

June 3, 2014

To: Honorable David C. Bury

From: Willis Hawley, Special Master

**Re: Report and Recommendation Relating to TUSD's Action Plan
for Recruitment and Retention**

Overview

The action plan that is the focus of this Report and Recommendation (R&R) is the District's plan to implement Sections IV.C and IV.F of the Unitary Status Plan. The action plan for recruitment and retention was initially proposed by the district in July 2013 (see Exhibit A-1) with a revision submitted in February 2014 to the plaintiffs (see Exhibit A-2) and yet another on March 24, 2014 (see Exhibit A-3). On April 24, 2014 was again revised (See Exhibit A-4) but not sent to the plaintiffs and the special master until May 5, 2014, the date this report and recommendation was scheduled for submission to the court. The April 24, 2014 revised plan included very small changes so this report and recommendation is based on that revision because doing so obviated the need to address some minor concerns in this R&R. Relying on the previous drafts, the plaintiffs have asked for a report and recommendation identifying the following objections as not having been addressed:

1. The quality and usefulness of the labor market study commissioned by the district are inadequate. (Mendoza, Fisher and Department of Justice)
2. The district's claim that it need not develop a retention plan is incorrect and should be negated. (Mendoza and Fisher)
3. There is a need to specify the provisions for a program that is required by the USP to support paraprofessionals to become certified teachers. (DOJ)

4. The provisions in the plan for providing recruiting for bilingual teachers should be clarified. (Mendoza and DOJ)
5. The district should clarify its commitment to nondiscriminatory hiring. (Mendoza and Fisher)
6. The composition of the recruitment and retention advisory group does not meet criteria in the Unitary Status Plan (USP). (Fisher)
7. “Diversity” in the plan should be defined as racial and ethnic diversity. (Fisher)

The district has agreed to remedy other objections by the plaintiffs. First the district agrees to add venues in which to advertise for Spanish bilingual certified teachers. Second, the district includes its support for first-year teachers in the list of incentives for recruitment. Third, requests by the Mendoza plaintiffs for some changes in wording were responded to affirmatively by the district.

Objections to the plan by the plaintiffs occurred over many months. Attributions here are general and the specifics vary. The analysis below focuses on particular aspects of those objections. Attached are the most recent summary of objections from each of the plaintiffs and requests for an R&R by the Fisher and Mendoza plaintiffs—Fisher, Exhibit B; Mendoza, Exhibits C-1, C-2, and C-3; and DOJ, Exhibit D. The District’s most recent responses to the objections are attached as Exhibit E.

On May 5, 2014, this R&R was submitted to the parties. The process for submitting R&Rs provides the District with 10 days to align its Action Plan under consideration with the Special Master’s recommendations. On May 22, 2014 the District submitted a revision of its Recruitment and Retention plan that addresses some but not all of the recommendations in the R&R. See Exhibit F. The Fisher and Mendoza plaintiffs have indicated that they do not feel that the May 22, 2014 revision adequately addresses all of their concerns and do not want their requests for an R&R to be withdrawn.

This version of the R&R draws attention to the recommendations that have become moot as a result of the District’s revisions and do not require action

by the Court. I do not delete those sections of the R&R because the revisions fell outside the prescribed time frame for alignment. Once the R&R is submitted to the Court, the plaintiffs have seven days to respond to the R&R if they feel that my judgments that the District has addressed the objections are inadequate (or that the R&R is otherwise inadequate). The District also has this period to object to the R&R.

Analysis of Plaintiff Objections

Adequacy of Labor Market Study

The objections here are of two kinds. The Fisher plaintiffs claim that the study is not usable because the contractor who carried out the study is biased and slants the evidence to support the district's position. Second, plaintiffs argue that the labor market study is flawed in numerous ways that undermine the use of the study to assess whether the action plan adequately addresses disparities in hiring.

The Issue of Bias

It seems likely that the district selected the contractor for the study who it expected would deliver data supporting its position. Organizations often select consultants who they believe will provide evidence that supports positions they want to pursue or believe they have attained. The dispositions and previous work of consultants, in and of themselves, are not evidence that a study is flawed or unusable. This takes us to the question of whether the study is so flawed that it must be redone and whether another labor market study addressing the plaintiffs' concerns would be productive.

Substantive Adequacy of the Labor Market Study

In the development of the USP, the parties agreed that specific quantitative goals for recruitment of persons of different races and ethnicities would not be part of the USP. It was further acknowledged that whether the racial and ethnic composition of the administrative, teaching and other certified staffs matched the racial and ethnic composition of the student body was not the legal test to which the district could be held accountable.

The purpose of the labor market study is to identify the potential pool of candidates from which the district might recruit so as to determine whether its efforts at recruitment are adequate to address disparities between the composition of the professional staff of the district and the pools of potential candidates. The district concludes from the data from the study that there are no disparities. The plaintiffs assert that the study is so flawed that the conclusion the district draws is problematic.

It is important to note that even if the data from a new study legitimated the district's claims, this would not release the district from the responsibility to undertake aggressive efforts to increase the numbers of African American and Latino educators. The USP identifies a number of strategies the district must pursue to increase the number of African American and Latino certified staff (see IV.A.3). Moreover, even if a new study that addressed the plaintiffs' objections, was to show that there were disparities, this would not help much in knowing whether the district's recruitment efforts were adequate for reasons identified below.

The labor market study commissioned by the district is limited in a number of ways. While it's not necessary to list them all, among the ways its usefulness in this case is undermined are:

1. The data from different sources are from different years and most are not current.
2. How positions are identified vary from source to source.
3. The selection of jurisdictions from which data were derived is problematic.
4. The categories of positions mask the real pool of candidates for particular types of positions. For example, the only candidates for principal positions are those with appropriate certification (certification requirements vary by state) and for whom a principal position was an upward career move. The data do not provide such information.

These limitations are, for the most part, not the result of failures by the consultant but rest in the characteristics of the data available and the scope

of the study. More fundamentally, the labor market study deals with only some of the factors that influence the ability of the district to recruit and retain African American and Latino staff. For example:

- There are no analyses of differences in salary and other benefits and that influence successful recruitment.
- Potential hires are influenced by the quality of life that they can experience in Tucson. This includes not only economic considerations but the social context.
- The attractiveness of a position is relative and can be time-specific. If more attractive locales for teaching are experiencing economic difficulties and are reducing staff these sites become potential sources of high quality staff that would not be available in different circumstances.

Of course, a better labor market study could be undertaken. But, a study that provided the information needed to facilitate the assessment of whether the district has undertaken the appropriate level of effort to recruit African American and Latino staff would be very expensive and require continual updating.

Given that the USP is replete with intention to enhance the number and quality of African American and Latino teachers and administrators. Moreover, the USP provides that the strategies for recruitment should be based on the outcomes of the labor market study “at minimum”(IV.A.3). The best way to assess whether the district is aggressively pursuing that goal of increasing the numbers of African American and Latino administrators and certified staff is to continually examine and evaluate the recruitment and retention practices that are spelled out in the recruitment and retention plan. A new labor market study is not warranted but there is nothing in the labor market study that would negate or reduce the district’s responsibility to implement provisions of the USP related to recruitment and retention.

Identifying the Recruitment and Retention Plan as a Retention Plan

The District revised its plan in accordance with the recommendation below. No action by the Court is needed.

For whatever reason, the district asserts that it has no responsibility to develop a retention plan despite the fact that it calls its own plan, though not consistently, a recruitment and retention plan. The plan it submitted to the plaintiffs has a full section for “Retention” (IV.F). It would be possible to identify a number of provisions of the USP and of the district’s own retention and recruitment that contradict the district’s assertion that it has no obligation to provide a retention plan. The district disclaimer is not actually part of the plan. The offending words appear in what the district calls an executive summary (and the summary is, in fact, not an accurate summary of the plan, not only with respect to issue of retention but in other ways).

In its counter to the plaintiffs’ objections, the district argues that it is doing a retention plan even if it doesn’t have to. At one point in its argument, it seems to seek to limit its responsibility to responding to problems of retention, if any. But in the plan, it proposes proactive steps. The assertion that it has no responsibility to develop a retention plan is likely what concerns the plaintiffs. And, as noted, the USP is clear that the District must develop a retention plan.

Rather than belabor this issue, the fix is simple: the relevant phrase in the executive summary should be deleted.

The Composition of the Recruitment and Retention Advisory Committee

The USP provides for the creation of a...”racially and ethnically diverse recruitment team comprised of school level and district level administrators, certified staff and human resources personnel” (IV.A.3). Elsewhere in the USP, in sections dealing with recruitment and retention, strategies for engaging local organizations and employers in partnerships are identified (IV.A.3.d.iii).

As of March 2014, there were four white members, eight African-Americans, one Latino, one Native American and one Asian-American. In April, following a challenge by the plaintiffs to this makeup, the District announced that the membership of the committee for 2014-15 will be

changed significantly to add six more Latino members, who will be the largest racial group. In district's recruitment and retention plan, this committee is defined as consisting of a racially and ethnically diverse group representing community members, select TUSD leaders, corporations, colleges and universities, teachers and administrators. The composition of the current committee does not meet these criteria. All but four members of the current 15 person committee are TUSD employees. There are no representatives of community organizations or corporations. While proportional representation of the race and ethnicity of the district's employees or students is not required (nor urged), it does seem anomalous that the majority of members are African Americans and that there is not a single Latino employee among the district's 11 employees on the committee. This will change in the next few months though the current committee members are presumably shaping recruitment and hiring policies and practices for the 2014-15 school year unless the committee's new members are being appointed to guide hiring and recruitment for people who will serve in the coming year .

The District proposed a change in its plan for the composition of the advisory committee that does not address the recommendations made.

Clarification of the District's Commitment to Non-discriminatory Hiring

The District's May 22, 2014 revision includes the wording from the USP confirming that it "...shall conduct recruitment for all employment vacancies on a nondiscriminatory basis". This is the recommendation or the R&R. There is no need for Court action on this recommendation.

Plaintiffs argue that the wording in the USP requiring that the district "...shall conduct recruitment for all employment vacancies on a nondiscriminatory basis" (IV.C.1) should be included in the recruitment and retention plan. This reference to nondiscriminatory practice is included in the executive summary of plan but not in the plan itself. The plan does say that the district will follow board approved policies and regulations which mandate that TUSD employees shall not discriminate against employees or applicants on the basis of race, color, religion, gender, age, national origin disability, marital status, and sexual orientation in any of its

activities or operations. This language commits the district to nondiscriminatory behavior in its hiring practices and there are ways that this commitment can be accessed through the monitoring process.

In its response to the plaintiff's objections regarding the use of the USP language, the district argues that it is doing so because of how the language of the USP is structured and because the USP requires special efforts to recruit and retain African-American and Latino staff. This seemingly unnecessary defense, given existing board policy, suggests that the district sees itself acting in a discriminatory way with respect to candidates or employees in the district who are not Latino and African American. Nowhere in the plan is there is a provision that says that the district must select, retain or reward a person of Latino or African American background whose qualifications or performance are inferior to those of a person of another race or ethnicity. In any event, belaboring this point seems unnecessary. If the district were to act in a discriminatory way in hiring, it would violate the district's policy, the USP, local, state and federal laws. On the other hand, why the district wants to avoid using the wording in the USP is of concern to the plaintiffs. In an April 24, 2014 response to Mendoza plaintiff objections, the district says that it "will comply with the...USP provision regarding nondiscrimination whether nor not that language is in the [district's] plan..."

Recruiting and Retaining Teachers with Spanish Bilingual Certification

The Mendoza plaintiff's and the Department of Justice assert that the district's strategies for attracting and retaining teachers with Spanish bilingual certification need to be clarified and enhanced. Main concerns are the nature of incentives for hiring and retention, how positions are advertised, and attention to increasing the number of Latino administrators. The district has agreed to increase the number of venues in which positions are advertised and to clarify that its efforts included administrators.

The USP places an emphasis on the recruitment and retention of teachers with bilingual certification in Spanish (IV.A.3.a). It does not, however, require that financial incentives be offered bilingual certified staff. The

district's March, 2014 plan says that such incentives may (emphasis added) be offered. In its April response to Mendoza plaintiffs' objections, the district says that..."certain financial incentives will (emphasis added) be promoted....targeting African American and Latino candidates (Exhibit E). In the revised plan, the word "targeting" is omitted, there is no focus on teachers with bilingual certification and the words "will" and "may" are both used to describe the intentions of the district with respect to financial incentives.

In its May 22, 2014 revision of the recruitment and retention, the District says that it will "promote" financial incentives and that these will "target" rather than "include" African American and Latino candidates. This change, while urged by plaintiffs, does not address their concerns noted above.

The efficacy of any incentive would, of course, depend on the nature and magnitude of the incentive. It does appear that many TUSD teachers with bilingual certification are serving in teaching positions where such certification is most needed.

Support for African American and Latino Non-certified Staff for the Attainment of Certification.

The USP, in section IV.C.a.v, says that the District shall, "Encourage and provide support for African American and Latino non-certified staff...who are interested in pursuing certification". In an early response to the plaintiffs, the district says that is researching the characteristics of such programs. The provision in the district's recruitment and retention plan to support certification for non-certified personnel is essentially a counseling program and it does not reflect the research on these types programs. The district justifies this minimal response to the USP by asserting that the labor market study showed no disparities and thus no need for a more robust—and expensive-- program. Since the USP does not define the characteristics of a certification program, even if the labor market study did find disparities, the district cannot be required to implement a program that, unlike the district's proposed program, is likely to have a positive effect on increasing the number of African American and Latino teachers.

The Meaning of Diversity

The District has revised its plan to modify the word “diversity” with “racial; and ethnic” as recommended below. There is no need for Court action on this recommendation.

The plaintiffs ask the District to specify that diversity means racial and ethnic diversity for the purposes of the plan. With respect to the particular provision raised by the Fisher plaintiffs, the district agrees to this change. The first lines of the USP provisions mandating recruitment (IV.C.3) and retention (IV.F) plans speak specifically to the recruitment and retention of African American and Latino candidate and employees. It follows that adding “racial and ethnic” to diversity is appropriate throughout the plan (sometimes the district uses the phrase, racial and ethnic diversity and sometimes it does not).

Recommendations

I have shown the recommendations that have been incorporated in the District’s May 22, 2014 revision of its recruitment and retention plan in italics. There is no need for the Court to take action on these recommendation unless the parties argue that my analysis is inadequate.

Labor Market Study

For the reason outlined above, I do not recommend that the court require that additional effort be invested in a new labor market study. However, the limits of the labor market study mean that the study should not be used to release the district from acting on any provision of the USP related to recruitment and retention.

Responsibility for a Retention Plan

The district has a responsibility to develop and implement a retention plan. Indeed, it has developed such a plan. To eliminate any ambiguity on

this point, the court should require that the district delete from its plan and the executive summary words that deny such a responsibility.

Membership on the Recruitment and Retention Advisory Committee

The court should require the district to align the membership of the recruitment and retention committee with the provisions and intent of its own recruitment and retention plan and clarify if the newly identified committee members will influence the selections of 2014 recruitment and retention efforts.

Nondiscriminatory Hiring

The district's recruitment and retention plan should include a clear statement of intent to engage in nondiscriminatory hiring. Since the district agrees to abide by the language of the USP, there seems little reason not to include the language of the USP. Moreover, that commitment should be clearly stated in its announcements of jobs for which it is recruiting. This recommendation is predicated by the fact that district job announcements have not always included statements. Currently, the website includes such a statement but jobs are advertised in many other venues.

Incentives for Bilingual Certified Teachers

While the need to attract and retain teachers with bilingual certification in Spanish is identified in the USP as a priority, the USP does not require that the district provide financial or other incentives to achieve that goal. Thus, the court should not require that such incentives be provided. In its 4-24 comments on the plaintiffs' objections, the district says that it will target incentives on African American and Latino candidates and employees. That intention should be included in the final plan.

Support for Noncertified Staff to Attain Certification

The USP clearly requires the district to create a program that encourages and supports noncertified staff to achieve certification. The district's plan is

a minimal response to this provision but there is no basis for requiring that it do more.

The Meaning of “Diversity”

While the district appears to agree with plaintiff’s concerns that diversity in this plan for recruitment and retention should be defined as ethnic and racial diversity, the court should require that the district modify “diversity” with the terms “ethnic and racial” throughout the recruitment and retention plan.

Timing

The district should submit the modifications of the recruitment and retention plan within 21 days of issuance of the court’s order.