SUPREME COURT OF ARIZONA

TOM HORNE, in his Official Capacity as Arizona Superintendent of Public Instruction,

Plaintiff / Appellant,

vs.

KATIE HOBBS, in her Official Capacity as Governor of the State of Arizona; KRIS MAYES, in her Official Capacity as Attorney General of the State of Arizona; CREIGHTON ELEMENTARY SCHOOL DISTRICT; AVONDALE ELEMENTARY SCHOOL DISTRICT; CARTWRIGHT ELEMENTARY SCHOOL DISTRICT; CHANDLER UNIFIED SCHOOL DISTRICT #80; FLAGSTAFF UNIFIED SCHOOL DISTRICT; GLENDALE ELEMENTARY SCHOOL DISTRICT; KYRENE ELEMENTARY SCHOOL DISTRICT; LAVEEN ELEMENTARY SCHOOL DISTRICT; MESA UNIFIED SCHOOL DISTRICT; OSBORN ELEMENTARY SCHOOL DISTRICT; ABC ENTITIES 1-10; DOE INDIVIDUALS 1-10,

Defendants / Appellees.

No. ______________

Court of Appeals Division One
No. 1 CA-CV 24-0615

Maricopa County Superior Court
Case No.: CV2023-013656

APPENDIX

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DIVISION ONE
FILED: 07/17/25
MATTHEW J. MARTIN, CLERK
BY: CM

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

TOM HORNE, Plaintiff/Appellant,	Court of Appeals Division One No. 1 CA-CV 24-0615
v.	
KATIE HOBBS, et al., Defendants/Appellees.	Maricopa County Superior Court No. CV2023-013656

DECISION DISTRIBUTION NOTIFICATION

A decision in the above-referenced case has been filed and distributed to the following:

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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

TOM HORNE, *Plaintiff/Appellant*,

v.

KATIE HOBBS, et al., *Defendants/Appellees*.

No. 1 CA-CV 24-0615

FILED 07-17-2025

Appeal from the Superior Court in Maricopa County
No. CV2023-013656
The Honorable Scott Minder, Judge

AFFIRMED

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OPINION

Judge Paul J. McMurdie delivered the Court's opinion, in which Presiding Judge Anni Hill Foster and Judge Michael J. Brown joined.

M c M U R D I E, Judge:

¶1 Arizona's superintendent of public instruction ("Superintendent") appeals from the dismissal of his lawsuit against certain school districts ("School Districts"),[1] the Attorney General, and the Governor, relating to the public schools' use of an English-learner instructional model approved by the state board of education ("Board"). We affirm the dismissal because the Superintendent lacks the authority to sue and lacks standing to sue these defendants. We affirm the fee awards for the School Districts and the Attorney General because, although they

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[1] The School Districts are: Creighton Elementary School District, Avondale Elementary School District, Cartwright Elementary School District, Chandler Unified School District #80, Flagstaff Unified School District, Glendale Elementary School District, Kyrene Elementary School District, Laveen Elementary School District, Mesa Elementary School District, and Osborn Elementary School District.

did not comply with Arizona Rule of Civil Procedure ("Rule") 54(g)(1), the award is mandatory under Arizona Revised Statutes ("A.R.S.") § 12-348.01.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2000, Arizona voters passed initiative measure Proposition 203. Codified at A.R.S. §§ 15-751 to -755, Proposition 203 governs the public-school instruction of non-English-speaking and non-native-English-speaking children who cannot perform ordinary classroom work in English ("English learners"). The initiative statutes provide that "all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms." A.R.S. § 15-752. As for English learners, the statutes specify that they must be placed in "structured English immersion" ("SEI")[2] classrooms where "[b]ooks and instructional materials are in English," "nearly all classroom instruction is in English," "all reading, writing, and subject matter[s] are taught in English," and "no subject matter shall be taught in any language other than English." A.R.S. §§ 15-751(5), -752. An SEI placement is normally not expected to exceed one year. A.R.S. § 15-752. Once children acquire a good working knowledge of English and can handle regular schoolwork in English, they must be reclassified and moved to mainstream English language classrooms. *Id.* The statutes provide that an English learner's parent or guardian may waive the SEI placement in some cases, in which case the student must be placed in an alternative ("non-SEI") classroom that uses "bilingual education techniques or other generally recognized educational methodologies permitted by law." A.R.S. § 15-753.

¶3 After Proposition 203, the Legislature enacted additional statutes about English learner education. Those statutes include A.R.S. § 15-756.01, which directs the Board to adopt and approve research-based SEI and non-SEI models for use by school districts and charter schools. Under A.R.S. § 15-756.01, the Board adopted and approved several SEI models, including a "50-50 dual language immersion" model. The School Districts use the 50-50 model as SEI education without a parent or guardian waiver provided in A.R.S. § 15-753.

¶4 The Superintendent believes the 50-50 model is not an SEI model and can only be used as a non-SEI model with a parent or guardian's

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[2] "Sheltered English immersion" is an equivalent term. A.R.S. § 15-751(5).

waiver. The Superintendent sued in his official capacity against the School Districts, the Governor, and the Attorney General. By his second amended complaint, he sought declarations that (1) the 50-50 model is unlawful without the parental waiver; (2) A.R.S. § 15-756.01 is unconstitutional if it allows the model as SEI; (3) a waiver is required for non-English instruction of English learners; and (4) an Attorney General opinion on the topic is wrong.

¶5 The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6) and for failure to join the Board as an indispensable party under Rule 12(b)(7). The superior court granted dismissal under Rule 12(b)(6) because the Superintendent lacked the authority to sue and lacked standing. The court awarded attorney's fees and costs to each of the defendants. The court did not reach whether dismissal was warranted under Rule 12(b)(7).

¶6 The Superintendent appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

STANDARD OF REVIEW

¶7 We review *de novo* an order granting dismissal for failure to state a claim under Rule 12(b)(6). *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012). We will affirm if the plaintiff is not entitled to relief under any interpretation of the facts susceptible to proof. *Id.*

DISCUSSION

¶8 The superior court dismissed the Superintendent's action under Rule 12(b)(6) based on a lack of authority to sue and standing. We agree that dismissal was correct on these grounds. Like the superior court, we do not determine whether dismissal was warranted under Rule 12(b)(7).

A. The Superior Court Correctly Ordered Dismissal for Lack of Authority to Sue.

¶9 Under the Arizona Constitution, the Board and the Superintendent are, with others, charged with "[t]he general conduct and supervision of the public school system." Ariz. Const. art. XI, § 2. The Constitution specifies that the elected Superintendent, an executive-branch officer who also serves as a member and the secretary of the Board, has powers and duties as "prescribed by law." Ariz. Const. art. XI, § 4; Ariz. Const. art. V, §§ 1, 9. The Superintendent has no common-law authority. *Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 19 (App. 1981). All of his

authority as Superintendent must be found in statute. *See State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130, ¶ 8 (2020) (Our constitution's reference to state officers' powers and duties "prescribed by law" refers to statutory authority.); *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 9, ¶ 7 (2022) (same). Statutory powers may be expressed or implied. *Ponderosa Fire Dist. v. Coconino County*, 235 Ariz. 597, 602-03, ¶ 25 (App. 2014).

¶10 The Superintendent is broadly charged with overseeing the Department of Education ("Department") by directing the Department's performance of its executive, administrative, and ministerial functions, as well as supervising the public schools. A.R.S. §§ 15-231(D), -251(1), (5). But the Board, not the Superintendent, is "the policy-determining body of the [D]epartment," "[e]xercis[ing] general supervision over and regulat[ing] the conduct of the public school system and adopt[ing] any rules and policies it deems necessary to accomplish this purpose." A.R.S. §§ 15-231(B)(1), -203(A)(1). Although the Superintendent must "[p]rovide information to the [Board] related to [the Board's] powers and duties," A.R.S. § 15-251(6), the Superintendent has no independent policy-making authority. His authority is limited to "[e]xecut[ing], under the direction of the [Board], the policies that have been decided on by the [Board]." A.R.S. § 15-251(4); *see also* A.R.S. § 15-231(B)(2) (The Superintendent is vested with "all executive, administrative and ministerial functions of the [D]epartment" and "is the executive officer responsible for the execution of policies of the [Board]."); A.R.S. § 15-203(A)(7) (The Board must "[d]elegate to the [Superintendent] the execution of [B]oard policies and rules."). The Board is expressly authorized to contract, sue, and be sued, A.R.S. § 15-203(B)(1)-(2); the Superintendent is not, *see* A.R.S. §§ 15-251 to -261.

¶11 As for English-learner education, the Superintendent is charged with identifying and reassessing English learners and overseeing the Department's funding administration and monitoring roles. A.R.S. §§ 15-756, -756.05, -756.04, -756.10, -231(D). But the Superintendent has no role in determining the instructional models available to the schools. The Board alone is allowed to adopt and approve lawful, research-based SEI and non-SEI education models for the schools' use. A.R.S. §§ 15-756.01(A)-(B), (D), -756.02(A).

¶12 The Department, under the Superintendent's direction, must monitor and report on English-learner education, including ensuring schools' compliance with all state and federal laws. A.R.S. §§ 15-756.07, -756.08, -756.10. And if the Department determines that a school district or charter school is not complying with the law, it may

require the district or school to submit to a Department-approved corrective action plan. A.R.S. § 15-756.08(D)-(H). But if the Department finds continued non-compliance at a mandatory follow-up evaluation within one year, it lacks enforcement authority. *See* A.R.S. § 15-756.08(I)-(J). Instead, the Department must refer the matter to the Board, which alone has the power to make a non-compliance finding with a funding penalty. A.R.S. § 15-756.08(J).

¶13 The Superintendent concedes that no statute expressly authorizes him to sue but argues that his statutory duties give him implied authority to pursue declaratory relief about the lawfulness of Board-approved SEI models used by schools. But "[i]mplied powers do not exist independently of the grant of express powers and the only function of an implied power is to aid in carrying into effect a power expressly granted." *Vangilder v. Ariz. Dep't of Revenue*, 252 Ariz. 481, 488, ¶ 24 (2022) (quoting *Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395 (1949)). Implied powers exist when they "may be fairly implied from, and are necessary for, the complete exercise of [the] express powers." *Ponderosa Fire Dist.*, 235 Ariz. at 603, ¶ 25 (quoting *City of Phoenix v. Phoenix Civ. Serv. Bd.*, 169 Ariz. 256, 259 (App. 1991)); *see also McMichael-Gombar v. Phoenix Civ. Serv. Bd.*, 256 Ariz. 343, 347, ¶ 12 (2023) (Although a city charter restricted the board's powers and duties to those expressly outlined in the charter and personnel rules, the board could also exercise powers "necessarily implied to effectuate powers expressly granted.").

¶14 The Superintendent argues implied powers are "necessary" when they are "convenient or useful or conducive to [an express] power's beneficial exercise." This definition originates from caselaw interpreting the federal constitution's Necessary and Proper Clause. *See United States v. Comstock*, 560 U.S. 126, 133-34 (2010). But in the implied-powers context, "necessary" carries its conventional meaning—i.e., "required." *See City of Flagstaff v. Associated Dairy Prods. Co.*, 75 Ariz. 254, 259 (1953) ("[T]he act contains no express grant of power to municipalities which *requires* the aid of the above language to carry it into effect, thus giving it the dignity of an implied power . . . ." (emphasis added)); *see also City of Phoenix*, 169 Ariz. at 259 (Powers are strictly limited by the statutes creating them.). None of the Superintendent's statutory duties require that he obtain a judicial determination on an SEI model's constitutionality. Although he might find such a determination helpful in connection with his duties (through the Department) to monitor the schools, assess their compliance with state and federal laws, and refer non-compliance to the Board, *see* A.R.S. § 15-756.08, nothing about those duties requires him to obtain a court order. And the Board, not the Department, has the ultimate duty to determine

non-compliance and impose a sanction. *See* A.R.S. § 15-756.08(J). When it is necessary to resort to the courts, the Board and the students' parents or guardians are expressly empowered to sue non-compliant districts and schools. *See* A.R.S. §§ 15-203(B)(2), -754.[3]

¶15 We are unpersuaded by the Superintendent's reliance on other lawsuits that he claims are "persuasive authority," which he cites to support his authority to sue under the English-learner statutes. He points to one federal lawsuit where he was a defendant (not a plaintiff), another federal lawsuit where a past Superintendent was a plaintiff, and a state-court lawsuit where the Secretary of State was a plaintiff. But none of these cases involved English-learner education. Nor does the Superintendent dispute that none of these cases analyzed his authority to sue.

¶16 The superior court correctly ordered dismissal under Rule 12(b)(6) based on the Superintendent's lack of express or implied authority to sue.

B. The Superior Court Correctly Ordered Dismissal for Lack of Standing.

¶17 The superior court also found the Superintendent lacked standing. We conclude that dismissal was also warranted for lack of standing.

¶18 Arizona courts require standing as a matter of judicial restraint, informed by federal law. *Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405, ¶ 22 (2020); *Bennett v. Napolitano*, 206 Ariz. 520, 525, ¶¶ 18-19 (2003). The standing requirement ensures that the judiciary is limited to exercising its judicial power. *Ariz. Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 409, ¶ 11 (App. 2024); *see* Ariz. Const. art. III ("The powers of the government of the state of Arizona shall be divided into three

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[3] A.R.S. § 15-754 provides that "[t]he parent or legal guardian of any Arizona school child" has "legal standing to sue for enforcement" of the Proposition 203 statutes. Although the statute uses the term "standing," the statute functions to confer authority to sue. *See* ¶ 19, *infra*. The statute contemplates only suits by parents or guardians. *See* A.R.S. § 15-754. A statute's "expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed." *Pima County v. Heinfeld*, 134 Ariz. 133, 134 (1982).

separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."). Standing is of particular concern when a dispute involves political challenges to executive-branch actions. *See Bennett*, 206 Ariz. at 525, ¶ 20 ("Without the standing requirement, the judicial branch would be too easily coerced into resolving political disputes between the executive and legislative branches, an arena in which courts are naturally reluctant to intrude.").

¶19 Although the concept of standing relates to the authority to sue, the inquiries are legally distinct. *State ex rel. Brnovich*, 250 Ariz. at 131, ¶ 11, n.2; *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 111, ¶ 24 (App. 2012). The authority to sue hinges on whether a public officer or entity has a constitutional or statutory right to begin the litigation. *State ex rel. Brnovich*, 250 Ariz. at 131, ¶ 11, n.2; *State ex rel. Montgomery*, 231 Ariz. at 111-12, ¶¶ 24-25. Standing hinges on whether a plaintiff, who has the authority to sue, has a justiciable interest in the controversy at issue. *State ex rel. Brnovich*, 250 Ariz. at 130, ¶ 11, n.2; *State ex rel. Montgomery*, 231 Ariz. at 111-12, ¶ 24; *Bennett*, 206 Ariz. at 316, ¶¶ 18-19 (The federal standing requirements, as adopted in Arizona, require a party to ensure there is an "actual case or controversy."). Standing requires "allege[d] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Bennett*, 206 Ariz. at 525, ¶ 18 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). We hold that even if we found the Superintendent could sue, he failed to allege facts supporting standing against any of the defendants.

¶20 First, the Superintendent has not alleged that he has or will suffer an injury by the Attorney General's written opinion. An executive officer may obtain non-binding guidance from the Attorney General. *See* A.R.S. § 41-193(A)(7); *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 469, ¶ 34 (App. 2007). But reviewing that guidance is not the role of the courts. *See Yes on Prop 200*, 215 Ariz. at 465, ¶¶ 14-16 (The courts have a responsibility to declare existing law, the Attorney General has a distinct responsibility to advise state government about the law upon request, and separation of powers prevents the courts from usurping the Attorney General's responsibility.). As an aside, we also note that here, the Attorney General's opinion expressly declined to address the lawfulness of the challenged model.

¶21 Second, the Superintendent has not alleged that he has or will suffer an injury because of any action or inaction by the Governor. The

Superintendent correctly points out that the Governor is constitutionally bound to ensure that the laws are faithfully executed and to appoint all other Board members with Senate approval. Ariz. Const. art. V, § 4; Ariz. Const. art. XI, § 3. But the Superintendent's pleading seeks no relief for the Governor's exercise of her duties and powers—he simply complains that she has publicly supported the 50-50 model. Moreover, because the Board is an independent government entity, it is speculative that any action by the Governor under her take-care power could redress the Superintendent's alleged harm.

¶22 Finally, the Superintendent has not alleged standing against the School Districts. The Superintendent contends he has standing because the part of Proposition 203 codified at A.R.S. § 15-754 exposes him to potential liability. *See Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 239-40 & 241, n.5 (1968) (School board members had standing to challenge the constitutionality of their statutory duty when they faced expulsion and funding losses if they refused to execute an unconstitutional duty.). Section 15-754 provides that "[a]ny school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of [the Proposition 203 statutes] may be held personally liable for fees and actual and compensatory damages by the child's parents or legal guardian," "cannot be subsequently indemnified for such assessed damages by any public or private third party," and, if liable, "shall be immediately removed from office, and shall be barred from holding any position of authority anywhere within the Arizona public school system for an additional period of five years."

¶23 We reject the Superintendent's argument for several reasons. First, his injury is speculative. The statute limits liability to actors who "willfully and repeatedly refuse[] to implement" the Proposition 203 statutes. A.R.S. § 15-754. Even assuming the Superintendent's exercise of his duties qualifies as "implementation" of the statutes, he can only be liable for his willful conduct related to his performance of his duties. None of his allegations establishes the same. No defendant has the authority to "force" him, as he argues, to violate his duties and expose himself to liability under A.R.S. § 15-754. Second, the Superintendent has not alleged traceability or redressability as to the School Districts. Although school districts and charter schools may propose instructional models, only the Board has the authority to approve models for use. A.R.S. § 15-756.01(A), (C). The School Districts have no final say in which models they may choose from, and the Superintendent acknowledges they are using the 50-50 model in accordance with the Board's directions. *See* A.R.S. §§ 15-756.01(A) & (C), -756.02(B)-(C).

¶24 The Superintendent relies on *Arizona Republican Party v. Richer*, 257 Ariz. 237 (2024), to argue that he may obtain declaratory relief against the School Districts because they implemented the Board's model. We note that *Richer*, which involved a challenge to a vote-counting procedure, did not hold that all entities with implementation roles would be proper defendants. *See id.* at 240-41, 244, ¶¶ 3, 6, 18-20. Recognizing that a suit may be brought against any "entity or official that has the ability to control the implementation" of a challenged law, *Richer* held that the plaintiffs' initial failure to name the Secretary of State as a defendant did not make the complaint groundless because, among other things, the plaintiffs named county defendants charged with executing the challenged procedure. *Id.* at 244, ¶¶ 18-20 (quotation omitted). But *Richer* stopped short of holding that the county defendants were proper, describing them as only "arguably" and "debatabl[y]" so. *Id.* at ¶¶ 19-20. In any event, the Superintendent lacks standing against the School Districts based solely on the lack of a non-speculative injury.

¶25 The Uniform Declaratory Judgment Act (A.R.S. §§ 12-1831 to -1846) does not change our conclusions about standing as to any of the defendants, even under the broad opportunity for relief it provides under A.R.S. §§ 12-831 and -835. Although an action for declaratory relief is remedial and to be liberally construed, A.R.S. § 12-1842, the plaintiff must have an underlying cause of action, *Ansley v. Banner Health Network*, 248 Ariz. 143, 151, ¶ 31 (2020). Nor may relief include "a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice." *Ariz. State Bd. of Dirs. for Junior Colls. v. Phoenix Union High Sch. Dist.*, 102 Ariz. 69, 73 (1967). Relief is also unavailable "when a defendant has no power to deny the plaintiff's asserted interests"—the defendant must be "an entity or official that has the ability to control" the challenged action. *Yes on Prop 200*, 215 Ariz. at 468, 470, ¶¶ 29, 36.

¶26 As we have explained, none of the defendants could control the Superintendent's performance of his duties, and his injuries are speculative. The superior court correctly ordered dismissal under Rule

12(b)(6) based on the Superintendent's lack of standing even under the Act's relaxed standard. We affirm the dismissal of the action.[4]

C. The Superior Court Correctly Awarded Attorney's Fees.

¶27 The Superintendent argues the superior court erred by awarding the Attorney General and the School Districts attorney's fees under A.R.S. § 12-348.01 because their request did not comply with Rule 54(g)(1)'s mandate that "[a] claim for attorney's fees must be made in the pleadings or in a Rule 12 motion filed before the movant's responsive pleading." Although we generally review fee awards for abuse of discretion, we review the interpretation of rules and statutes *de novo*. *In re the Restated Tr. of Crystal H. West*, 249 Ariz. 355, 357, ¶ 7 (App. 2020) (rules); *Canon Sch. Dist. No. 50 v. W.E.B. Constr. Co.,* 177 Ariz. 526, 529 (1994) (statutes).

¶28 After the Superintendent filed his second amended complaint, each defendant filed a separate motion to dismiss on the court-set deadline. But only the Governor's motion requested attorney's fees, citing, as relevant, A.R.S. § 12-348.01.

¶29 The Attorney General and the School District filed "joinders" in the Governor's fee request under A.R.S. § 12-348.01. In the dismissal order, the superior court only awarded the Governor her fees because she was the only party to claim them in her Rule 12 motion. But when the Attorney General and the School Districts pointed to their joinders, the court found all fee requests timely and awarded each defendant group around $40,000 in fees.

¶30 Rule 54(g)(1) provides that attorney's fees "must" be claimed in the pleadings or a Rule 12 motion. This rule ensures that parties receive notice of the risk of bearing their opponents' fees, thereby encouraging settlements. *In re Restated Tr. of Crystal H. West*, 249 Ariz. at 358, ¶¶ 8-10.

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[4] We note that even if we concluded dismissal were improper, we could not, as the Superintendent requests, declare the 50-50 model illegal. The most we could do would be to reverse the dismissal and permit the superior court to decide the merits. *See City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 14-15, ¶¶ 26, 28-29 (App. 2023) (An appellate court is a court of review; decisions in the first instance are for the superior court to make on a developed record.).

Normally, a court may not award fees when a party disregards the rules of procedure. *Id.* at 358-60, ¶¶ 8-10, 15-16.

¶31 The Attorney General and the School Districts did not comply with Rule 54(g)(1). Their joinders were neither Rule 12 motions nor filed by the court-set Rule 12 deadline, and their reliance on caselaw recognizing judicial discretion to allow untimely fee applications is misplaced—those cases relied on a rule provision that, unlike Rule 54(g)(1), expressly allowed the court to extend a post-judgment deadline. *See, e.g.*, *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 479-80, ¶¶ 60-62 (App. 2010) (Where the relevant version of Rule 54(g)(2) provided that a motion for attorney's fees "shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court," the court could extend the deadline absent prejudice.). Nor did the joinders make clear that the Attorney General and the School Districts were seeking their fees rather than supporting the Governor's request for her fees. The joinders simply stated that they "join[ed] in Defendant Governor Katie Hobbs' request . . . for attorneys' fees under A.R.S. § 12-348.01."

¶32 But despite the Attorney General and School Districts' failure to comply with Rule 54(g)(1), the court was still required to award the fee claims under A.R.S. § 12-348.01, which makes the award mandatory. Section 12-348.01 provides that "if a[] . . . governmental officer acting in the officer's official capacity . . . files a lawsuit against this state, or a[] . . . governmental officer acting in the officer's official capacity[,] . . . the court *shall* award reasonable attorney fees to the successful party in the action." A.R.S. § 12-348.01 (emphasis added).[5] *See also City of Tempe v. State*, 237 Ariz. 360, 367, ¶¶ 26-27 (App. 2015) (Section 12-348.01 provides mandatory fee awards in any lawsuit.). The language of the statute, which the Superintendent triggered by petitioning, does not give a court the discretion to refuse a reasonable fee request.

¶33 The superior court correctly awarded the mandatory fees to the Attorney General and the School Districts, and we affirm the awards.

ATTORNEY'S FEES AND COSTS

¶34 The Superintendent and each defendant request attorney's fees on appeal under A.R.S. § 12-348.01, and the Governor also requests fees

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[5] School districts are political subdivisions of the state. *Amphitheater Unified Sch. Dist. #10 v. Harte*, 128 Ariz. 233, 234 (1981).

under A.R.S. § 12-349. Under A.R.S. § 12-349, we may award fees and sanctions in any civil action when claims are brought without substantial justification.

¶35 We deny the Superintendent's fee request and grant the defendants' fee requests under A.R.S. § 12-348.01 because the defendants prevailed on all claims. We similarly grant the defendants their costs under A.R.S. § 12-341. Having awarded fees under A.R.S. § 12-348.01, we need not assess the Governor's fee request under A.R.S. § 12-349. The Governor, the Attorney General, and the School Districts may recover reasonable appellate attorney's fees and costs upon their compliance with ARCAP 21.

CONCLUSION

¶36 We affirm.

MATTHEW J. MARTIN • Clerk of the Court
FILED: JR

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

TOM HORNE, in his Official Capacity as Arizona Superintendent of Public Instruction, **Plaintiff;** **vs.** **KATIE HOBBS, in her Official Capacity as Governor of the State of Arizona; KRIS MAYES, in her Official Capacity as Attorney General of the State of Arizona; CREIGHTON ELEMENTARY SCHOOL DISTRICT; AVONDALE ELEMENTARY SCHOOL DISTRICT; CARTWRIGHT ELEMENTARY SCHOOL DISTRICT; CHANDLER UNIFIED SCHOOL DISTRICT #80; FLAGSTAFF UNIFIED SCHOOL DISTRICT; GLENDALE ELEMENTARY SCHOOL DISTRICT; KYRENE ELEMENTARY SCHOOL DISTRICT; LAVEEN ELEMENTARY SCHOOL DISTRICT; MESA UNIFIED SCHOOL DISTRICT; OSBORN ELEMENTARY SCHOOL DISTRICT; ABC ENTITIES 1-10; DOE INDIVIDUALS 1-10,** **Defendants.**	**Case No.: CV2023-013656** **SECOND AMENDED VERIFIED COMPLAINT FOR DECLARATORY RELIEF** **(TIER II)** **(Assigned to The Honorable Katherine M. Cooper)**

For his Second Amended Complaint against Arizona Governor Katie Hobbs, Arizona Attorney General Kris Mayes, Creighton Elementary School District and other named school districts, ABC Entities 1-10, and Doe Individuals 1-10, Arizona Superintendent of Public Instruction Tom Horne ("Plaintiff," or "Superintendent") hereby alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff is the Arizona Superintendent of Public Instruction and is named herein in his official capacity. A.R.S. §15-251 provides that the Superintendent shall, among other duties, "[s]uperintend the schools of this state." As part of his duties, he must ensure that the Department of Education provide adequate support to the State Board in complying with state law on English-immersion models, and that the Department of Education report to the State Board any noncompliance with state and federal law on English language learners. A.R.S. §§ 15-756.01, 15-756.08(J).

2. Defendant Katie Hobbs is the Governor of the State of Arizona and is named in her official capacity. Under Article V, Section IV of the Arizona Constitution, the Governor "shall take care that the laws be faithfully executed." In the case of *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216 (Ariz. Ct. App. 2007), the court held that the Governor is a proper party in this kind of action because of Article V, Section IV. In addition, the Governor has been touting dual language even though she knows, or should know, that it is contrary to law. On September 7, 2023, Governor Hobbs's office issued the following statement: ""Dual language programs are critical for training the workforce of the future and providing a rich learning environment for Arizona's children. Governor Hobbs is proud to stand by dual language programs that help ensure the next generation of Arizonans have an opportunity to thrive. . . . She will not back down in the face of Superintendent Horne's lawsuit."

3. Defendant Kris Mayes is the Attorney General of the State of Arizona and is named in her official capacity. In the same case cited above (*Yes on Prop 200*), the court also held that the Attorney General is a proper party when there is an issue as to whether a statute is unconstitutional.

4. Defendant Creighton Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

5. Defendant Avondale Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

6. Defendant Cartwright Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

7. Defendant Chandler Unified School District #80 is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

8. Defendant Flagstaff Unified School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

9. Defendant Glendale Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

10. Defendant Kyrene Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative, as explained below.

11. Defendant Laveen Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative.

12. Defendant Mesa Unified School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative.

13. Defendant Osborn Elementary School District is implementing the State Board dual language model and not seeking statutory waivers, which is contrary to the voter-protected initiative.

14. Defendants ABC 1-10 entities and Does 1-10 are named in the event that those entities whose names are unknown and are necessary parties. If Plaintiff learns the true identities of Defendants ABC Entities 1-10 or Does 1-10, he will move to amend this Complaint accordingly.

FACTUAL ALLEGATIONS

15. In the year 2000, and by a margin of over 60%, Arizona voters passed a structured English for the Children immersion initiative known as Proposition 203. This initiative was codified as A.R.S. §§ 15-751, *et seq*.

16. The part of the initiative that was codified as A.R.S. § 15-752 specifically states that "all children in Arizona public schools shall be taught English by being taught in English, and all children should be placed in English language classrooms." (Emphasis added.)

17. A.R.S. § 15-753 states that "the requirements of A.R.S. § 15-752 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian," under specific circumstances set forth in the statute.

18. The purpose of Proposition 203 was that children should no longer be taught in bilingual or dual language classes, where they are taught part of the day in Spanish. Instead, the purpose of Proposition 203 was that children should be taught the entire school day in English, so that they would quickly become proficient in English. *See* Declaration of Margaret Garcia Dugan, attached hereto as **Exhibit "1,"** which is hereby incorporated as if set forth herein. Her Declaration reads as follows:

> [i] The purpose of this declaration is to give background information of which I have personal knowledge, supporting the already clear language of the English for the Children initiative that passed with 63% of the vote. The purpose of the initiative is that English Language Learners be taught English through English immersion, and in classes conducted in English, throughout the school day. They cannot be taught in a program conducted in any other language

during the school day. To the extent the legislation passed by the Arizona legislature in 2019, A.R.S. § 756.01, is viewed as authorizing dual language models, it does not further the purpose of the initiative, and is therefore invalid pursuant to Proposition 105, the Voter Protection Act.

[ii] I am a former national principal of the year and was Arizona Chief Deputy Superintendent of Schools in the administration of Superintendent of Public Instruction Tom Horne, from 2004 to 2011, and again in Superintendent Horne's third term, which began this year.

[iii] As co-chair of English for The Children, I participated in writing the initiative. The other two who participated in writing the initiative were Co-Chair Hector Ayala and Chair Maria Mendoza. They are submitting declarations in support of the contents of this declaration. All three declarations are attached to the Verified Complaint as Exhibits 1, 2 and 3, respectively.

[iv] The purpose of the initiative is clearly stated in the first sentence of A.R.S. §15-752. It states, in part, that "all children in Arizona public schools shall be taught English by being taught in English, and all children shall be placed in English language classrooms." (Emphasis added.) This is the purpose of the initiative: that children should no longer be taught in bilingual or dual language classes, where they are taught part of the day in Spanish, but should be taught the entire school day in English, so that they would quickly become proficient in English.

[v] As Chief Deputy Superintendent, I participated in the models that implemented this requirement. The first model was for four hours of structured English immersion: one hour each of reading, writing, speaking, and listening, with the teaching of grammar -- an important part of these models. For the remainder of the school day, the students would be in regular classes with English-speaking students where the teaching is in English, such as physical education, mathematics, etc.

[vi] Additional models, for as little as two hours, were established for students with some knowledge of English. Still, the rest of the school day was to be in the regular classrooms with English-speaking students - - taught in English. Either way, the students were to be learning English throughout the school day, so they could quickly master English, and then succeed academically.

[vii] If the school day was partly taught in another language, this would delay their mastery of English. This is consistent with the immersion models used by adults who wish to learn another language. It is also consistent with the doctrine of "time on task", where the more times students spend learning something the more they will learn. If only half the school day is spent in class is taught in Spanish, the students will certainly learn English more slowly. That

is why the purpose of the initiative was that students be taught in English throughout the school day, either in structured English immersion instruction, or in the regular classroom. (See language of initiative quoted above.)

[viii] Attached as Exhibit 4 to the Verified Complaint is an opinion from legislative council that the dual language classrooms likely violate the Voter Protection Act.

[ix] Some have interpreted legislation passed by the legislature in 2019 as authorizing dual language classrooms. If that is true, the legislation is invalid as a violation of the Voter Protection Act, proposition 105, the voter-protected initiative. That is because it does not further the purpose of the initiative, which was to make sure that students are taught in English through the school day so that they can learn English quickly and then go on to academic success.

[x] When students become proficient in English, they can certainly be encouraged to learn other languages. But the first priority must be to further the purpose of the initiative to have students learn English throughout the school day to speed up their proficiency in English so they can succeed academically.

[xi] Although the language of the initiative, quoted above, clearly articulates its purpose, there is additional evidence in the initiative supporting that purpose. For example, a student could be in a dual language classroom, if they obtained a waiver, signed by their parents, but only if they meet one of three alternatives. One example of an alternative condition would be if the student was proficient in oral English, but not in the other categories. If that student's parents or guardian sign a waiver, he can be in dual language. Had the intended purpose of the initiative been to allow students to be taught in a language other than English throughout the school day, then there would have been no need for the waiver provision.

[xii] If the 2019 legislature intended to authorize dual language, the proper way to do so would have been through an initiative or referendum where the voters would have a chance to decide if they wanted to contradict their prior vote in favor of Proposition 203. But passing a law that does not further the purpose of the English for the Children initiative is invalid as it violates the Voter Protection Act.

19. In 2006, the state legislature enacted A.R.S. § 15-756.01, which provided that "[t]he state board of education shall either use research based models of structured English immersion programs that were previously developed and adopted by the English language learners task force

or develop and adopt new research based models of structured English immersion programs for use by school districts and charter schools." A.R.S. § 15-756.01 (2006).

20. In 2019, the Arizona legislature amended A.R.S. § 15-756.01 to state that "[t]he state board of education shall adopt and approve research based models of structured English immersion for school districts and charter schools to use."

21. The State Board of Education, on the recommendation of a prior Superintendent, adopted (on the "consent agenda," without discussion) a model known as "50-50 Dual Language Immersion."

22. The dual language model makes no reference to whether or not a statutory waiver must first be obtained.

23. When asked by the press, the Executive Director of the State Board indicated that the Department of Education requiring waivers was not contrary to the dual language model adopted by the State Board. The model did not specify one way or another about waivers. The Director indicated that requiring waivers was an executive function for the Department of Education and did not contradict the model adopted by the State Board. If the requirement of waivers is included, then a dual language model is legal. However, as explained below, the defendant Attorney General erroneously ruled that waivers are not required.

24. The dual language model is contrary to Proposition 203, because it involves teaching the students in a language other than English for half the day every day. The voter-protected initiative specifically requires that English-language learners be taught English by <u>being taught in English</u>, and that they be placed in <u>English-language classrooms</u>. Dual language classrooms, in the absence of a statutory waiver, are therefore prohibited by the voter-protected initiative.

25. Advocates of the dual language model argue that the legislature passed A.R.S. § 15-756.01 with the intent of allowing dual language instruction.

26. To the extent A.R.S. § 15-756.01 allows dual language, it is unconstitutional because it does not further the purpose of the voter protected initiative. Ariz. Const. art. 4, part 1,

§ 1 (6)(C) ("the legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon…unless the amending legislation furthers the purposes of such measure….").

27. The authorization by the State Board of dual language models is void because the State Board cannot overrule a voter-protected initiative.

28. Certain legislators asked Defendant Attorney General Kris Mayes for an opinion on the subject of dual language. The Attorney General Opinion is attached hereto as **Exhibit "5"** to this First Amended Verified Complaint. In the Opinion, the Attorney General expressly refuses to comment on whether the dual language model is contrary to the voter-protected initiative. However, the decision erroneously states that schools could rely on the State Board model, without waivers, because it is the State Board, not the State Superintendent, that enforces the law in this area. The Superintendent always understood that the statutory corrective measure of withholding funds requires him to make a proposal to the State Board, and it is the State Board that withholds funds; so this portion of the opinion added nothing new.

29. The Defendant Attorney General's opinion erroneously stated that waivers are not required for the dual language models and that schools could rely on the State Board action authorizing dual language.

30. The part of the opinion that states schools can rely on the State Board model is erroneous, because no governmental body can override a voter-protected initiative. The voter-protected initiative specifically requires that instruction be in English until the student tests as proficient in English, or a parental waiver is obtained. The Attorney General is therefore advising school districts that they could proceed with dual language without a waiver, even though this is contrary to the voter-protected initiative which cannot be overruled by the State Board. Also, as noted, the State Board model did not say one way or another, as to whether waivers would be required.

31. Defendant Creighton Elementary School District, among others, is permitting dual language instruction for English language learners and not obtaining parental waivers. Creighton's

rate of English language learners becoming proficient in English last year was 5.1%. By contrast, the following districts[1] implemented structured English immersion, and had the following rates of students becoming proficient in English last year: Catalina 33.03%, Liberty Charter 32.86%, American Leadership Charter 25.4%, Scottsdale 23.87%.

32. It has been conveyed to the Superintendent that the State Board will not act in regard to this issue until there is a Court decision.

DECLARATORY RELIEF

33. Plaintiff incorporates by reference the above allegations.

34. Pursuant to Arizona's Uniform Declaratory Judgment Act, A.R.S. §§ 12-1831 *et seq.,* Plaintiff is entitled to and requests a judicial determination and declaratory judgment because Plaintiff is a person whose right, status, or other legal relations are affected by A.R.S. §15-751, and who therefore has the right to bring this action.

35. Plaintiff asks the Court to declare that A.R.S. § 15-756.01 is unconstitutional to the extent it allows dual language because it amends Proposition 203 in a way that does not further the voter-protected initiative's purpose—which is that children be taught in English for the entire school day, in order for them to quickly become proficient in English.

36. Plaintiff asks the Court to declare that the State Board's dual language model is contrary to Proposition 203.

37. Plaintiff asks the Court to declare that statutory parental waivers are required for instruction in any language other than English, for English language learners.

38. Plaintiff asks the Court to declare as erroneous the Attorney General's opinion that schools can rely on the State Board's dual language model without waivers.

REQUEST FOR RELIEF

THEREFORE, Plaintiff prays for judgment in his favor and against Defendants as follows:

A. Declare that A.R.S. § 15-756.01 is unconstitutional to the extent it allows dual language because it amends Proposition 203 in a way that does not further the voter-

[1] These statistics are limited to elementary schools, so as to be comparable to Creighton.

protected initiative's purpose that children be taught in English for the entire school day, in order for them to quickly become proficient in English.

B. Declare that the State Board's dual language model is in violation of Arizona law.

C. Declare that statutory parental waivers are required for instruction in any language other than English, for English language learners.

D. Declare that Defendant Attorney General's opinion that district and charter schools can rely on the State Board's dual language model without waivers is legal error.

E. At this time, Plaintiff does not seek relief against any party other than the above stated Declaratory Judgments and costs pursuant to A.R.S. §§ 12-341, 12-1840. Pursuant to Rule 54(g), Plaintiff reserves the right to seek attorneys' fees if and as provided by law.

RESPECTFULLY SUBMITTED on November 1, 2023.

WILENCHIK & BARTNESS, P.C.

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ELECTRONICALLY filed on
November 1, 2023, via AZTurboCourt.com

COPY electronically transmitted by the
Clerk of the Court via AZTurboCourt.com
to the Honorable Katherine Cooper

WILENCHIK & BARTNESS — A PROFESSIONAL CORPORATION

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VERIFICATION
(Rule 80(i), Ariz.R.Civ.P.)

I, Tom Horne, declare under penalty of perjury that I believe the facts set forth in this First Amended Verified Complaint to be correct, based on the information supplied to me.

EXECUTED on: 11/1/23

Tom Horne
By: Tom Horne

WILENCHIK & BARTNESS

DECLARATION OF MARGARET GARCIA DUGAN

1. The purpose of this declaration is to give background information of which I have personal knowledge, supporting the already clear language of the English for the Children initiative that passed with 63% of the vote. The purpose of the initiative is that English Language Learners be taught English through English immersion, and in classes conducted in English, throughout the school day. They cannot be taught in a program conducted in any other language during the school day. To the extent the legislation passed by the Arizona legislature in 2019, A.R.S. § 756.01, is viewed as authorizing dual language models, it does not further the purpose of the initiative, and is therefore invalid pursuant to Proposition 105, the Voter Protection Act.

2. I am a former national principal of the year and was Arizona Chief Deputy Superintendent of Schools in the administration of Superintendent of Public Instruction Tom Horne, from 2004 to 2011, and again in Superintendent Horne's third term, which began this year.

3. As co-chair of English for The Children, I participated in writing the initiative. The other two who participated in writing the initiative were Co-Chair Hector Ayala and Chair Maria Mendoza. They are submitting declarations in support of the contents of this declaration. All three declarations are attached to the Verified Complaint as Exhibits 1, 2 and 3, respectively.

4. The purpose of the initiative is clearly stated in the first sentence of A.R.S. §15-752. It states, in part, that "all children in Arizona public schools shall be taught English by being taught in English, and all children shall be placed in English language classrooms." (Emphasis added.) This is the purpose of the initiative: that children should no longer be taught in bilingual or dual language classes, where they are taught part of the day in Spanish, but should be taught the entire school day in English, so that they would quickly become proficient in English.

5. As Chief Deputy Superintendent, I participated in the models that implemented this requirement. The first model was for four hours of structured English immersion: one hour each of reading, writing, speaking, and listening, with the teaching of grammar -- an important part of these models. For the remainder of the school day, the students would be in regular classes with English-speaking students where the teaching is in English, such as physical education, mathematics, etc.

6. Additional models, for as little as two hours, were established for students with some knowledge of English. Still, the rest of the school day was to be in the regular classrooms with English-speaking students - - taught in English. Either way, the students were to be learning English throughout the school day, so they could quickly master English, and then succeed academically.

7. If the school day was partly taught in another language, this would delay their mastery of English. This is consistent with the immersion models used by adults who wish to learn another language. It is also consistent with the doctrine of "time on task", where the more times students spend learning something the more they will learn. If only half the school day is spent in class is taught in Spanish, the students will certainly learn English more slowly. That is why the purpose of the initiative was that students be taught in English throughout the school day, either in structured English immersion instruction, or in the regular classroom. (See language of initiative quoted above.)

8. Attached as Exhibit 4 to the Verified Complaint is an opinion from legislative council that the dual language classrooms likely violate the Voter Protection Act. .

9. Some have interpreted legislation passed by the legislature in 2019 as authorizing dual language classrooms. If that is true, the legislation is invalid as a violation of the Voter Protection Act, proposition 105, the voter-protected initiative. That is because it does not further the purpose of the initiative, which was to make sure that students are taught in English through the school day so that they can learn English quickly and then go on to academic success.

10. When students become proficient in English, they can certainly be encouraged to learn other languages. But the first priority must be to further the purpose of the initiative to have students learn English throughout the school day to speed up their proficiency in English so they can succeed academically.

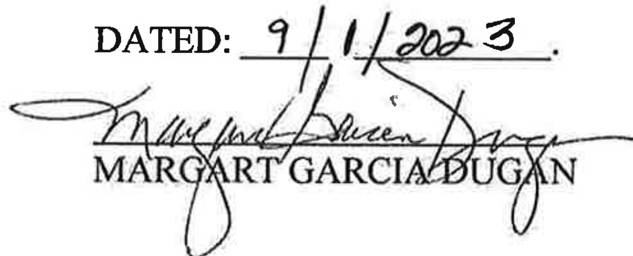
11. Although the language of the initiative, quoted above, clearly articulates its purpose, there is additional evidence in the initiative supporting that purpose. For example, a student could be in a dual language classroom, if they obtained a waiver, signed by their parents, but only if they meet one of three alternatives. One example of an alternative condition would be if the student was proficient in oral English, but not in the other categories. If that student's parents or guardian sign a waiver, he can be in dual language. Had the intended purpose of the

initiative been to allow students to be taught in a language other than English throughout the school day, then there would have been no need for the waiver provision.

12. If the 2019 legislature intended to authorize dual language, the proper way to do so would have been through an initiative or referendum where the voters would have a chance to decide if they wanted to contradict their prior vote in favor of Proposition 203. But passing a law that does not further the purpose of the English for the Children initiative is invalid as it violates the Voter Protection Act.

13. I declare, under penalty of perjury, that the statements in this Declaration are true and correct.

DATED: 9/1/2023.



MARGART GARCIA DUGAN

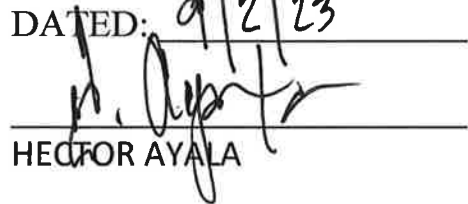
EXHIBIT 2

DECLARATION OF HECTOR AYALA

1. I have read the Declaration of Margaret Garcia Dugan, dated September 1, 2023 and agree with its contents. I incorporate by reference, pursuant to rule 10 (c), Arizona Rules of Civil Procedure, the contents of her Declaration, as though they were fully set forth in this Declaration.

2. I declare, under penalty of perjury, that the statements in this Declaration are true and correct.

DATED: 9/2/23.



HECTOR AYALA

EXHIBIT 3

DECLARATION OF MARIA MENDOZA

1. I have read the Declaration of Margaret Garcia Dugan, dated September 1, 2023 and agree with its contents. I incorporate by reference, pursuant to rule 10 (c), Arizona Rules of Civil Procedure, the contents of her Declaration, as though they were fully set forth in this Declaration.

2. I declare, under penalty of perjury, that the statements in this Declaration are true and correct.

DATED: Sept. 2, 23

Maria E. Mendoza
MARIA MENDOZA

EXHIBIT 4

ARIZONA LEGISLATIVE COUNCIL

MEMO

May 31, 2023

TO: Senator Sonny Borrelli

FROM: Hannah Nies, General Counsel

RE: Proposition 203; 50-50 dual language immersion model (R-56-36)

QUESTION

Does the 50-50 dual language immersion model for structured English immersion adopted by the state board of education under Arizona Revised Statutes (A.R.S.) section 15-756.01 violate Proposition 203?

ANSWER

If the 50-50 dual language immersion model allows students to be taught subject matter in a language other than English as part of structured English immersion, the model likely violates Proposition 203.

DISCUSSION

In 2000, the Arizona voters approved Proposition 203, which provided as follows:

> Subject to the exceptions provided in section 15-753, all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms.[1] Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

A.R.S. section 15-752. The measure defined "sheltered English immersion" or "structured English immersion" as

[1] A.R.S. section 15-751 defines "English language classroom" as "a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. English language classrooms encompass both English language mainstream classrooms and sheltered English immersion classrooms."

> an English language acquisition process for young children in which *nearly all* classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and *all* reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, *no subject matter shall be taught in any language other than English*, and children in this program learn to read and write solely in English. This educational methodology represents the standard definition of "sheltered English" or "structured English" found in educational literature.

A.R.S. section 15-751, paragraph 5 (emphasis added).

In 2019, the Legislature required the state board of education to adopt and approve research-based models of structured English immersion for school districts and charter schools to use. Laws 2019, chapter 3, section 2. Each of these models is required to include a statutorily prescribed minimum amount of English language development. *Id.* Pursuant to this mandate, the state board of education adopted and approved four different structured English immersion models, one of which is the "50-50 dual language immersion model." *Structured English Immersion (SEI) Models*, Ariz. Dep't of Educ., https://www.azed.gov/oelas/structured-english-immersion-models (last visited May 22, 2023).

We were able to identify only one document that discusses the 50-50 dual language immersion model. *See 50-50 DLI Model*, Ariz. Dep't of Educ., https://www.azed.gov/sites/default/files/2020/01/50-50%20Dual%20Language%20Immersion%20Model%2003.27.2020.pdf?id=5e348a0503e2b316d8ba1bb5 (last visited May 22, 2023). It is technical in nature, and we were unable to deduce from the document how exactly the model is to be implemented.[2] The document we identified, however, states that a school site implementing this model ensures

> quality integrated instruction in disciplinary language and content by . . . [r]equiring that the DLI program include 50% of content (i.e., math, science and/or social studies) instruction in English. The distribution of this instruction relative to the partner language and across the school day, week, unit, or year may be determined by how the site allocates English and the partner language across units of instruction. . . .

Id.

[2] The department of education's website indicates that there is an "SEI Program Model Implementation Guide" that is in the process of being updated, but it is not yet available. *See Structured English Immersion (SEI) Models*, Ariz. Dep't of Educ., https://www.azed.gov/oelas/structured-english-immersion-models (last visited May 22, 2023).

This seems to suggest that students participating in this model could receive up to 50% of content (i.e., math, science and/or social studies) instruction in a language other than English.

If this is indeed how the 50-50 dual language immersion model is implemented, it would likely not satisfy the definition of "structured English immersion" prescribed in A.R.S. section 15-751, thus violating Proposition 203. That definition prohibits any subject matter from being taught "in any language other than English," and the model clearly allows for some subject matter to be taught in a language other than English.

This argument assumes that students are taught subject matter in a language other than English as part of structured English immersion under this 50-50 dual language immersion model. One might argue that although statutes require these students to be educated through structured English immersion, they do not expressly require the students to be educated *only* though structured English immersion. Although a student placed in structured English immersion must be taught in English when that student is actively participating in structured English immersion, the statutes do not necessarily preclude a student who is learning English from being taught in a language other than English when the student is *not* in structured English immersion. However, from what we can deduce from the document referenced above, the 50-50 dual language immersion model seems to allow subject matter to be taught in a language other than English as part of structured English immersion, thus seemingly violating Proposition 203.

CONCLUSION

If the 50-50 dual language immersion model allows students to be taught subject matter in a language other than English as part of structured English immersion, the model likely violates Proposition 203.

cc: Grant Hanna

EXHIBIT 5

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL July 17, 2023	No. I23-005 (R23-013) Re: Which state entity has statutory authority to eliminate a model of structured English immersion approved by the State Board of Education

To: Representative Jennifer Pawlik, Leg. Dist. 13
Representative Laura Terech, Leg. Dist. 4
Representative Nancy Gutierrez, Leg. Dist. 4
Representative Judy Schwiebert, Leg. Dist. 2

Questions Presented

You have raised questions regarding how structured English immersion ("SEI") instructional models approved by the State Board of Education (the "Board") may be modified or rescinded and the procedures for addressing public schools that are not in compliance with laws applicable to English language learners ("ELL"s). You have also asked whether the Dual Language Immersion SEI Model ("Dual Language Model") approved by the Board is consistent with Arizona law.

Summary Answer

Arizona law is clear that the Board has the sole authority to eliminate or modify an approved SEI model. The Board also has the sole authority to determine whether a school district or charter school has failed to comply with Arizona law governing English language learners. Only those school districts and charter schools found by the Board to be noncompliant are barred

from receiving monies from the English language learner fund. For the reasons explained below, we respectfully decline to address your question regarding the Dual Language Model.

Background

In 2000, Arizona voters passed Proposition 203 in an effort to ensure that students considered to be ELLs in Arizona are taught the English language "as rapidly and effectively as possible."[1] To effectuate this intent, Prop. 203 repealed and replaced Title 15, Chapter 7, section 3.1 of the Arizona Revised Statutes ("ELL Statutes"). The language added by Prop. 203 provides, in relevant part, that

> all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

A.R.S. § 15-752.

Section 15-753, also added by Prop. 203, provides that the "requirements of section 15-752 may be waived" by parental consent, allowing an ELL to be taught "English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law." Prop. 203 defines "sheltered English immersion" as

> an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English.

A.R.S. § 15-751(5).

[1] Proposition 203, (2000), https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop203.htm#:~:text=Proposition%20203%20allows%20parents%20to,their%20child%20has%20special%20needs.

In 2006, the legislature passed H.B. 2064, which added sections 15-756 through -756.13 to the ELL Statutes.[2] The bill appropriated funds to support ELL programs and established the Arizona English Language Learners Task Force, which was directed to create and approve models for SEI instruction.[3] The bill required that the SEI models include a minimum of four hours of English language development.[4] Further, the bill created the Office of English Language Acquisition Services within the Arizona Department of Education (the "Department") and tasked it with monitoring schools' progress as they implemented their ELL programs.[5]

In 2013, the legislature amended the ELL Statutes, in part to dissolve the ELL Task Force and transfer its authority, powers, and duties to the Board.[6] In 2019, the legislature again amended the ELL Statutes. Senate Bill 1014 passed unanimously and changed the required minimum amount of English language development contained in SEI models from four hours to 120 minutes per day for students in Kindergarten through fifth grade, and 100 minutes per day for students in grades six through twelve.[7] Further, the bill directed the Board to establish a framework for evaluating research-based models and required that the framework meet certain criteria.[8] The bill also made changes to the evaluation process carried out by the Department.[9]

[2] H.B. 2064, 47th Leg., 2nd Reg. Sess. (Ariz. 2013), https://www.azleg.gov/legtext/47leg/2R/laws/0004.pdf.
[3] *Id.* § 15-756.01.
[4] *Id.*
[5] *Id.* § 15-756.07, -756.08.
[6] Ariz. State Senate Fact Sheet for H.B. 2425, 51st Leg., 1st Reg. Sess. (March 25, 2013), https://www.azleg.gov/legtext/51leg/1r/summary/s.2425ed_aspassed.pdf.
[7] Ariz. State Senate Fact Sheet for S.B. 1014, 54th Leg., 1st Reg. Sess. (Feb. 28, 2019), https://www.azleg.gov/legtext/54leg/1R/summary/S.1014ED_ASENACTED.DOCX.htm.
[8] *Id.*
[9] *Id.*

In January 2020, exercising its authority under A.R.S. § 15-576.01, the Board approved the Dual Language Model. This Model allows schools to teach ELL students in English for half of the school day and in a partner language for the other half of the day.[10]

On June 19, 2023, the Superintendent for Public Instruction issued a statement purporting to declare that the Dual Language Model violates Prop. 203.[11] The statement warned schools that "[a]ny district or school that continues placing English Language learners into dual language classes, without the requisite parental waivers, should be aware of the legal consequences."[12] The statement cited a three-page memo from the General Counsel of the Legislative Council that was prepared for State Senator Sonny Borrelli.[13] The memo states that the Dual Language Model "likely violates Proposition 203."[14]

The Department's Office of English Language Acquisition Services then sent a letter to Arizona school districts on June 20, 2023, stating that it had been "advised from the Arizona Legislative Council … that the 50-50 Dual Language Immersion SEI Model of the Structured English Immersion Models approved by the State Board of Education in January 2020 is in

[10] Arizona Board of Education Board Notice of Public Meeting (January 27, 2020), Item 4A, "Approval of Research-Based Structured English Immersion and Alternative Models of English Instruction,"
https://simbli.eboardsolutions.com/SB_Meetings/ViewMeeting.aspx?S=112020&MID=1128;
Arizona Department of Education, "50-50 DLI Model,"
https://www.azed.gov/sites/default/files/2020/01/50-50%20Dual%20Language%20Immersion%20Model%2003.27.2020.pdf?id=5e348a0503.
[11] Superintendent Tom Horne, Letter, "Re: English Language Learner," June 19, 2023,
https://www.azed.gov/sites/default/files/2023/06/English%20Language%20Learners%20DRAFT%204%20%20FINAL.pdf.
[12] *Id.*
[13] Arizona Legislative Council Memo (May 31, 2023),
https://www.azed.gov/sites/default/files/2023/06/36%20Proposition%20203%3B%2050-50%20dual%20laguage%20immersion%20model.pdf
[14] *Id.* at 3.

violation of Proposition 203."[15] The letter informed schools that, "[e]ffective immediately, the 50-50 Dual Language Immersion Model is hereby eliminated as a model of Structured English Immersion."[16] The letter further stated that, in order to continue placing ELL students in a dual language immersion program, a school must "comport with the use of the bilingual parental waiver for English Language Learners as codified in law within Proposition 203 and ARS 15-753."[17]

On June 30, 2023, four legislators on the House Education Committee submitted a joint request for an Opinion from this Office seeking guidance regarding whether the Dual Language Model remains an approved SEI model and whether schools that implement the Dual Language Model may lose access to ELL funds.

Analysis

I. Only the Board has statutory authority to eliminate an SEI model or determine that a school is noncompliant with ELL requirements.

The powers and duties of the Board and the Superintendent of Public Instruction are prescribed by the legislature. Ariz. Const. art. V, § 9 ("The powers and duties of … [the] superintendent of public instruction shall be as prescribed by law."); Ariz. Const. art. XI, § 3 (stating the powers and duties of the Board shall be as "prescribed by law"). The legislature has prescribed that the Board "shall . . . [e]xercise general supervision over and regulate the conduct of the public school system and adopt any rules and policies it deems necessary to accomplish this purpose." A.R.S. § 15-203(A)(1). The Superintendent is directed to "[e]xecute, under the

[15] Arizona Department of Education, Letter (June 20, 2023), https://www.azed.gov/sites/default/files/2023/06/Emailed%20Communication-50-50%20Dual%20Language%20Immersion%20Letter%20to%20LEAs%20_6.20.23.pdf.
[16] *Id.*
[17] *Id.*

direction of the state board of education, the policies that have been decided on by the state board." A.R.S. § 15-251(4).

The ELL Statutes grant the Board the statutory authority to "adopt and approve research-based models of structured English immersion for school districts and charter schools to use." A.R.S. § 15-756.01(A). Further, the ELL Statutes grant the Board the authority to "delete from, add to or modify" existing SEI models. *Id.* (G).

The Superintendent is empowered by § 15-756.08 to "direct the office of English language acquisition services" within the Department to monitor schools' implementation of ELL programs in accordance with the guidelines provided in § 15-756.08. The purpose of this monitoring is to assess "programmatic effectiveness" and to ensure that schools are providing legally adequate ELL services to facilitate English proficiency. A.R.S. § 15-756.08(B).

If the Department determines that a school district or charter school is not complying with the legal requirements for ELLs, the Department must issue a report and follow prescribed procedures to assist schools in creating and implementing a corrective action plan. A.R.S. § 15-756.08(C), (E)–(J). If, after following these procedures, the Department believes a school to be out of compliance with the law, the Department "shall refer the school district or charter school to the state board of education for a finding of noncompliance." *Id.* (J). A school district or charter school that "is found by the state board to be noncompliant shall not continue to receive any monies from the Arizona English language learner fund established by section 15-756.04 for English language learners." *Id.*

The ELL Statutes do not authorize either the Superintendent or the Department to eliminate or modify an existing SEI model approved by the Board. *See* A.R.S. § 15-756.01(G). Additionally, the ELL Statutes do not authorize the Superintendent or the Department to determine

that a school district or charter school is not in compliance with the ELL Statutes. *See* A.R.S. § 15-756.08(J). Rather, the Superintendent's and the Department's role in implementing the ELL Statutes is limited to monitoring and referring school districts and charter schools to the Board for a finding of noncompliance, as explained above. *Id.* (C), (E)–(J). Finally, the ELL Statutes do not authorize the Superintendent or the Department to withhold ELL funding from a school district or charter school absent a finding of noncompliance by the Board. *Id.* (J).

Contrary to the June 20, 2023 letter from the Department's Office of English Language Acquisition Services, the Board has not modified the Dual Language Model or otherwise deleted the Dual Language Model from the approved list of SEI models. The Dual Language Model thus remains an approved SEI model. School districts and charter schools may implement any SEI model approved by the Board, including the Dual Language Model, and only the Board has the authority to determine whether school districts and charter schools are in compliance with the ELL Statutes. A.R.S. § 15-756.01(G); § 15-756.08(J).

Additionally, just as the Superintendent lacks authority to make final determinations regarding whether schools are in compliance, the Superintendent also lacks authority to issue formal legal opinions on school matters. The legislature has assigned the task of writing legal opinions (and approving opinions issued by county attorneys) relating to school matters to the Attorney General. A.R.S. § 15-253(B). This section further instructs the Superintendent to distribute copies of "attorney general opinions … relating to school matters to all county attorneys [and] county school superintendents." *Id.* (A)(1). The Superintendent also must "[r]equire each county school superintendent to furnish copies of all attorney general opinions relating to school matters to all school districts in his county." *Id.* (A)(2). Any legal opinion issued by the Superintendent—like the Superintendent's June 19 statement—lack legal force.

In sum, the Board has sole statutory authority to delete or modify an SEI model. Further, the Board holds the authority to make the final determination as to whether a school district or charter school is noncompliant and ineligible for ELL funding. Neither the Department nor the Superintendent has statutory authority to reject an SEI model approved by the Board, or to declare its illegality. Nor does the Superintendent or the Department have authority to withhold monies from school districts or otherwise impose consequences on schools for utilizing the Dual Language Model.

II. We decline to opine on whether the Dual Language Model satisfies the SEI requirements of Prop. 203.

In 2019, the legislature made substantial amendments to the ELL statutory scheme.[18] The amendment reduced the required amount of English language development time for SEI models. A.R.S. § 15-756.01(A). That statute also requires that SEI models must be "research-based" and must be "the most cost-efficient models that meet all state and federal laws." *Id.* (D). Prior to approval, the Board is also required to submit SEI and alternative models to the joint legislative budget committee for review; the Board must also submit the models to the president of the senate, the speaker of the house, and the governor. § 15-765.01(F). And whenever "adopting, approving or modifying" ELL programs, the Board must "review and consider the information and data obtained" by the Department in its monitoring of ELL programs under § 15-756.08. *Id.* (G).

The new provisions also required that the Board create a framework for evaluating potential SEI models. *Id.* (I). The framework must ensure that all approved models include the following: "coherent instruction aligned with this state's English language proficiency standards"; "oral and written language instruction, including structured opportunities to develop verbal and written skills

[18] *See* Ariz. State Senate Fact Sheet for S.B. 1014, *supra* note 7.

and comprehension strategies"; "access to complex language content through grade-level textbooks with appropriate supports"; and "parental engagement." *Id*. In sum, the Board's approval of the Dual Language Model (and other ELL models) is subject to a detailed and complex process involving technical expertise.

The Attorney General does not issue all opinions that are requested. For example, the Attorney General will typically decline to issue opinions that: (1) address matters pending before a court, Ariz. Att'y Gen. Op. I81-137; *but see* Ariz. Att'y Gen. Op. I91-002; or (2) respond to legal questions from constituents or third parties, Ariz. Att'y Gen. Ops. I78-81, -83. When called upon to address the constitutionality of a statute, the Attorney General presumes a statute is constitutional and will find otherwise only when the statute is clearly or patently unconstitutional. *See* Ariz. Att'y Gen. Op. I83-069 ("Because the Attorney General has the duty to uphold and defend state laws, we will not opine that a statute is unconstitutional unless it is patently so.").

By the same token, this Office should generally be reluctant to issue an official Opinion stating that a particular official action by a state agency is contrary to law. That is especially true when the agency action requires subject matter expertise and a detailed administrative decision-making process that the legislature has directed the agency, rather than this Office, to undertake. *See* A.R.S. § 41-193(A)(7) (providing that upon request from certain elected or appointed officials, the Attorney General shall "render a written opinion on any ***question of law*** relating to" the office of the requesting party) (emphasis added); Ariz. Att'y Gen. Op. I13-009 ("We decline to answer questions of fact.") (citing A.R.S. § 41-193(A)(7)); Ariz. Att'y Gen. Op. I90-007 (declining to offer opinion where question would depend on "particular facts or circumstances"); Ariz. Att'y Gen. Op. I80-236 (expressing no opinion where doing so would require "an analysis of individual fact situations"); *cf. Moulton v. Napolitano*, 205 Ariz. 506, 511 ¶ 9 (App. 2003) (the doctrine of

administrative exhaustion "allow[s] an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies"); *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 492 ¶ 9 (App. 2009) (stating courts evaluate agency action by considering whether the action "was supported by the law *and substantial evidence*") (emphasis added).

In this case, the legislature has assigned to the Board the authority to adopt SEI models. The Board has adopted several such models, including the Dual Language Model. Second-guessing that determination would require a fact-intensive inquiry into the Board's processes, the contents of the Dual Language model, and a comparison of those contents to the ELL Statutes. The complex nature of this inquiry is acknowledged in the Legislative Council memo cited by the Superintendent in his statement.[19] The memo's author states they were "able to identify only one document that discusses the 50-50 dual language immersion model," indicating that the document was found in an online search, without any context or verification from the Board.[20] The memo further states that the document "is technical in nature" and that the memo's author was "unable to deduce from the document how exactly the model is to be implemented."[21]

This is not the type of record on which an official legal determination should be made, and this Office declines to attempt such a fact-dependent analysis in the context of an official request for an Opinion, which does not involve public hearings or other taking of evidence. The Board has approved the Dual Language Model as a model of SEI instruction, and school districts and charter schools remain entitled to rely on that approval.

[19] *See* Arizona Legislative Council Memo, *supra* note 13 at 2.
[20] *Id.*
[21] *Id.*

Conclusion

Only the Board has the statutory authority to exclude the Dual Language Model from the list of approved SEI models and to declare a school noncompliant and ineligible for ELL funds. The Superintendent does not have authority to impose any consequences on, or withhold any monies from, a school district or charter school that utilizes a Board-approved SEI Model absent a finding of noncompliance by the Board.[22]

Kris Mayes
Attorney General

[22] Because the Dual Language Model is a Board-approved SEI model, no waiver is required for schools that utilize the Dual Language Model to serve ELLs. *See* §§ 15-752, -753, -756.01(A).