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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,
 Plaintiffs,
v.
United States of America,
 Plaintiff-Intervenor,
v.
Anita Lohr, et al.,
 Defendants,
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.

CV 74-90 TUC DCB
(lead case)

ORDER

CV 74-204 TUC DCB
(consolidated case)

1 Report and Recommendation: Advanced Learning Experiences

2 On August 13, 2014, the Special Master filed a Report and Recommendation (R&R)
3 (Doc. 1645) relating to the Unitary Status Plan (USP) Section V, Quality of Education,
4 subsection A, Access to and Support in Advanced Learning Experiences (ALEs), which
5 requires TUSD to improve the academic achievement of African American and Latino
6 students and ensure they have equal access to the District's ALEs. (USP¹ (Doc. 1713) §
7 V.A.1.)

8 The R&R was requested by the Plaintiffs Mendoza and joined in by the Fisher
9 Plaintiffs. The Plaintiffs' objections are limited to the annual goals set by TUSD, not the
10 specifics of the detailed plan of action to be undertaken to increase the numbers of these
11 students, and ELL students, in ALEs. (USP § V.A.2-5.) At issue is subsection 2.a, as
12 follows:

13 By [July 1,]² 2013, the District shall hire or designate a District Office
14 employee to be the Coordinator of Advanced Learning Experiences
15 ("ALEs"), ALEs shall include Gifted and Talented ("GATE") programs,
16 Advanced Academic Courses ("AACs"), and University High School
17 ("UHS"). AACs shall include Pre-Advanced Placement ("Pre-AP")
18 courses, which were formerly referred to as "Honors," "Accelerated," or
19 "Advanced," and any middle school course offered for high school
20 credit; Advanced Placement ("AP") courses; Dual-Credit courses; and
21 International Baccalaureate ("IB") courses. The ALE Coordinator shall
22 have responsibility for: reviewing and assessing the District's existing
23 ALEs, developing an ALE Access and Recruitment Plan, assisting
24 appropriate District departments and schools sites with the
25 implementation of the ALE Access and Recruitment Plan, and
26 developing annual goals, in collaboration with relevant staff, for progress
27 to be made in improving access for African American and Latino
28 students to ALE programs. These goals shall be shared with the Plaintiffs
and the Special Master and shall be used by the District to evaluate
effectiveness.

(USP § V.a.2.a) (emphasis added).

25 ¹The Revised USP (Doc. 1713), filed November 6, 2014, was revised to correct
26 typographical errors; the USP was originally filed, as approved by the Court on February 20,
2013 (Doc. 1450).

27 ²Date changed by agreement of the Parties and Special Master.

1 To implement Section V of the USP, TUSD prepared the ALE Access and
 2 Recruitment Plan (ALE Action Plan). The subsection challenged by the Plaintiffs is
 3 Section II, Annual Goals and Progress Monitoring, which provides, as follows:

4 In creating annual goals for progress monitoring, the District has used the
 5 “20% Rule”, which was presented by Donna Ford, Ph.D. of Vanderbilt
 6 University to the United States District Court For The Northern District
 7 of Illinois Eastern Division in *Mcfadden v. Board of Education for
 Illinois School District U-16*. Dr. Ford further explains the rule and how
 it should be used in districts working to eliminate discrimination in her
 book, *Recruiting and Retaining Culturally Different Students in Gifted
 Education* (2013).

8 In that book, Dr. Ford offers a relatively simple rule for identifying
 9 discrimination in the data. According to her, discrimination may be
 10 occurring if any subgroup has a participation rate in something deemed
 desirable (like ALEs) that is 20% less than their enrollment rate in the
 11 district. “For example, if Black students are 10% of a school district, then
 they should be at least 8% of ALEs... If Hispanic students are 40% of a
 12 school district, then they should be at least 32% of ALEs.” Thus, goals
 in this plan will be designed to increase all minority subgroup (sic) to a
 <20% threshold within five years, using SY 2012-13 as the baseline year
 13 for both White and minority subgroups.

14 (ALE Action Plan (Doc. 1645-2), Ex. A at § II) (emphasis added).

15 The 20 % Rule, therefore, sets a goal at a sum certain number NOT less than the
 16 minority groups’ enrollment rate District-wide. Using the base line years proposed by
 17 TUSD, SY 2012-13 to the end of SY 2017-18,³ TUSD’s goal for increasing GATE
 18 services is 0.19 % per year for African American students and for Latino students 0.29 %
 19 per year. For AAC, TUSD’s goal is .09 % per year for African American Students.
 20 (ALE Plan § II.A and B.) The 20 % Rule is already satisfied for AAC for Latino
 21 students. *Id.* TUSD does not apply the 20% Rule to ELLs. UHS is not at issue, here.

22 Plaintiffs and the Special Master believe that the annual goals are too low and
 23 should be increased, especially because participation among African-American and
 24 Latino students, as of SY 2012-13, is relatively close to being not less than 20 % of the

26 ³The tentative end date for attaining unitary status is the end of SY 2016-17. (USP
 27 (Doc. 1713) at 60, ¶ XI.A.2.)

1 minority students' enrollment district-wide. For example: African American students
2 make up 5.8% of the district-wide student population, with the less than 20% goal being
3 4.64% and the current participation level being 3.7%, therefore, TUSD needs to increase
4 GATE participation for African American students by 1%. The same percentage increase
5 is required for Hispanic students in GATE programs. For AACs, African American
6 students make up 6.2%⁴ of the district-wide student population, with the less than 20%
7 goal being 4.96% and the current participation level being 4.5%, therefore, TUSD needs
8 to increase AAC participation by half a percent. There is no need to increase
9 participation by Hispanic students in AACs. (R&R (Doc. 1645), Ex. A: ALE Action Plan
10 at 14.)

11 The Special Master recommends an admittedly arbitrary 15 % increase, instead
12 of less than 20%. Plaintiffs rely on the USP's requirement that the strategies identified in
13 the ALE Plan must "increase the number of African American and Latino students,
14 including ELL Students, enrolling in ALEs." USP § V.2.c; USP § V.3.a.i (specifying
15 measures for increasing GATE services); USP § V.4.a.i (same for AACs). Plaintiffs
16 suggest equal access goals should mirror the percentage of these students in the general
17 student body. For example, parity would be reached for African American Students, who
18 make up 10 % of the student body, when they make up 10 % of the ALE participants.

19 The Plaintiffs and the Special Master believe goals should be program specific.
20 There are eleven programs: three GATE programs (Self-contained; pull-out, and
21 resource) and eight AACs (Advanced Placement (AP); Advanced Pre-AP; Honors Pre-
22 AP; Dual-Credit; IB; Dual language; UHS, and middle school courses for high school
23 credit). They are all very different from each other. For example, GATE pull-outs

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25 ⁴The Court does not understand why the percentages for the minority students district-
26 wide for SY 2012-2013 is reported differently for GATE (5.8% African American; 61.8%
27 Hispanic) and AACs (6.2% African American; 59.6% Hispanic). (R&R (Doc. 1645), Ex.
A: ALE Action Plan at 14.)

1 provide students with the program less than half a day once a week, whereas, a self-
2 contained GATE is virtually full time. According to Plaintiffs and the Special Master,
3 program effectiveness must be examined by the outcome of student participation in each
4 AAC program. (R&R (Doc. 1645) at 3.)

5 TUSD disagrees. According to TUSD setting separate goals for each ALE
6 program “will mean that ALE programs will be competing against each other for
7 students.” (Objection (Doc. 1654) at 5.) It would warp incentives by pushing students
8 towards ALE programs falling short of the 20% Rule rather than towards the program
9 best fitting their needs. *Id.* “For example, if 10 Latino students who previously have not
10 participated in ALE’s choose to enroll in International Baccalaureate (“IB”) courses,
11 rather than AP courses, and as a result TUSD misses the participation target the Special
12 Master would impose for AP courses, the District will be penalized for failing to meet
13 that target, despite the fact it is increasing overall Latino ALE participation in compliance
14 with the USP’s unambiguous directive.” *Id.* For example, assuming that a full time
15 GATE program is superior to a once a week GATE program,⁵ “the District may spend
16 time and resources recruiting a fifth grade Latina student for GATE testing and

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18 ⁵TUSD challenges this assumption, but the challenge appears to be based on student
19 choices to remain in a neighborhood school with a pull-out program rather than travel away
20 from home to attend a self-contained GATE program. “TUSD’s data shows that the
21 percentage of African American and Latino students participating in ‘more intensive and
22 more rigorous’ ALE is lower than the percentage of African American and Latino students
23 involved in ‘limited programs taught by a teacher who visits their school once a week.’”
24 (Objection (Doc. 1654) at 5.) The superiority between the two types of GATE programs is
25 important and should be based on academic benefit to a student not transportation
26 considerations. Assuming a “more intensive and more rigorous” ALE is academically more
27 beneficial to students, the question of equity must consider the location of these programs
28 and whether transportation burdens fall disproportionately on African-American and Latino
students. The Court assumes the ALE Access and Recruitment Plan will gather and review
data which will enable the District to consider this aspect of equal access. By this footnote,
the Court does not mean to suggest any outcome— only that transportation burdens must be
considered. *Green v. County School Bd of New Kent*, 391 U.S. 430, 435, 436-37(1968).

1 placement. [She] then may be offered placement at a self-contained GATE program at a
2 school 10 miles away from her home. The student may decide instead to stay at her home
3 school and receive GATE ‘pull out’ services, as do many students. The District has, in
4 this example, successfully recruited, tested, and offered a Latina student self-contained
5 GATE placement, and the student has selected GATE placement that meets her needs.
6 The District should not be penalized because this student has chosen one GATE service
7 over another. Students and their parents have many reasons for selecting particular
8 ALE’s, and the District must be permitted to offer this flexibility to serve the varying
9 needs of its students.” (Objection (Doc. 1654) at 6.)

10 The Special Master concludes that TUSD does not want to apply the less than
11 20% Rule to all eleven ALE programs to avoid accountability. True, TUSD does not
12 want to be “penalized” for individual programs that fail to satisfy the 20% Rule, if it
13 increases the overall participation in ALEs by African American and Latino students.
14 The Court does not, however, believe that TUSD can avoid accountability because it
15 agrees to gather and tabulate all the relevant data necessary to assess each ALE program,
16 individually, in respect to the 20 % Rule. TUSD cannot avoid the numbers, which will or
17 will not equal less than 20% of the enrollment rates in the District for African American
18 and Latino students, including ELLS. The problem will not be accountability as long as
19 relevant data is gathered and Plaintiffs and the Special Master are free to point out any
20 individual program where discrimination may exist. The Court notes that the 20% Rule is
21 based on the percentage of African American and Latino students, including ELLS
22 enrolled in the District, which changes annually. Consequently, the annual goal must
23 adjust accordingly.

24 As the Court sees it, the problem is that the 20% Rule is an over-simplistic
25 measurement for effectiveness, especially if TUSD intends to apply it to determine
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1 unitary status.⁶ The Court is not inclined, without full briefing, to consider whether the
2 20% Rule, establishing a floor, satisfies the USP mandate to increase the number of
3 minority students participating in ALEs, which suggests a goal somewhere in the ceiling.
4 Because TUSD is close to satisfying the 20% Rule, the Court believes the less than 20%
5 mark can be hit sooner than later, especially by the USP target date: SY 2016-17. This is
6 certainly true in the elementary grades where the pool of potential participants is limited
7 by the district-wide number of minority students, as compared to upper-grades where
8 ALE participants are limited by the number of minority students drawn into the pipeline
9 in elementary school. TUSD may use the 20% Rule as an annual goal for GATE and
10 AACs, but it must reach this minimum standard as soon as practicable, and report data for
11 the 20% Rule for all ALEs so the Parties and Special Master can consider whether
12 discrimination may exist in each individual ALE program.

13 In short, TUSD may apply the “less than” 20% Rule each year as a rule-of-
14 thumb⁷ to red-flag areas of concern, including participation by ELL students in ALE
15 programs, which may warrant further inquiry or improvement. However, as TUSD’s
16 GATE example illustrates, there are other variables which must factor into TUSD’s
17 assessment regarding the effectiveness of the ALE Access and Recruitment Plan. For

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19 ⁶TUSD’s argument that any goal to improve participation by ELL students in ALEs
20 is “unattainable,” also, suggests it may believe it has attained unitary status in regard access
21 to ALEs by ELL students. *See* (Objection (Doc. 1654) at 9-10 (listing multiple of reasons,
22 such as ELL student’s limited proficiency in English and the need for these students to attend
23 two or four-hour pull out English language classes, for why it is “simply impossible for some
24 ELL students to participate in some ELL classes that are English-intensive, and the new
25 ‘common core’ standards in Arizona have made even math courses increasingly language-
26 rich.”).

27 ⁷*See* (R&R (Doc. 1645) at 5, Ex. C: TUSD responses to Mendoza Ps at 3 ¶ 3a
28 (referring to 20% Rule as “rule-of-thumb”), *see also* (R&R (“Doc. 1645) at 5) (Special
Master disputing that the 20% Rule is “research-based” and that: “Moreover, Dr. Ford, in
testimony in an Illinois case, says that the less that the (sic) 20 percent guideline should be
a minimal measure of equal access.”

1 example, TUSD must consider the feasibility⁸ of neighborhood access for minority
2 students to self-contained or more rigorous GATE programs. Certainly, goals for
3 increasing participation at the elementary grade levels will be easier to attain than
4 increasing participation in higher grade levels which requires the District to build a pipe-
5 line. TUSD suggests it is not possible to place ELL students in ALEs, yet ELLs were
6 expressly identified in the USP for increased participation. All of these variables require
7 a flexible measurement of success depending on the individual ALE.

8 The Court agrees with the District that flexibility is necessary, but does not agree
9 with the District that flexibility can be found in the 20% Rule. It is instead an imprecise
10 standard, merely a rule-of-thumb, which may suggest discrimination depending on
11 multiple variables. This is obvious from TUSD's objections to applying the 20% Rule to
12 ELLs or individual ALEs, and TUSD's failure to make grade distinctions. Given that the
13 ALE Action Plan's annual goals result in total increases of participation by minorities in
14 ALEs of zero to one percent, the Court assumes the 20% Rule will not be the sole basis
15 for determining unitary status in respect to USP § V, Access to and Support in Advanced
16 Learning Experiences (ALEs), because if it is— unitary status could certainly be had by
17 the end of SY 2016-17, or sooner. Instead, TUSD proposes an end-date of SY 2017-
18 2018. The Court rejects this. Instead, TUSD should establish the end-goal(s) for
19 improving access for African American and Latino students to ALE programs to attain
20 unitary status by SY 2016-17 and work backwards to set the annual goals.

21 TUSD should provide the Plaintiffs with a 20% Rule Report for each individual
22 ALE program, by grade level. TUSD should begin consulting with the Plaintiffs and the
23 Special Master regarding how to comprehensively measure the effectiveness of the ALE
24 Action Plan to determine whether TUSD has attained unitary status in regard to the

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26 ⁸By feasibility, the Court means resource availability to meet transportation, staffing,
27 recruiting, funding, etc., needs for proposed programs.

1 District's responsibility to ensure to the extent practicable that African American and
2 Latino students have equal access to the District's Advanced Learning Opportunities.
3 Subsequently, TUSD should set the requisite annual goals, necessary, to attain unitary
4 status by the end of SY 2016-17, pursuant to the ALE Action Plan.

5 **Accordingly,**

6 **IT IS ORDERED** that the Special Master's R&R (Doc. 1645) is adopted in part
7 and rejected in part.


8 **IT IS FURTHER ORDERED** approving the 20% Rule as a rule-of-thumb
9 annual goal to be met as soon as practicable but no later than the USP target date: SY
10 2016-17. TUSD has agreed to categorize GATE programs by the amount of time students
11 are engaged in them in a typical week and for all AAC programs to break data down by
12 school level— elementary, middle, K-8, and high school. It shall report the 20% Rule goal
13 in the same way. Within 20 days of the filing date of this Order, TUSD shall provide
14 Plaintiffs and the Special Master with a 20% Rule Report for all eleven ALEs.

15 **IT IS FURTHER ORDERED** that TUSD shall develop goals for increasing
16 participation of ELL students in specific ALE programs, where practicable, and provide
17 explanation to the Plaintiffs and the Special Master as to how these goals were derived.
18 Within 20 days of the filing date of this Order, TUSD shall complete this ELL
19 Supplement to the ALE Action Plan Report and provide it to the Plaintiffs and Special
20 Master for review and comment.

21 **IT IS FURTHER ORDERED** that TUSD shall, in consultation with the
22 Plaintiffs and the Special Master, develop the comprehensive goals for attaining unitary
23 status by ensuring that African American and Latino students have equal access to the
24 District's Advanced Learning Opportunities. Withing 60 days of the filing date of this
25 Order, TUSD shall file a Supplement to the ALE Action Plan, which shall include these
26 unitary status goals and annual goals for attaining unitary status by the end of SY 2016-

1 17. THERE SHALL BE NO EXTENSIONS OF TIME FOR FILING THE
2 SUPPLEMENT TO THE ALE ACTION PLAN. Plaintiffs and the Special Master may
3 file objections within 14 days of the filing date of the Supplement ALE Action Plan.
4 TUSD may file a Reply within 7 days of the filing date of any Objection.

5 DATED this 13th day of February, 2015.

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9 David C. Bury
10 United States District Judge
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