of proficiency within one year. However, children learn at different speeds, and districts cannot limit to one year alternative services for LEP students who are not yet able to participate meaningfully in the district's programs.*

<http://www.ed.gov/offices/OCR/archives/prop227q.html>. (last accessed 9/7/2007)(Emphasis added).

Any arbitrary limitation on funding for ELL students is contrary to federal law.² By itself, the two-year limitation on formulaic funding contained in HB 2064 renders the legislation insufficient to comply with the district court's orders that ELL programs be adequately funded.

The Appealing Defendants attempt to avoid this clear application of federal law by arguing that HB 2064 does not include a two year cutoff, but

² State law is not inconsistent with the federal law. In 2000, Arizona voters approved Proposition 203 establishing sheltered English immersion as the principal methodology for the delivery of English acquisition services. Ariz. Rev. Stat. §15-751 *et seq.* While that law aspires to the goal of exiting ELL students after one year, it does not terminate or otherwise limit the provision of services to one year or any other period of time. Ariz. Rev. Stat. § 15-752. Appealing Defendants do not argue otherwise.

rather actually extends funding beyond two years. L.I.B. at 59, S.B. at 24-25. The Superintendent even claims that HB 2064 actually *increases* funding for ELL students after two years. S.B. at 25. This argument, however, is contradicted by the plain language of HB 2064. As discussed at length above, under HB 2064, there are two sources of funding for ELL students: the formulaic funding, which is a guaranteed amount for each ELL student for normal classroom instruction, and the compensatory fund, which is a fixed amount of money appropriated each year by the legislature (although no amount of appropriation is guaranteed) and available only for services outside normal classroom instruction like tutoring and summer school. School districts do not automatically receive compensatory funding but must compete with other school districts by submitting applications for compensatory fund grants to the Department of Education.

Under HB 2064, for the first two years that a student is classified as an ELL, a school district is guaranteed to receive formulaic funding for that student and may, if money is available and a grant is awarded, receive compensatory funding for that student. After two years, whether the student is proficient in English or not, the school can no longer receive the guaranteed formulaic funding for that student. It may still receive compensatory instruction funding, but again, that amount cannot be used for

normal classroom instruction and depends on whether funds are available and whether the school's request is granted by the Department. There is simply no way that this modification in the funding can be seen as anything but a reduction. As the district court properly held, these arbitrary limitations violate the EEOA.

C. The District Court Properly Denied the Motions in Limine

1. The Original Judgment in this Case Found that the State's Funding for All ELL Students Violated the EEOA Because It Was Arbitrary and Capricious.

On January 24, 2000, the district court issued a declaratory judgment that the Defendants were in violation of the EEOA because the state's minimum base level funding for ELLs was arbitrary and capricious and bore no relation to the actual funding needed to insure that ELL students are achieving mastery of the state's specified "essential skills." *Flores*, 172 F. Supp.2d at 1239. After a trial to determine "whether Defendants fail to provide adequately for the instruction of LEP students and other 'at risk' minority students attending public school systems in districts like NUSD," the court found that inadequate funding had resulted in numerous deficiencies in the NUSD including lack of qualified faculty, overcrowded classrooms, insufficient teaching materials, a lack of classroom aides and

tutoring programs and the inability to train parents to help their children in the classroom, among others. *Id.* at 1226, 1236, 1239.

In reaching this holding, the Court made numerous findings of fact and conclusions of law. Those findings included findings regarding the state's system of funding ELL education statewide, as well as specific findings of deficiencies in the Nogales district. *Id.* at 1228-1239. For example, Findings of Fact 1 through 9 addressed the system for funding ELL education throughout the state, and were in no way confined to the Nogales Unified School District. *Id.* at 1228. Similarly, Findings 10 and 11 addressed a statewide LEP Cost Study prepared by the Department of Education in 1987-1988. *Id.* at 1229. And Findings 13 through 18 addressed the ability of districts to use overrides to help finance the cost of educating ELL students and the differing override capabilities among districts throughout the state. *Id.* at 1229-1230.

The conclusions of law were likewise not limited to the Nogales Unified School District. Specifically, Conclusions 4 and 6 address the failure of the State generally to establish minimum standards for *Lau* instruction or accurately determine the cost of meeting such standards. *Id.* at 1238-39. Thus, it was entirely appropriate that as part of the post-judgment relief in this case, this Court has repeatedly directed the State to determine

the actual cost of educating ELL students and, based on that information, provide adequate funding.

In determining whether, seven years later, the state has complied with the original judgment, it was necessary for the district court to not only consider the current conditions in the Nogales Unified School District, but also the current funding allocated for ELL students and whether that funding accurately reflects the true cost of educating those students or whether it continues to be arbitrary and capricious and/or inadequate. In making that determination, it was entirely appropriate for the district court to consider statewide cost data, and just as the cost data considered in 1999 was not limited to Nogales, the cost data presented at the hearing was not limited.

2. The District Court Properly Allowed and Considered Evidence Regarding The Cost of Educating ELL Students in Arizona.

The four motions in limine filed by the Intervenor-Defendants to exclude evidence and testimony regarding the cost of ELL instruction follow a pattern that the Arizona Legislature exhibited over the last seven years since the judgment was entered in this case. Each and every time the legislature has been presented with data about the costs of educating English language learners (“ELL”), the data are ignored. That way, the Legislative Intervenors can continue to claim that no additional funding is needed.

When actual costs are considered, however, it becomes clear that the current funding is inadequate. That is why the Legislative Intervenors wanted to prevent the district court from seeing the cost data.

The evidence that Plaintiffs offered falls into two categories: 1) cost studies conducted at the behest of the state; and 2) empirical evidence of what Arizona districts actually spend. The first category was relevant to the Rule 60(b)(5) motion because it not only provided information about actual cost but also demonstrated the amount of cost data that has actually been available to the legislature over the last seven years and which *could have* been used as a basis for complying with the judgment were the legislature so inclined.

The Legislative Intervenors objected to two costs studies offered into evidence by Plaintiffs: a report prepared by Kim Baker, and the NCSL Cost study, a study that was already part of the record in the case, having been submitted to the district court by the state in 2005 as evidence of its effort to comply with the judgment. Hearing Exs. 18 and 19. Both of these studies, however, were public records admissible under Rule 803(8). Ms. Baker was a legislative analyst for the Senate Democrats who had a significant role in evaluating the first cost study that was performed by the Arizona Department of Education in 2001. At the request of her superiors, Ms.

Baker prepared a report that calculated the costs of adequately educating ELL students. She also participated with NCSL and the Auditor General's Office in the preparation of the cost survey that was sent to school districts as part of the NCSL cost study. *See* Deposition of Kim Baker, CR 611. Ms. Baker was not called by Plaintiffs as an expert witness, but as a fact witness. CR 575. Thus, there was no need for the district court to make any determination regarding her expertise.

The second study objected to by the Legislative Intervenors is the NCSL cost study which is a report that was required by the legislature pursuant to HB 2010 and for which public funds were expended. In arguing that the district court should have excluded the NCSL study, the Appealing Defendants claim that according to NCSL itself, the cost study was deficient and not based on a complete set of data. This is misleading at best. What the Appealing Defendants fail to explain is that the NCSL cost study actually consists of two parts. The first part was an attempt by NCSL to survey school districts and collect cost data showing what school districts are actually spending on their ELL programs. Hearing Ex. 19. It is that part of the report for which the NCSL indicated that it had an insufficient number of responses from school districts to the cost survey. This does not mean the data are unreliable, only that the study is not as complete as originally

planned. The number of survey responses does not affect the admissibility of the study, only the weight that should be attributed to it.

The second part of the NCSL cost study involved convening national and state expert panels to identify the components of ELL programs and attach costs to them. *Id.* at p. xi-xii. Neither NCSL nor anyone else has ever characterized that part of the cost study as incomplete or unreliable. In fact, the legislature even posted the NCSL cost study on its website. The bottom line is that the NCSL is obviously a public record and report and therefore admissible pursuant to Rule 803(8), Fed. R. Evid.

The second category of evidence offered by the Plaintiffs established what Arizona school districts are actually spending on ELL programs and where those funds come from. In addition to the testimony of administrators from five school districts, the Plaintiffs offered the testimony of Chuck Essigs who surveyed approximately 100 school districts about their incremental cost of educating ELL students. Of those 100, 30 school districts responded and reported that, on average, they are spending approximately \$1,800 per student, an amount which is also generally consistent with the conclusions of the cost studies. Hearing Ex. 20. The Plaintiffs' evidence also showed that the school districts that are able to provide this level of funding can only do so by resort to federal and local

funding sources because the funding provided by the state is inadequate. *See, e.g.* Hearing Ex. 7; CR 617 at 26-8.

As Plaintiffs explained below, they did not offer Mr. Essig's testimony as expert testimony because he did not offer any information that requires expertise or special knowledge. CR 575. While Mr. Essig is, as Legislative Intervenors acknowledged below, an expert in the area of school finance, the information that he provided to the district court in this matter did not require that expertise. Rather, Plaintiffs offered Mr. Essig's testimony to introduce straightforward factual information about the amount of money some school districts in Arizona are currently spending on their ELL programs. *Id.* This is factual information that Mr. Essig has compiled by contacting the school districts and simply requesting it. The information that Mr. Essig obtained and presented was all a matter of public record and readily verifiable by the Legislative Intervenors. Hearing Ex. 20.

This evidence provided the district court with a clear picture of how much it costs to provide ELL programs, how much school districts are actually spending on those programs and where they are getting the money to fund those programs. That evidence was not only relevant to the issue before the district court but essential for the district court to understand the

extent to which the Defendants have yet to comply with the judgment in this case and how far they must go to achieve compliance.

3. Even if the District Court Erred In Admitting the Evidence over Intervening Defendants' Objections, the Error Was Harmless In Light of the Additional Evidence Regarding Costs Provided by Plaintiffs and the District Court's Rulings Regarding The Arbitrariness of the Funding and the State's Improper Reliance on Federal Funds to Fulfill Its Obligation Under the EEOA.

Finally, even if the district court's decision to admit the cost studies and Mr. Essig's testimony was error, it was harmless error. It is a fundamental principle that error may not be predicated on a ruling admitting evidence unless a substantial right is affected. Rule 103(a), Fed. R. Evid. *Glanzman v. Uniroyal, Inc.*, 892 F. 2d 58, 61 (9th Cir. 1989)(an error which does "not affect the substantial rights of the parties" will be deemed harmless and not grounds for reversal.). In a nonjury case, the district court's erroneous admission of evidence ordinarily will be harmless error if that evidence did not weigh in the court's decision or the evidence was merely cumulative of other evidence that was admissible and sufficient to sustain the district court's findings. *Sablan v. Department of Fin. of Commonwealth of N. Mariana Islands*, 856 F. 2d 1317, 1321 (9th Cir. 1988).

Here, both criteria are met. First, the district court's finding that the state had failed to comply with the judgment was not based solely on the

evidence that Legislative Intervenors sought to exclude. Rather, it was largely attributable to the failure of the Appealing Defendants to introduce any evidence to establish that the current funding provided by the state for ELL instruction was based on actual cost. Further, in addition to the cost studies and testimony of Mr. Essigs, there was ample evidence in the record, including testimony from the Appealing Defendants' own witnesses, to support the district court's conclusion that the funding provided by the state was not adequate and that the state was improperly using federal funds to supplant its obligation under the EEOA. Finally, the district court indicated at the time the challenged evidence was submitted that it would not be a significant factor in its decision. CR 621 at 216: 23-24 ("If it makes you feel a little better, I'm not that much interested in those surveys.") Therefore, even if it was error for the district court to admit the cost studies and Mr. Essig's testimony, that error was harmless.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs-appellees respectfully request that this Court affirm the district court's March 22, 2007 Order.

RESPECTFULLY SUBMITTED this 10th day of September, 2007.

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CERTIFICATE OF COMPLIANCE

I, Joy E. Herr-Cardillo, do hereby certify that Plaintiff-Appellees' Combined Answering Brief is in compliance with the type-volume limitation and typeface requirements of Federal Rules of Appellate Procedure, Rule 34(a)(7), and Ninth Circuit Rule 32-1, because this brief contains 13,702 words, excluding parts of the brief exempted by Rule 32, and has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

DATED this 10th day of September, 2007.

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PROOF OF SERVICE

I, Joy E. Herr-Cardillo, hereby certify that on September 10, 2007, an original and 15 copies of Plaintiff-Appellees' Combined Answering Brief were filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by depositing with the United States Postal Service by First Class

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On September 10th, 2007, and pursuant to the Consent to Electronic Service executed by the parties and filed with the Court, I electronically transmitted the foregoing document to:

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