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IN THE UNITED STATES DISTRICT COURT

FOR THE 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,

CV 74-90 TUC DCB
(Lead Case)

**TUSD'S REPLY TO MENDOZA
PLAINTIFFS' OBJECTIONS TO
ADVANCED LEARNING
EXPERIENCES SUPPLEMENT**

CV 74-204 TUC DCB
(Consolidated Case)

1 Maria Mendoza, et al.
 2
 3 Plaintiffs,
 4 United States of America,
 5
 6 Plaintiff-Intervenor,
 7
 8 v.
 9 Tucson Unified School District No. One, et al.
 10
 11 Defendants.

12 Tucson Unified School District #1 (“TUSD”), by and through undersigned counsel,
 13 files this Reply to Mendoza Plaintiffs’ Objections to TUSD’s Advanced Learning
 14 Experiences Supplement (ECF 1788) (“Mendoza Objection”). *See* ECF 1795. Neither the
 15 Special Master nor any other Plaintiff has objected to TUSD’s ALE Supplement.

16 The Mendoza Objection should be denied because, as directed by the ALE Order,
 17 ECF 1771, TUSD has established goals for increased African American and Latino
 18 participation in Advanced Learning Experiences both on an overall ALE participation level,
 19 and by individual program, just as the Court directed. TUSD agrees with the Mendozas that
 20 unitary status should not and cannot be determined by a numerical threshold set now but
 21 rather will be guided by a future assessment of the District’s good faith efforts.¹

22 The Mendozas then note that enrollment goals for UHS are not, but should be,
 23 included in the ALE Supplement. They ignore that UHS is expressly excluded from the
 24 ALE Order at p. 3, l. 21, and is governed by a discrete Action Plan and separate orders of
 25 this Court (ECF 1520; 1544).

26 ¹ The District’s ALE Supplement noted its desire to demonstrate unitary status as to
 27 ALEs by meeting *specific* threshold targets in 80% of ALE programs in addition to an
 28 overall increase based on the 20% rule. The District did not, however, intend that its
 submission be construed as an effort to predetermine the standard by which its unitary
 status should be evaluated. To the extent that the Supplement created such an impression,
 that reference – to “demonstrate unitary status” – is withdrawn. TUSD’s unitary status
 regarding its compliance with the law, including as to ALE’s, should be evaluated based
 upon the applicable legal standard and the USP.

The remainder of the Mendozas' objection relates to the ELL Supplement that was required by the ALE Order. That Order, however, did not direct that the ELL Supplement be filed with the Court, much less provide for a briefing schedule. Accordingly, the Mendozas have raised subject matter not appropriately before this Court and those concerns therefore must be disregarded and stricken.

I. Standard of Review

This Court must review the objection *de novo* pursuant to Fed. R. Civ. P. 53, and must uphold the ALE Supplement if it "conforms to the consent decree entered into by the parties and ... is compatible with the Constitution." *United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1360 (N.D. Ind. 1981). The Mendozas have not objected to the ALE Supplement as unconstitutional. The Court must determine whether the ALE Supplement conforms to the USP and the ALE Order (ECF 1771). This is consistent with controlling case law, which dictates that the "Court is not here to act as a 'super school board' and is mindful of its role; the Court does not intend to micro-manage programmatic decisions by the District and will defer to reasonable proposals by the District." *See* ECF 1477; *see also Anderson v. Canton Mun. Separate School District*, 232 F.3d 450, 454 (5th Cir. 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *United States v. South Bend Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981); *Richmond Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 12 (1971), quoting *Brown v. Bd. of Ed.*, *Brown II*, 349 U.S. 249, 299 (1955).

II. The ALE Supplement Complies With Both the USP and ALE Order

The ALE Order required TUSD to develop "unitary status goals" and set "annual goals for attaining unitary status by the end of SY 2016-17." ECF 1771, p. 9, ll. 25-26. TUSD established its participation goals for African American and Latino students in the original ALE Plan to which the Special Master filed his R&R, ECF 1645, and which the Court addressed in the ALE Order. The ALE Supplement responds to the ALE Order by refining and explaining the District's goals, including setting more aggressive targets for

each ALE program. Among those refinements is a more aggressive target for each ALE Program. That is, the ALE Supplement proposes that participation by the plaintiff classes meet the “20% rule” threshold by the end of the 2015-16 school year, and that in 2016-17 at least 80% of the District’s ALE programs reach a “15% rule” threshold. For SY 2017-18 – into what the District hopes will be post-unitary time – the Supplement elevates the target further. For SY 2017-18, the Supplement suggests a 10% rule, with an ultimate goal of parity between the enrollment rates of African Americans and Latinos district-wide and their ALE enrollment rate. The Mendozas do not dispute that TUSD has set goals and explained its basis for doing so.

The Mendozas object to the provision that TUSD will show it has attained unitary status if it achieves the 15% rule in 80% of the ALE programs:

The Tucson Unified School District shall show it has obtained unitary status in the area of Advanced Learning Experiences when it reaches meets [sic] the below listed goals for 2016-17 in 80% (37 out of 45) of the individual programs with a corresponding overall ALE increase for African American and Latino students so that their ALE participation rate is within 15% of their enrollment rate in the district.

ECF 1788 at 10. The Mendozas contend this goal conflicts with the ALE Order requirement that TUSD provide a 20% rule report on each individual ALE program. However, the Mendozas mischaracterize the ALE Order because a requirement to **report** on each ALE program is not a requirement **to achieve** the 20% rule as to each ALE program.

To the extent the 80% reference is viewed as an effort to request that the Court predetermine the standard against which unitary status will be measured, TUSD withdraws it. Setting any pre-determined statistical outcome as the barometer for unitary status would inappropriately subvert the long-established applicable legal standard for such a determination. Indeed, the Unitary Status Plan recites the well-established framework for assessing whether a school district has sufficiently eliminated the vestiges of an unconstitutional *de jure* system.

A school district under a desegregation order is obligated to: (1) fully and satisfactorily comply with the court’s desegregation decree(s) for a reasonable period of time; (2) eliminate the vestiges of the prior *de jure* segregation to the extent practicable; and (3) demonstrate a good-faith

1 commitment to the whole of the court's decrees and to the applicable
2 provisions of the law and the Constitution.

3 The measure of a school district's progress toward unitary status 'is the
4 effectiveness, not the purpose,' of its actions. *Brinkman*, 443 U.S. at 537- 38;
5 see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).
6 A district must show both past compliance with its desegregation obligations
7 and a commitment to the future operation of its school system in a
8 nondiscriminatory manner. See *Dowell*, 498 U.S. at 247. To that end, a district
9 must demonstrate its "affirmative commitment to comply in good faith with
10 the entirety of a desegregation plan." *Freeman*, 503 U.S. at 499.

11 ECF 1713 at 6. Accordingly, unitary status will be determined at the end of SY 2016-17
12 under the legal standard summarized by the USP – and not whether TUSD meets its goals
13 in 8 out of 10 of the individual ALE programs.

14 Next, the Mendozas charge that the District's goal – satisfying a "15% test" in 80%
15 of the ALE programs – is actually *less* ambitious than the application of a "20% test" cross-
16 programmatically. A review of the attached data does not support this assertion. Indeed,
17 under multiple scenarios, which both include and exclude Dual Language enrollment,
18 TUSD predicts that achieving a 15% or less difference in the smallest 80% of all included
19 ALEs, with no improvement from current levels in the largest 20%, will result in overall
20 African American/Hispanic ALE percentages substantially in excess (between 88.6% and
21 97.0% depending on ethnicity and the inclusion or exclusion of Dual Language from the
22 comparison) of the "20% test" for the ALEs taken together. This is true for both African
23 American and Hispanic student participation in ALE programs.

24 The District agrees with the Mendozas that any rule of thumb, standing alone, is an
25 imprecise measure. For example, the Mendozas point out substantial Latino participation
26 rates in dual language could skew any cross-programmatic total. True. It is for this
27 precise reason that the District's targets for 2017 include both District-wide and program
28 specific goals.²

² Under this combined formula, high Latino representation in one program would not be enough. The District's goal would be for seven of the remaining nine ALEs to likewise reflect a Latino participation rate within 15% of the Latino population at that grade level.

Any District-wide statistics on the 20% rule should be reviewed to ensure that the success is across multiple programs. But this need to assess statistics consistent with known realities cuts multiple ways. For example, all current IB programs (limited to three schools) are located in racially-concentrated west-side schools. This fact of geography may very well make it far easier to satisfy the “15% rule” with regard to Latino students than for their African-American peers. Self-contained GATE programs are more abundant on (though not exclusive to) Tucson’s central and east side areas.

III. Many of the Mendoza Plaintiffs’ Objections Are Outside the Scope of the ALE Order and ALE Supplement

A. UHS is Not Part of the ALE Supplement.

The Mendozas “strenuously object” to the omission of UHS goals in the ALE Supplement. However, the ALE Order clarifies that UHS does not fall within the scope of the ALE Order. *See* ALE Order, ECF 1771 at 3 (“UHS is not at issue, here.”) Indeed, there are separate orders in place with respect to UHS. *See* ECF 1520 (Order Adopting Special Master R&R re UHS Admissions); ECF 1543 (Special Master Motion to Amend R&R re UHS Admissions); ECF 1544 (Order Granting Motion to Approve UHS Admissions Revisions).

B. The Mendoza Plaintiffs’ Objections to the ELL Supplement are Not Permitted by the ALE Order.

Nearly half of the Mendozas’ ALE Objection addresses the ELL Supplement. These objections are not properly before this Court and should be both disregarded and stricken. TUSD was required to submit to the Special Master and Plaintiffs an ELL Supplement (ECF 1771, lines 15-20) to provide goals (with explanation) for increasing ELL participation. The Court ordered that the District “develop goals for increasing participation of ELL students in specific ALE programs, where practicable, and provide explanation to the Plaintiffs and Special Master as to how these goals were derived.” ALE Order at p. 9, ll 15-17. The Court then directed that TUSD “provide” the supplement to the

1 Plaintiffs and Special Master, which it did on March 5, 2015. The Court did not authorize
2 briefing of objections.

3 On the other hand, TUSD was required to file with the Court an ALE Supplement
4 with comprehensive goals for ensuring African American and Latino students have equal
5 access to ALEs. The Court ordered a briefing schedule with respect to the ALE
6 Supplement that permitted objections by the Special Master and Plaintiffs within fourteen
7 days and a reply brief by TUSD within seven days thereafter. ALE Order, p. 10, ll 2-3. The
8 Mendoza Plaintiffs are inappropriately attempting to bootstrap ELL objections and issues
9 neither contemplated nor permitted by the Court into its objection to the ALE Supplement.
10 This is not permitted and, accordingly, absent the Court ordering briefing on the ELL
11 Supplement, TUSD does not respond to the ELL objections herein except to state that it will
12 follow reclassified ELL students (those no longer considered English Language Learners)
13 to the extent practicable as they may enter ALE experiences.

14 **C. The Mendoza Plaintiffs Ask the Court to Issue Orders Beyond the Scope**
15 **of the ALE Supplement.**

16 The ALE Order notes: “The Plaintiffs’ objections are limited to the annual goals set
17 by TUSD, not the specifics of the detailed plan of action to be undertaken.” *See* ALE Order
18 at p. 2. In response to those objections, and drawing from the Special Master’s Report and
19 Recommendation, the Court directed additional work on the District’s ALE Plan in a very
20 specific targeted area: the setting of annual ALE participation goals, by program and
21 overall, for the plaintiff classes. The Mendoza Objection, however, goes beyond the ALE
22 Order’s directives and asks the Court to require that certain activities be added to the
23 “detailed plan of action to be undertaken.” Specifically, they ask the Court to order that the
24 school board formally adopt all of the strategies that the ALE Supplement noted as ongoing
25 “Study/Action Items. The Court should reject this request.

26 **IV. Conclusion**

27 Based on the foregoing, TUSD respectfully requests that the Court deny the
28 Mendoza Plaintiffs’ objections to TUSD’s ALE Supplement, that the Court disregard and

1 strike as unpermitted the Mendoza complaints regarding any ELL issues, and issue its order
2 approving the TUSD ALE Supplement.

3
4 DATED this 5th day of May, 2015.

5 RUSING LOPEZ & LIZARDI, P.L.L.C.

6
7 s/ J. William Brammer, Jr.

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14 **ORIGINAL** of the foregoing filed via the CM/ECF
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16 Notice of Electronic Filing provided to all parties
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EXHIBIT 1

**Projection of effect of Raising 80% of ALE programs to 80%/85% levels on overall
African American participation levels in ALE**

Program	District	14-15 N	African American		
			14-15 Percentage	80%	85%
Pullout GATE	1577	66	4.19%	97	103
Self-Contained GATE	1057	50	4.73%	65	69
Resource GATE	1221	84	6.88%	75	80
Advanced Placement (AP)	2985	183	6.13%	184	195
Advanced Pre-AP	1309	106	8.10%	81	86
Honors Pre-AP	4953	342	6.90%	305	324
Dual Credit	228	23	10.09%	14	15
International Baccalaureate (IB)	1719	126	7.33%	106	113
Dual Language (DL)	2163	52	2.40%	133	142
Middle School for High School Credit	1237	55	4.45%	76	81
Total	18449	1087	5.89%	1136	1207
Total without Dual Language	16286	1035	6.36%	1003	1066

	N	% of ALE Enrollment	% of District Enrollment
Raise 8 smallest ALEs (including DL) to 80% if not there already, maintain others at 14-15 levels	1236	6.70%	86.9856%
Raise 7 smallest ALEs (not including DL) to 80% if not there already, maintain others at 14-15 levels	1103	6.77%	87.9833%
Raise 8 smallest ALEs (including DL) to 85% if not there already, maintain others at 14-15 levels	1260	6.83%	88.6822%
Raise 7 smallest ALEs (not including DL) to 85% if not there already, maintain others at 14-15 levels	1130	6.94%	90.0881%

**Projection of effect of Raising 80% of ALE programs to 80%/85% levels on overall
Hispanic participation levels in ALE**

Program	District	14-15 N	Hispanic	80%	85%
			14-15 Percentage		
Pullout GATE	1577	791	50.16%	763	811
Self-Contained GATE	1057	517	48.91%	512	544
Resource GATE	1221	667	54.63%	591	628
Advanced Placement (AP)	2985	1316	44.09%	1445	1535
Advanced Pre-AP	1309	753	57.52%	634	673
Honors Pre-AP	4953	2636	53.22%	2397	2547
Dual Credit	228	119	52.19%	110	117
International Baccalaureate (IB)	1719	1323	76.96%	832	884
Dual Language (DL)	2163	1883	87.06%	1047	1112
Middle School for High School Credit	1237	780	63.06%	599	636
Total	18449	10785	58.46%	8929	9487
Total without Dual Language	16286	8902	54.66%	7882	8375

	N	% of ALE Enrollment	% of District Enrollment
Raise 8 smallest ALEs (including DL) to 80% if not there already, maintain others at 14-15 levels	10785	58.46%	96.63%
Raise 7 smallest ALEs (not including DL) to 80% if not there already, maintain others at 14-15 levels	8902	54.66%	90.35%
Raise 8 smallest ALEs (including DL) to 85% if not there already, maintain others at 14-15 levels	10832	58.71%	97.04%
Raise 7 smallest ALEs (not including DL) to 85% if not there already, maintain others at 14-15 levels	9168	56.29%	93.04%