

TUSD’s 8/5/14 Response to the Mendoza Plaintiffs’ 7/24/14 Request for Report and Recommendation Regarding Principal & Teacher Evaluations (“Principal/Teacher R&R Request”)

TUSD had hoped that providing on July 9, 2014 the detailed history of the principal/teacher evaluations (“TUSD Principal/Teacher Memo”) issue would allay the concerns of the Special Master regarding his interpretation of the USP that a “plan” is required under USP § X.E.6 (even though the clear USP language does not and the parties previously had understood none was required).

However, on July 10, 2014, the Special Master advised that his position nevertheless remained unchanged. He did not specifically comment on the substance of the Principal/Teacher Memo TUSD provided him. However, in that July 10 email, he urged the Plaintiffs (none of whom previously had taken any position on this matter) to request an R&R. *See* July 10, 2014 Special Master Email (“If the plaintiffs believe that teacher and principal evaluation is not important enough to warrant comment and review as provided in the USP, they should so indicate.”) Following this remark, the Mendoza Plaintiffs, *for the first time*, now advise they agree with the Special Master that a “plan” and USP § I.D.1 review are required for principal/teacher evaluations and requested an R&R. The Fisher Plaintiffs did not respond to the Special Master’s remark, neither did the DOJ. To date, neither the Special Master nor any Plaintiff has raised any substantive complaint with TUSD’s principal/teacher evaluation instruments, which were shared with the parties in January and February as part of TUSD’s status report and Annual Report.

TUSD provides this response to the Principal/Teacher R&R Request made by the Mendoza Plaintiffs in hopes that the Mendoza Plaintiffs may reconsider their recent position, which TUSD suggests is not supported by the USP.

The Mendoza Plaintiffs, after urging from the Special Master, have requested that the Special Master bring to the Court’s attention TUSD’s compliance with respect to USP § X.E.6. As a preliminary matter, TUSD requests clarification from the Mendoza Plaintiffs on the specific provision of USP § X.E.6 that it contends TUSD has not complied with, if any, as such in no way is clear from the Mendoza’s Principal/Teacher R&R Request.

The USP language is unambiguous that no plan regarding Principal and Teacher Evaluation is required. The inquiry should end here. Instead of pointing to any USP language requiring a plan (because none exists) the Mendoza Plaintiffs suggest in their Principal/Teacher R&R Request that such a requirement exists, even though not expressly stated, because (1) an entire subsection of the USP is dedicated to principal/teacher evaluations and (2) because the history of TUSD's actions allegedly imply that it agreed at one point that a "plan" was required.

TUSD agrees that review of the pertinent USP language is instructive on the issue of whether a plan is required. Indeed, as explained in the TUSD Principal/Teacher Memo, the construction of the USP demonstrates a plan is NOT required because the USP expressly states where plans are required. But, the USP devoting a subsection to a USP objective does not bear any relation to whether a plan or § I.D.1 review is required. In fact, there are numerous instances in the USP of subsections that do not require a plan or §I.D.1 review. For example, reviewing a list of the subsections, and any plan requirements under the Administrators and Certificated Staff section (within which Principal/Teacher evaluations is a subsection) is instructive because subsections C, F, G & I require development of plans while subsections A, B, D, E, F, H (Principal/Teacher Evaluations) & K do not require the development of plans. Accordingly, the construction of Principal/Teacher evaluations as a subsection has no relevance to whether it requires a plan or §I.D.1 review. If the Mendoza Plaintiffs still disagree, and there is nexus between the creation of subsections and requirements of §I.D.1 review (either as a plan, policy, procedure other significant change) that they failed to note in their Principal/Teacher R&R Request, please provide that analysis and TUSD will consider it.

Next, the Mendoza Plaintiffs claim TUSD's actions in the past demonstrate its understanding that the USP requires a plan and §I.D.1 review for principal/teacher evaluations. For this, the Mendoza Plaintiffs first point to May 2013 communications from TUSD's prior counsel. As already explained in the TUSD Principal/Teacher Memo, the transmission of the teacher evaluation instruments for I.D.1 review occurred *before* TUSD's October 2013 meeting with the Special Master where the understanding was confirmed with him that no plan was required. This was confirmed by the Special Master's October 2013 email where he clarified that principal/teacher evaluations was subject to IC monitoring –

not Plaintiffs' review – even though principal/teacher evaluations remained on the list of review items to identify TUSD's deadline to review its principal/teacher evaluation instruments. *See* TUSD Principal/Teacher Memo, Attachment 6 (“The review of [revisions to the] teacher and principal evaluations is described as procedure, what will be involved, when, etc. The IC will monitor the content and report to the Plaintiffs accordingly.”) This explains why no plaintiff ever submitted comments or review of the teacher evaluation instruments submitted in May 2013. Indeed, even the May 2013 transmittals never indicted that a “plan” was required.

The Mendoza Plaintiffs also cite an October 4, 2013 email from the Special Master and an October 11, 2013 email from TUSD's desegregation director, Sam Brown, which was included with the TUSD Principal/Teacher Memo. These messages, again, were drafted in the context of TUSD's understanding from its October 2013 Special Master meeting that no plan or §I.D.1 review was required, and TUSD's evaluations would be subject to IC monitoring (as confirmed by the Special Master's October 18, 2013 email). Indeed, Mr. Brown included as a parenthetical that he understood the deadline to mean for TUSD perform its “new revisions” in accordance with the language of the USP. Nowhere does his message assent to creation of a plan, or a costly and time-consuming §I.D.1 review.

Next, the Mendoza Plaintiffs cite the November USP Status Plan and argue that TUSD did not protest the inclusion of teacher/principal evaluations. There was no reason to protest as the Special Master already had clarified in previous cover emails that principal/teacher evaluations were subject to IC monitoring. *See* TUSD Principal/Teacher Memo, Attachment 6.

The Mendoza Plaintiffs do not explain their own failure to protest when TUSD reported in January and February 2014 that it considered compliance with USP § X.E.6 was “completed” and provided copies of the principal/teacher evaluation instruments. Indeed, given that TUSD's reporting and position on this has been consistent for nearly a year (and made crystal clear in the January and February 2014 reports), this request seems untimely and intended to create unnecessary conflict.

Finally, the Mendoza Plaintiffs claim that TUSD did not share its understanding that no plan or §I.D.1 review was required until May 16, 2014 – when TUSD filed a response to the Order re: IA (as permitted by the Court) to ensure the record was clear on the nature of the IA. In addition to clarifying the record, TUSD was ensuring the IA order was accurate and reflected the understanding of the Special Master’s October 18, 2013 email and TUSD’s January and February 2014 reports that compliance for that year was completed. TUSD did not know there was a dispute over this issue until the Special Master submitted a memorandum after the fact disagreeing. Accordingly, it is not true that this is a “new position” as the Mendoza Plaintiffs pictured in the Principal/Teacher R&R Request. In fact, it appears the Mendoza Plaintiffs have taken a new position in their July 24, 2014 R&R request, and only at the urging of the Special Master.

TUSD hopes the Mendoza Plaintiffs will consider the response above closely, and respond with any extant additional helpful information. We would urge the Mendoza Plaintiffs to adopt a position on this issue that aligns with the language of the USP. If the Mendoza Plaintiffs are willing to put this matter to rest, it appears the Special Master may also be willing to do so – and that no other Plaintiff shares the Mendoza Plaintiffs’ recent concerns.