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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs

CV 74-90 TUC DCB
(Lead Case)

v.

United States of America,

Plaintiff-Intervenor,

**OBJECTION TO REPORT AND
RECOMMENDATION ON THE
ADVANCED LEARNING
EXPERIENCES PLAN (ECF 1645)**

v.

Anita Lohr, et al.,

Defendants,

(Oral Argument Requested)

CV 74-204 TUC DCB
(Consolidated Case)

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

Maria Mendoza, et al.

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District No. One, et al.

Defendants.

1 **I. INTRODUCTION**

2 Defendant Tucson Unified School District No. One (“TUSD” or the “District”)
3 hereby objects to the Special Master’s Report and Recommendation (“ALE R&R”) on the
4 Advanced Learning Experiences (“ALE”) Plan (the “ALE Plan”). ECF 1645. TUSD
5 objects to the Special Master’s recommendations because they neither relate to nor
6 implement any of TUSD’s Unitary Status Plan (“USP”) obligations and because
7 implementing them would be detrimental to TUSD’s valid policy goals. TUSD’s ALE
8 Plan¹ is compliant both with the USP and with the Constitution, and therefore the Court
9 should sustain this Objection.

10 **II. STANDARD OF REVIEW OF OBJECTIONS TO THE ALE R&R**

11 This Court must review this objection *de novo* pursuant to Fed. R. Civ. P. 53, and
12 must uphold it if it “conforms to the consent decree entered into by the parties and ... is
13 compatible with the Constitution.” *United States v. South Bend Community School Corp.*,
14 511 F. Supp. 1352, 1360 (N.D. Ind. 1981). As neither of the Plaintiffs nor the Special
15 Master has objected to the ALE Plan as unconstitutional, the Court’s review must determine
16 whether it conforms to the USP. This is consistent with controlling case law, which dictates
17 that the “Court is not here to act as a ‘super school board’ and is mindful of its role; the
18 Court does not intend to micro-manage programmatic decisions by the District and will
19 defer to reasonable proposals by the District.” *See* ECF 1477; *see also Anderson v. Canton*
20 *Mun. Separate School District*, 232 F.3d 450, 454 (5th Cir. 2000); *Morgan v. McDonough*,
21 689 F.2d 265, 276 (1st Cir. 1982); *United States v. South Bend Community School Corp.*,
22 511 F. Supp. 1352 (N.D. Ind. 1981) (“This Court is not here to act as a super school board
23 nor is it here to decide what the best or most desirable plan of desegregation may be.
24 Rather, this Court’s duty is only to determine whether the plan submitted conforms to the
25 consent decree entered into by the parties and whether it is compatible with the Constitution

26 _____
27 ¹ *See* ECF 1645-2-4 (draft ALE Plan dated 3/03/14) and ECF 1645-8 at 10 – 1645-11
28 (revised ALE Plan dated 5/30/14).

1 of the United States”); *Richmond Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th
 2 Cir. 1975) (“Except as last-resort refuges for the protection of constitutional rights, courts
 3 should not attempt to function as super school boards”); *Swann v. Charlotte-Mecklenburg*
 4 *Bd. of Ed.*, 402 U.S. 1, 12 (1971), quoting *Brown v. Bd. of Ed.*, *Brown II*, 349 U.S. 249, 299
 5 (1955) (“School authorities have the primary responsibility for elucidating, assessing, and
 6 solving these problems; courts [] have to consider whether the action of school authorities
 7 constitutes good faith implementation of the governing constitutional principles.”).

8 **III. PROGRAM-SPECIFIC GOALS FOR ALE PARTICIPATION ARE**
 9 **NOT REQUIRED BY THE USP AND DO NOT PROMOTE OVERALL**
 10 **INCREASED AFRICAN AMERICAN AND LATINO ALE**
 11 **PARTICIPATION.**

12 The Special Master has recommended that TUSD be required to set separate goals
 13 for African American, Latino and ELL student participation for each of the various ALEs
 14 offered by the District. Although the R&R neither describes nor enumerates the ALEs for
 15 which a separate goal should be set, presumably the R&R contemplates a participation goal
 16 for each of the 11 ALEs the District offers.² The Special Master cites no USP language
 17 requiring separate goals for each ALE program, but rather states the District’s proposed
 18 policy on this issue is “inconsistent not only with this section of the USP but with the spirit
 19 of the USP in general.” The language of the USP and the rationale behind the District’s
 20 policy decision not to set separate goals for participation in every individual ALE program
 21 both demonstrate this is not the case.

22 **A. TUSD’s ALE Participation Goal Complies With The USP**

23 The USP requires TUSD to develop strategies to “identify and encourage African
 24 American and Latino students to enroll in ALEs; to increase the number of African
 25 American and Latino students, including ELLs, enrolling in ALEs; and to support African
 26 American and Latino students, including ELL students, in successfully completing ALEs.”

27 ² The 11 programs are: Self-contained GATE; “pull-out” GATE; “resource” GATE;
 28 Advanced Placement (“AP”); Advanced Pre-AP courses; Honors Pre-AP courses; Dual-
 Credit; IB; Dual-Language; University High School (“UHS”); and middle school courses
 for high school credit.

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1 See ECF 1450 at 29, USP § V(A)(2)(c). The goal articulated by the clear language in the
2 USP is increased overall participation by students in the plaintiff classes in ALEs. Nowhere
3 does the USP state a preference for certain ALEs over others. The USP *does* separately
4 discuss three types of ALEs—Gifted and Talented Education (“GATE”), Advanced
5 Academic Courses (“AACs”), and UHS. Regarding GATE, the USP requires TUSD to
6 “[i]ncrease the number and percentage of African American and Latino students, including
7 ELL students, receiving GATE services by improving screening procedures....” *Id.* at 30,
8 USP § (V)(A)(3)(a)(i). Regarding AACs, the USP requires the District to “increase the
9 number and percentage of African American and Latino students, including ELL students,
10 enrolled in AACs by improving identification, recruitment, and placement to ensure that
11 students have access to AACs in a fair and nondiscriminatory manner[.]” *Id.* at 31, USP §
12 (V)(A)(4)(a)(i). The UHS requirements are more extensive and require revisions to the
13 admissions process, which already have been established by this Court. *See* ECF 1544.

14 In the ALE Plan, TUSD has prescribed goals for African American and Latino
15 participation in GATE, AACs, and UHS. *See* ECF 1645-2 at 16-17. In doing so, it has
16 fulfilled its USP obligations. Nowhere does the USP require TUSD to develop separate
17 goals for participation in every individual ALE. Neither the Special Master nor the
18 Mendoza Plaintiffs, who requested an R&R on this issue (joined by the Fisher Plaintiffs but
19 not the Department of Justice (“DOJ”)), have pointed to any USP language supporting their
20 proposed requirement. Because the District has developed participation goals for UHS,
21 AACs and GATE programs, it has complied with the USP in establishing ALE goals.

22 **B. TUSD’s ALE Participation Goal Serves the Purpose of the USP**
23 **and Should Not Be Disturbed**

24 This Court should defer to TUSD’s reasonable programmatic proposals. In addition
25 to being entirely unrelated to TUSD’s USP obligations, separate goals for every individual
26 ALE are unlikely to promote overall increased African American and Latino participation
27 in ALEs. As TUSD previously has explained to the Plaintiffs and Special Master, setting
28 separate goals will mean that ALE programs will be competing against each other for

1 students. *See* ECF 1645-11 at 3-6. For example, if 10 Latino students who previously have
2 not participated in ALEs choose to enroll in International Baccalaureate (“IB”) courses,
3 rather than AP courses, and as a result TUSD misses the participation target the Special
4 Master would impose for AP courses, the District will be penalized for failing to meet that
5 target, despite the fact it is increasing overall Latino ALE participation in compliance with
6 the USP’s unambiguous directive. *See* Declaration of Martha G. Taylor (“Decl. Taylor”),
7 TUSD’s ALE Director, at ¶ 6.

8 Further, separate goals for individual ALE programs will create warped incentives.
9 TUSD will have an incentive to push students into whichever programs are falling short of
10 their participation goals, rather than encouraging students to participate in the ALE program
11 best fitting their needs. If this occurs, the student’s chance at success in the ALE might be
12 significantly lower than if the student had been placed in a different ALE. *Id.* at ¶ 7. As
13 noted by the Special Master in the R&R, “there is a great deal of difference among the
14 [ALE] programs.” ECF 1645-1 at 2. But this fact does not weigh in favor of separate
15 goals. Rather, it demonstrates that ALE is not “one size fits all,” and allowing the District’s
16 students to choose the best ALE for the individual student will best further the goals of the
17 USP. *Id.* at ¶ 8.

18 The Special Master suggests separate goals for specific GATE services are
19 warranted because “some students in GATE programs are involved in GATE virtually full
20 time while others may have less than half a day once a week of GATE.” ECF 1645-1 at 3.
21 He also notes TUSD’s data shows the percentage of African American and Latino students
22 participating in “more intensive and more rigorous” ALE is lower than the percentage of
23 African American and Latino students involved in “limited programs taught by a teacher
24 who visits their school once a week.” *Id.* This criticism presupposes that a GATE program
25 serving a student more hours per week is superior to a GATE program the student enjoys
26 fewer hours a week. This is not necessarily so. For example, the District may spend time
27 and resources recruiting a fifth grade Latina student for GATE testing and placement. The
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1 student then may be offered placement at a self-contained GATE program at a school 10
2 miles away from her home. The student may decide instead to stay at her home school and
3 receive GATE “pull out” services, as do many students. The District has, in this example,
4 successfully recruited, tested, and offered a Latina student self-contained GATE placement,
5 and the student has selected GATE placement that meets her needs. The District should not
6 be penalized because this student has chosen one GATE service over another. Students and
7 their parents have many reasons for selecting particular ALEs, and the District must be
8 permitted to offer this flexibility to serve the varying needs of its students. *See* Decl. Taylor
9 at ¶ 8.

10
11 Finally, practical barriers also make separate goals impracticable. There is variance
12 in the availability of ALE programs at every school. For example, although Cholla High
13 School has a vibrant and extensive IB program, it has fewer AP course offerings. *Id.* at ¶ 9.
14 There is no difference in the rigor or benefit of IB versus AP, and both programs allow
15 students to earn college credit. *Id.* It is nonsensical to penalize TUSD if it does not meet its
16 AP target because more students choose IB over AP. The better measure of improvement,
17 therefore, is whether there has been an increase in overall participation in ALEs by African
18 American and Latino students.³

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24 ³ If, despite the USP’s clear language and TUSD’s explanation of the practical barriers to
25 separate goals, the Court determines that a further break-down of ALE participation goals is
26 appropriate, TUSD suggests, in the alternative, the Court order TUSD to set one goal for
27 Pre-AP courses, which are available to students in sixth through tenth grade, and another
28 goal for all of the other AACs, which are primarily offered to students in eleventh and
twelfth grade, as a group. Although this is not required by the USP, it would at least avoid
the problem of ALEs competing against one another, because generally Pre-AP courses are
offered to and selected by different students than are the other AACs.

1 **IV. THE DISTRICT’S GOAL FOR AFRICAN AMERICAN AND LATINO**
 2 **PARTICIPATION IN ALE PROGRAMS IS USP-COMPLIANT AND**
 3 **RESEARCH-BASED, AND THE SPECIAL MASTER’S SUGGESTED**
 4 **GOAL IS NOT SUPPORTED BY EITHER EXPERT OPINION OR**
 5 **RESEARCH, AND EXCEEDS THE SCOPE OF HIS AUTHORITY.**

6 **A. TUSD’s ALE Participation Goal Complies With The USP**

7 The USP requires that TUSD’s ALE Coordinator work in collaboration with relevant
 8 District staff to set annual participation goals. The USP also requires that “[t]hese goals
 9 shall be shared with the Plaintiffs and the Special Master and shall be used by the District to
 10 evaluate effectiveness.” ECF 1645-2 at 3. As noted in the ALE R&R, the District consulted
 11 Dr. Donna Ford of Vanderbilt University, a nationally renowned scholar in the field of
 12 minority student access to gifted and talented programs, in developing the annual
 13 participation goals in the ALE Plan. Dr. Ford’s “20% Rule,” cited in the R&R, is explained
 14 in her book, *Recruiting and Retaining Culturally Different Students in Gifted Education*
 15 (2013). *See* Decl. Taylor at ¶ 10. As described in the ALE Plan, the rule posits that
 16 “discrimination may be occurring if any subgroup has a participation rate in something
 17 deemed desirable (like ALEs) that is 20% less than their enrollment rate in the district.”
 18 ECF 1645-2 at 15. For example, if African American students make up ten percent of the
 19 students in the District, then African American students should make up at least eight
 20 percent of the students participating in ALEs. Using Dr. Ford’s rule, the District developed
 21 a goal for African American and Latino participation in ALEs designed to increase their
 22 participation in ALEs to the 20% threshold within five years, using the 2012-13 school year
 23 as a baseline. *See* Decl. Taylor at ¶¶ 11 and 12.

24 **B. The 20% Rule Serves the Purpose of the USP and Should Not Be**
 25 **Disturbed**

26 The Mendoza Plaintiffs requested an R&R on the District’s participation goal,
 27 objecting to it as too low. The Fisher Plaintiffs joined in this request - the DOJ did not. As
 28 stated in the ALE R&R, the Mendoza Plaintiffs believe the District’s goal should be parity,
 meaning that if African American students make up ten percent of the students in the
 District, they should make up ten percent of ALE participants. However, the Mendoza

1 Plaintiffs never have indicated that any expert has suggested this was an appropriate goal,
2 nor have they cited any research to that effect. The Mendoza Plaintiffs support their
3 suggested goal by referring to the section of the USP stating “that African American and
4 Latino students have equal access to [ALE].” See ECF 1645-1 at 5. However, equal access
5 is not the same as, nor will it necessarily produce, equal participation. The Special Master
6 acknowledges that “[j]ust as we take into account student’s [sic] socioeconomic
7 backgrounds in assessing academic progress of different groups of students, such a
8 consideration would make it reasonable to not use ‘equal’ as a goal[.]” *Id.* There is simply
9 nothing backing up the Mendoza Plaintiffs’ claim that the District’s participation goal is too
10 low.

11 The Special Master stated in the ALE R&R that “splitting the difference” between
12 the District’s goal and the Mendoza Plaintiffs’ suggested goal would be “arbitrary, yet he
13 recommends “splitting the difference again” between the District’s goal, which is supported
14 by a nationally recognized education expert, and the Mendoza Plaintiff’s suggested goal,
15 which is wholly unsupported. ECF 1645-1 at 6. Just as there is no basis for the Mendoza
16 Plaintiffs’ suggested goal, there is also no basis for the Special Master’s suggested goal.

17 It is inappropriate to order the District to follow an arbitrary ALE participation goal
18 that is unsupported by any expert opinion, research, or logical explanation whatsoever.
19 Moreover, it is not the Special Master’s role under either the USP (ECF 1450) or the
20 Appointment Order (ECF 1350) to dictate policy for the District. Furthermore, the scope of
21 the Special Master’s authority and expertise does not include interfering with USP-
22 compliant policy criteria that neither obstruct the USP’s goals nor that it mandates. The
23 Special Master has no legal authority to act as a “super school board” by imposing on
24 TUSD his policy preferences on nonracial matters when TUSD is complying with all
25 aspects of the USP. See, e.g., *Anderson v. Canton Mun. Separate School District*, 232 F.3d
26 450, 454 (5th. Cir. 2000). The District has complied with the USP by creating, with input
27 from a nationally renowned education expert, a goal for increased African American and
28 Latino participation in ALEs and the strategies to reach such a goal. Because it is clear that

1 the District has complied with the USP, and because neither the Mendoza Plaintiffs nor the
2 Special Master has suggested that the District's participation goal is unconstitutional, nor
3 have they provided any evidence to support an alternative goal, TUSD's proposal must be
4 upheld by the Court.

5 **V. THE USP DOES NOT REQUIRE THE DISTRICT TO SET SPECIFIC**
6 **GOALS FOR THE PARTICIPATION OF ELL STUDENTS IN ALE**

7 The USP requires that the ALE Plan "include strategies to identify and encourage
8 African American and Latino students, *including* ELL students, to enroll in ALEs; to
9 increase the number of African American and Latino students, *including* ELL students,
10 enrolling in ALEs; and to support African American and Latino students, *including* ELL
11 students, in successfully completing ALEs." *See* ECF 1645-2 at 4 (emphasis added).
12 Clearly, the unambiguous language of the USP simply requires that the District's strategies
13 to increase ALE participation include ELL students who are members of the Plaintiff
14 classes. The USP does not require that ELL students be treated as an entirely separate
15 group. Indeed, it would be illogical to treat them as such given the fact that ELL students
16 are not a plaintiff class in this litigation.

17 Further, the practical obstacles to ELL participation in many ALE programs make
18 setting separate goals for ELL students unrealistic, and perhaps unattainable. An ELL
19 student is defined as a student who is unable to communicate fluently or learn effectively in
20 English. ELLs do not have the English-language ability to achieve their full academic
21 potential in schools and learning environments in which instruction is delivered largely or
22 entirely in English. *See* Decl. Taylor at ¶ 13. They often come from non-English-speaking
23 homes and background. They typically require specialized or modified instruction in both
24 the English language and in academic courses. *Id.* In addition, TUSD ELL students in a
25 secondary program (grades six through twelve) are required by ADE and TUSD to be in
26 either a four-hour or two-hour block based on number of ELL students in a three-grade
27 span. At the elementary level, as required by ADE and TUSD, students are either in a four-
28 hour or pull-out program based on number of ELL students in a three-grade span. *Id.* at ¶

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1 14. Both these factors pose obstacles to increased ELL participation in ALEs. *Id.* It
2 simply is impossible for some ELL students to participate in some ALEs that are English-
3 intensive, and the new “common core” standards in Arizona have made even math courses
4 increasingly language-rich. *Id.* Further, the required four-hour English language
5 instruction blocks make it impossible for ELL students to participate in some ALEs because
6 of scheduling constraints. *Id.*

7 TUSD also receives an influx of refugee students in the Plaintiff classes who come to
8 TUSD with limited or no prior formal educational experiences. *Id.* at ¶ 15. These students
9 are counted in the Plaintiff class numbers but have no realistic expectation of participating
10 in ALEs due to their limited or non-existent English language development and formal
11 education. *Id.* These students’ educational needs are best met by ensuring that they receive
12 the support they need to complete their regular classes, rather than pushing them toward
13 ALEs before they are adequately prepared. *Id.*

14 In addition, once an ELL student tests “Proficient” based on the Arizona English
15 Language Learner Assessment (“AZELLA”), he or she is then able to access content in
16 ALE programs. Decl. Taylor at ¶ 16. However, at this point the student would no longer
17 be classified ELL and therefore his or her ALE participation would not be identified under
18 “ELL” for USP purposes. *Id.*

19 In sum, both the plain language of the USP and the practical constraints surrounding
20 ELL participation in ALEs support TUSD’s position that it should not be forced to create
21 separate goals for ELL participation in ALEs.
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