August 10, 2015

To: Parties

From: Bill Hawley

Re: Draft R&R on Objections to the 2016 Budget

Introduction

Because this R&R is specifically ordered by the Court, I am submitting a preliminary draft to the parties in an effort to resolve differences and avoid the Fisher and Mendoza objections to the District's budget being submitted to the Court.

If I have misrepresented your positions or if you want clarify or object to my proposals, please let me know asap. If the District agrees with the actions I ask the Court to direct it to do, it should so stipulate so we can take the matter off the table.

The Department of Justice has filed no objections to the 2015-16 USP budget passed by the Governing Board. The Fisher and Mendoza objections were filed on July 24, 2015. Some plaintiff objections include complaints that the District did not respond to questions submitted to it by the plaintiffs and argue that this affected their ability to evaluate the budget. Since complaints do not represent objections to particular allocations, I will not address them in this R&R.

Comment [FISHER1]: The Fisher Plaintiffs disagree: it would be unreasonable and counterproductive to ignore plaintiff objections not linked to specific allocations. In fact, the "complaint" that the District failed to provide information necessary to evaluate the adequacy of the USP budget is better characterized as an objection: the description and disaggregation of administrators' duties (into work implementing the USP and work otherwise necessary) is certainly necessary before the plaintiffs can object to the ratio of USP funding to M&O funding allocated to those administrators' salaries. Which this memorandum recognizes as a valid inquiry (with respect to Bryant Nodine's salary).

Objections by Both Plaintiffs

<u>The District's Decision to Freeze Hiring for Positions Approved by the Court</u>

Both plaintiffs object to the District actions during the past fiscal year that froze positions that had been approved in the 2014-15 budget approved by the Court. In freezing the hiring of people to these positions, the District impeded the implementation of agreed-upon actions related to provisions of the USP.

Recommendation

While there is no indication that the District intends to freeze expenditures approved by the Governing Board in 2015-16 budget, there is also reason to believe that the District will again freeze Court-approved expenditures should it believe that financial exigencies so require. The Court should prohibit such actions in the future. The parties agreed at meetings held in March 2015 that the District could reallocate funds if it shared such proposed actions with the plaintiffs and special master thus allowing for objections prior to the action being proposed.

Objection related to the proposed In-School Intervention (ISI) and District Alternative Education (DAE) Programs.

In response to criticisms by the plaintiffs and the special master relating to both the number of suspensions and potentially discriminatory nature of suspensions, as well as general guidance from its consultant on school dropouts, the District has modified existing policies and strategies relating to both short-term and long-term suspensions. Both plaintiffs object to the fact that the development of these new strategies were not submitted to the plaintiffs and the special master in accordance with provisions Section I.D.1 of the USP. However, the Mendoza plaintiffs do not formally object to not having been informed in a timely way reserving this concern for another time. The Fisher plaintiffs have additional objections arguing that: (1) the substance of the plans were not approved by the Governing Board so that the Governing Board had no opportunity to know of the plaintiffs objections, (2) the proposed funding substitutes 910 G funds for Management and Organization (M&O) previously used to support at least part of these new programs, (3) the DAE program will result in a racially concentrated school environment for the students involved and (4) that these programs give too little attention to the training and climate development that would prevent behavioral problems that might lead to suspensions.

The Mendoza objections focus on what appear to be inconsistencies or omissions in the proposed programs and inconsistencies with the approved dropout prevention plan. Because suspensions are highly correlated with dropping out

and failing to graduate, it is important that policies and practices with respect to suspensions and dropout prevention are coherent. It is not clear that the issues raised by the Mendoza plaintiffs with respect to the ISI and DAE programs are the result of intent by the district or the consequence of the policy development processes involved because the district has not commented on either the Mendoza or Fisher objections.

Recommendations

With respect to the Fisher objections relating to the process of review, it is arguable that Section I.D.1 of the USP would not apply because the proposals could be seen as modifications of existing programs and policies, a point made by the Fisher plaintiffs when they argue that funding these programs represents supplanting rather than supplementing. In any event, the parties are and discussion about clarifying the comment and review processes pursuant to a recent order of the court. While the order encouraged the submission to the Board of comments by the plaintiffs and the special master when major policies are being considered, the procedures for implementing this order have not yet been approved. I recommend that the court not reject the expenditures for the ISI and DAE programs on procedural grounds. The fact that the Board does not require detailed explanations for expenditures (it did not review magnet school plans either) is a matter of Board policy that apparently delegates substantial autonomy to the Superintendent on budget matters. But this does not relieve the District from justifying its expenditures to the plaintiffs.

Comment [FISHER2]: The Fisher Plaintiffs would not agree with the argument that the modification of existing - as opposed to the introduction of wholly new - programs or policies should not also trigger the requirements of the USP.

With respect to the argument that these expenditures represent supplanting, I believe that the Court should not reject these expenditures in their entirety on these grounds. The plaintiffs and the special master have expressed concerns that the district do more to reduce the number of suspensions and eliminate any sources of discrimination and such disciplinary actions. Clearly, this is a high priority of the USP. The District proposals, while in need of revision to deal with inconsistencies and ambiguity, are not unreasonable. Moreover, the District proposes an extensive evaluation of the efficacy of these program changes, a development that should be supported (see need for clarification of this below).

Comment [FISHER3]: The Fisher Plaintiffs' ability to evaluate the proposed programs has been harmfully restricted by the District's failure to adhere to the procedures governing the development, implementation and funding of programs implicating the student assignment and discipline provisions of the USP. Both the ISI and the DAE programs propose the reassignment of TUSD students for disciplinary purposes, impact the student assignment and discipline provisions of the USP, warrant desegregation impact analyses, formal plans and the solicitation of feedback from the Special Master and the plaintiffs. None of the above have occurred and yet the District has asked the plaintiffs, the SM and the Court to approve, carte blanche, the allocation of over one million dollars. The Fisher Plaintiffs remain convinced that these procedural objections must be addressed before the plaintiffs and the SM and the Court will be in a position to properly evaluate and comment on the substance of the proposed programs.

However, some of the funding from 910g funds proposed for these programs replace funding from M&O sources which appears to be supplanting. Just because a goal is identified in the USP does not mean that the pursuit of that goal can be funded by 910g funds. To argue that it did would mean that every effort to improve the achievement of African American and Latino students would be eligible for 910g funding. There is no easy formula to be called upon here. I recommend that the Court direct the District to identify activities embedded in the ISI and DAE activities funded from M&0 funds prior to the 2013-14 budget and reduce the 910g funding accordingly. Why not simply use last year's budget as a baseline? Prior to the 2013, there was little rationale for the use of 910g funds. Since then, the District has been transitioning to a set of policies for the use of 910g funding that ties that funding directly to the provisions of the USP. This case can be seen in that light.

Comment [FISHER4]: The Fisher Plaintiffs believe reference to past budgets would be a useful starting point, but remain convinced that the substance and goals of the programs and the degree to which they are driven by the requirements of the USP should be determine the ratio of USP to M&O funding they are allocated.

The Fisher plaintiffs object to placing students at sites where such placement would result in a racially concentrated school or school becoming more racially concentrated. This concern is predicated on the proposed plan to locate students with long-term suspensions at Project More. However, these placements are meant to be temporary and no alternative is proposed by the Fisher plaintiffs that would allow for focused service delivery being proposed in the DAE plan. Were students in need of the services to be provided were to be assigned to different schools the schools would have to be staffed appropriately. I recommend that the Court not reject the DAE plan because it may assign students to a racially concentrated school.

Comment [FISHER5]: The Fisher Plaintiffs cannot agree to the deliberate creation of racially identifiable schools. The potentially limited amount of time students spend in the racially identifiable school (in comparison to the total amount of time they spend at TUSD schools over the course of their education) does not undo the harm such assignment would cause. Shifting the burden of proposing alternative solutions to the plaintiffs, under the procedurally compromised circumstances described above, is wholly inappropriate and counterproductive. Having addressed and rectified the procedural defects described above, and assuming further that the substance of the proposed programs warrants implementation (an assumption that the Fisher Plaintiffs cannot concede here), the Fisher Plaintiffs would be happy to explore alternative siting scenarios that do not require the establishment of racially identifiable schools.

The Fisher plaintiffs argue correctly that the ISI and DAE plans do not deal with the prevention of student behaviors that result in suspension except in so far as the strategies to be employed affect the students suspended. This concern of the Fisher plaintiffs was addressed in a report I made to the Court as a result of earlier objections by the Fisher plaintiffs about the inadequacy of discipline related professional development. This led to a revision of the district plan for professional development and an appropriate action would be to monitor the implementation of this revised plan. A member of the Implementation Committee has been engaged in such monitoring and a report from the special master will be

forthcoming that concludes, among other things, that additional work by the district with respect to professional development that would reduce student misbehavior is warranted.

I recommend that the Court direct the District to address the following concerns of the Mendoza plaintiffs:

1. Specify the alternatives to suspension that apply to students who are suspended between 10 and 20 days.
2. Identify an approach to Social Emotional Learning other than The Seven Habits of Highly Effective Teams or provide an evidence-based rationale for the use of the proposed the "7 Habits" program for character development.
3. Clarify the role of social workers in the ISI program that is consistent with the proposed role of social workers in the dropout prevention plan.
4. Identify the elements of the "success plan" for students leaving the ISI program that includes the components set forth in the dropout prevention plan.
5. Clarify that out of school suspensions will not be used for Level 1 or 2 offenses under any circumstance.
6. If a comprehensive evaluation of the DAE program is not being called for, such an evaluation should be undertaken.
7. Clarify that students assigned to the DAE program (a) will not have their suspensions extended as a result and (b) how students who are not suspended for the specific days identified in the DAE will be treated.
8. Clarify that a Level I violation may not be the cause of out of class suspensions under any circumstances and that Level one through three violations may not be elevated to level 4.

Funding for Magnet Schools

Both the Fisher and Mendoza plaintiffs object to specific funding decisions for particular magnet schools but the nature of their objections are quite different.

The Fisher plaintiffs object to the funding of magnet coordinators at Ochoa and Cragin on the grounds that they will lose their magnet status in 2016-17. The

Mendoza plaintiffs are concerned that some magnet schools who are at risk of losing their magnet status are underfunded.

While Ochoa may well lose magnet status if it cannot integrate its entry class, that decision has not been made. The District made a commitment to Cragin's families and staff in 2014-15 to implement a new magnet school at the site. The District now feels that this decision, which was opposed by the plaintiffs, should be withdrawn but this commitment is reflected in the hiring of personnel that should be honored for the current budget year.

With respect to the schools that the Mendoza plaintiffs have identified as vulnerable--Ochoa, Robison, Utterback and Holladay—they argue that these need additional funding. It should be noted that all of these schools have more funding in the current year than they did in the previous year. It is not unreasonable to argue that even more funds would help these schools but the District confronts a difficult dilemma. If it assumes, based on a careful analysis of past experiences with respect to both integration and student achievement, that these schools are likely to lose magnet status, a heavy investment in those schools without revised plans seems problematic. If some schools do lose magnet status, and the special master may make such a recommendation based on enrollment data within the next few weeks, the District should engage in a plan to meet the academic performance needs of the students in those schools and not invest further in either futile efforts to attract more integrated student population or the development of the themes that putatively differentiate them as magnets. Moreover, if magnet status is withdrawn, funds aimed at recruitment of diverse student populations for the current year can be reallocated to enhancing academic achievement.

While the district should be given wide latitude in developing school level magnet plans, virtually every comprehensive approach to improving the achievement in schools where students are performing well below standards, especially if the students are from low income communities, places an emphasis on family engagement. In general, the school level plans for magnet schools and programs serving underperforming students appear to give inadequate attention to

Comment [FISHER6]: The Fisher Plaintiffs fail to understand how this recommendation justifies the challenged allocation. Saying that something should happen without offering any explanation about why it should happen is not a particularly persuasive argument. As the Fisher Plaintiffs explained in their objection, there is no rational basis for funding magnet coordinators at schools that will not be functioning as magnets. Such allocations would be better spent on academic interventions recognizing that the schools at issue will not continue to operate as magnets. This memorandum does not offer a reasoned counter-argument to the Fisher Plaintiffs' objection to the challenged allocation.

enhancing family engagement in ways that are consistent with the essential elements of culturally responsive pedagogy.

The Mendoza plaintiffs also object to the lack of transparency in school level budgets and asks the court to direct the District to provide the expenditures budgeted for each magnet school and program and file such information with the Court and post such information on the District website as provided for in section X.B.6 of the USP.

Recommendations

I recommend that the Court not require the District to alter it 910g budget for magnet schools as requested by the Fisher and Mendoza plaintiffs. However, it is difficult to know exactly what the budget calls for because the budget provisions do not reconcile well with the expenditures listed in the school level plans submitted by the District to the Court. Therefore, the Court should require the District to:

1. Fully fund the activities identified in the school level plans embodied in the comprehensive magnet plan submitted to the court whether these funds come from 910 G or other sources.
2. Direct the school to identify the expenditures budgeted for each magnet school program insufficient detail to allow the public to understand how the activities in the plan will be supported. This information shall be posted on the district website as provided for in the USP.
3. Ensure that activities needed to implement the academic improvement plans in schools now identified as C and D schools include family engagement. These family engagement activities may be funded from other sources that 910 G and may be part of the District's overall family engagement plan.

Comment [FISHER7]: It is hard to understand how this recommendation logically follows from the analysis provided above: the allocations are money misallocated in light of the foreseeable and immanent withdrawal of magnet status and the concomitant need to revisit the schools' goals, but inexplicably we shouldn't expect the District to reallocate what is recognized as misallocated desegregation funding. The Fisher Plaintiffs see no rational basis for withdrawing their objection or endorsing this recommendation.

<u>Additional Objections by the Fisher Plaintiffs</u>

The Fisher plaintiffs object to fully funding the position of Director of Planning Services from 910 G funds. They also object to funding a portion of the salary of Richard Foster (who serves as Interim Assistant Superintendent for Curriculum and Instruction) and ask the Court to direct the District to revise its budget show that it has eliminated all instances of salary supplanting and exemplified by this particular instance.

Recommendation

In response to a question from the special master, the District indicated on July 7, 2015 that 50% of the Director of Planning's Work involves the implementation of the USP. Therefore, the Court should limit 910g funding to 50% of the Director of Planning's salary and benefits. The Fisher plaintiffs proposal that the District be required to identify in detail the role that each administrator or professional educator, or other employee play in implementing the USP does not seem feasible. The activities required by the USP are embedded in the day-to-day work of the vast majority of employees in the District. We have established collaboratively some guidelines for determining when funding involves supplanting rather than supplementing-- such as the so-called formula plus rule. In Dr. Foster's case, the District proposes to fund one fourth of his salary. No doubt at least one fourth of his work is directly related to the implementation of the USP but to specify the exact amount would be very difficult. I recommend that the Court not require the District to specify the particular time that each employee allocates to implement the USP. However, I also recommend that the District pay all of Dr. Foster's salary from M&O, as it has in the past and as it did for Assistant Superintendent for Curriculum and Instruction. The implicit understanding among the parties has been that positions the District would have absent a USP (such as a Director for Professional Development), would be funded by M&O funds. If this were not the case, 910g funds would be supporting almost every employees in the District because almost all employees have some role to play in implementing the USP.

The Use of 910 G Funds at University High School

Comment [FISHER8]: If the District is clearly capable of conducting this analysis for the Director of Planning, why is it unfeasible to conduct that same analysis for other administrative positions?

Comment [FISHER9]: Without some greater understanding of the position and the duties and the amount of time afforded to those duties, a great deal of doubt remains about the appropriate ratio of USP to M&O funding allocated to the position.

Comment [FISHER10]: This would satisfy the Fisher Plaintiffs concerns with respect to this position, but it might also prove inconsistent and unfair: don't fund Dr. Foster's salary at all, even if he spends time on tasks otherwise unnecessary were it not for the requirements of the USP, but do fund Bryant Nodine's salary from the USP budget at a rate keyed off the percentage of his time spent on tasks otherwise unnecessary were it not for the requirements of the USP. The internal inconsistency of this approach could prove unfair and irrational applied to the full range of positions receiving allocations from the USP budget.

The Fisher plaintiffs are concerned about 910 G funds are used to support the 30% of the UHS students who do not live in the District.

Recommendation

On July 17, 2015, the District provided me with an explanation of how 910 G funds were used at UHS. It appears that much of this funding is focused on recruitment of resident African-American and Latino students and the provision of services to these students to ensure their success at UHS. I recommend that the Court ask the special master to examine whether 910g funds are used to support students who do not reside in TUSD and to make a report to the Fisher plaintiffs accordingly no later than October 15, 2015. Should they wish at that point to object to these expenditures, the Fisher plaintiffs could then do so. It may be that some nonresident students who are struggling at UHS would receive services concomitantly with TUSD resident students and if this were the case it would not seem inappropriate. This conclusion would make a general stipulation that no 910g funds could be used to facilitate the learning of nonresident students impractical as might other examples of how 910g funds are used at UHS.

Comment [FISHER11]: The Fisher Plaintiffs remain convinced that the challenged allocations are appropriately challenged here and now, not halfway through the Fall semester. The District carries the burden of demonstrating that the challenged allocations are appropriate, if the Court determines that it has not yet met that burden and wishes to afford it further time to do so, the District can certainly provide the necessary information on a tighter timeline. The Fisher Plaintiffs have already lodged their objection to the allocation. Affording the plaintiffs the opportunity to object again halfway through the semester would only serve to delay the necessary judicial determination that the objection has already triggered.

<u>Objection to the Extent of 910 G Funding for Gifted and Talented Education (GATE)</u>

The Fisher plaintiffs assert that the District intends to fund 60% of the cost of GATE classes from 910 G funds and 40% of its GATE classes from the M&O budget. On the face of it, this ratio does not seem justifiable but in the absence of a careful analysis, it would be difficult to specify the percentage of funding for GATE programs that should come from M&O funding. Clearly, the USP calls for increased recruitment enrollment and retention of African-American and Latino students in such classes. And, the District has agreed that the formula plus rule should apply.

Recommendation

The Court should direct the District to undertake a careful analysis of the rationale for the use of 910 G funding for GATE classes and to do so in collaboration with the special master with a preliminary report being submitted to the plaintiffs in January, 2016.

Comment [FISHER12]: The proposed analysis should precede, not follow, the challenged allocation. Approving a full six months of funding before assessing the appropriateness of the funding would be inappropriate, especially in light of the preceding acknowledgement that "[o]n the face of it, this ratio does not seem justifiable but in the absence of a careful analysis, it would be difficult to specify the percentage of funding for GATE programs that should come from M&O funding." The careful analysis lacking is the analysis the District should have already conducted to demonstrate, and not simply claim, that the challenged allocations are appropriate and justifiable under the goals of the USP.

910 G funding for the Pan- Asian Student Services Department

The Fisher plaintiffs assert that because Asian students are not covered by the USP, the department providing services to such students should not be funded from 910G. The District argues that this department also is responsible for supporting refugee students, a significant number of whom are from Africa and such students are classified as African-American. Fisher plaintiffs argue that the African-American Student Service Department, provides services to African refugees.

Recommendation

To my knowledge, this is the first time this issue has been raised in the context of budget considerations. Moreover, the District is involved in a study of the roles being played by the African-American Student Services Department and the Mexican American Student Services Department. These studies could lead to a significant restructuring of student services provision. I recommend that the Court direct the District to conduct a study of how the needs of refugee Africans students are being met and should be met in the future and what the budget implications of such a study should be for both the Pan- Asian Studies department and the African-American student department.

Comment [FISHER13]: Until the described study has been conducted and shows otherwise, the Fisher Plaintiffs remain convinced that the District should revise its 2015-16 USP budget to eliminate the proposed allocation as unrelated to the goals of the USP.

Proposed Allocation to Implement Recommendations of the African-American Academic Achievement Task Force (AAAATF)

During the budget process for the 2014-15 budget,, the district agreed to set aside $500,000 for implementing the recommendations of the AAAATF. Draft three of the 15-16 budget, lists an allocation of $1,105,230 for Activity 514: AAAATF Recommendations. In the final budget, the amount listed is $724,702 and almost all of these funds are to be used by the African-American Student services Department leaving no funds to implement the AAAATF assuming they propose

additional strategies for meeting the academic needs of African American students. Thus far, there are been no recommendations from the task force and thus no expenditures.

Recommendation

It makes little sense to have a task force that was established to address a serious problem--the underachievement of African-American students--and provide no funding for its proposals. I recommend that the District provide a set aside of $500,000, as previously promised in the last budget year to permit (not require) implementation of the AAAATF report scheduled for submission to the District this fall.

Comment [FISHER14]: Agreed.

Additional Objection from the Mendoza Plaintiffs

Mendoza plaintiffs draw attention to the absence in the 2015-16 budget of funding to expand your language programs as provided for in the USP. They note that there are actually fewer students now in dual language programs that when the USP was approved in 2013. In my R&R dealing with the Comprehensive Magnet Plan, I recommended that the District not be required to create an additional dual language magnet program because the existing programs have failed to attract an integrated student population. However, that conclusion does not excuse the District from aggressively pursuing the establishment of dual language programs. Other districts have found dual language programs to promote integration and, as important, such programs have been found to enhance language skills AND to promote cognitive development generally. In short, the case for dual language programs is substantial. It does not appear that the District has engaged in an in-depth study of what makes for effective dual language programs for integration purposes nor has it examined whether locating dual language programs in other sections of the District and in schools that do not have Latino student populations in excess of 85% (the case for Davis and Roskruge) would not attract students of all racial and ethnic backgrounds. The District argues that it is difficult to sustain dual language programs because of the difficulty of recruiting bilingual teachers. However, the USP provides for financial

incentives for to recruit and retain teachers in hard to staff subject areas. Such incentives have not been used recently to recruit bilingual teachers in TUSD.

Recommendation

The Court should direct the District undertake a significant study to identify what it would take to implement one or more additional dual language programs. This study, as have other studies undertaken by the District, should engage a nationally recognized consultant to assist in the study. Study design should be submitted to the plaintiffs and the special master within 30 days of the Court's order and a report on the results of the study submitted to the plaintiffs and the special master no later than January 2016 so that one or more new programs could be initiated should the study suggests that such action is feasible.