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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,  
Plaintiffs  
and  
United States of America,  
Plaintiff-Intervenor,  
v.  
Tucson Unified School District, et al.,  
Defendants,  
and  
Sidney L. Sutton, et al.,  
Defendants-Intervenors,

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No. CV-74-00090-TUC-DCB

Maria Mendoza, et al.,  
Plaintiffs,  
and  
United States of America,  
Plaintiff-Intervenor,  
v.  
Tucson Unified School District, et al.  
Defendants.

No. CV-74-0204-TUC-DCB

**ORDER**

1 Advanced Learning Experiences

2 February 13, 2015, the Court issued an Order in response to a Report and  
3 Recommendation (R&R) filed by the Special Master at the behest of the Mendoza  
4 Plaintiffs. He recommended improvements to TUSD's Advanced Learning Experiences  
5 (ALE) Access and Recruitment Action Plan. The Unitary Status Plan (USP) requires  
6 TUSD to improve access in ALE programs by Black and Hispanic students (minority  
7 students), including English Language Learners (ELL) students. USP § V.a.2.a.<sup>1</sup>; *see*  
8 *also* § V.a.2.c (requiring TUSD to support minority students' successful completion of  
9 ALEs). The ALE programs include the following: Gifted and Talented Education (Self-  
10 Contained; Pull-Out, and Resource); Advanced Placement; Pre-Advanced Placement;  
11 Honors Pre-Advanced Placement; Dual Credit; International Baccalaureate; Dual  
12 Language; Middle School Course for High School Credit, and University High School  
13 (UHS). The USP required TUSD to develop annual goals and share those goals with  
14 Plaintiffs and the Special Master. USP § V.A.2.a. When TUSD did this in 2014, the  
15 Plaintiffs and Special Master complained that the goals set by TUSD did not sufficiently  
16 increase minority access in ALE programs.

17 Plaintiffs and the Special Master challenged TUSD's proposal for a "less-than"  
18 20% Rule, which set the goal for minority access at NOT less than 20% of the minority  
19 group's enrollment rate District-wide. TUSD proposed a base-line year of SY 2012-13  
20 with an end-date of SY 2017-18. The Court noted that the USP proposed deadline for  
21 attaining unitary status in the USP is SY 2016-2017. The Court rejected, outright, the  
22 adequacy of zero to one percent increases in ALE participation, but did not adopt  
23 Plaintiffs' suggestion of parity. The Court found that the "less-than 20% Rule" was an  
24 imprecise standard: merely a rule-of-thumb, which might red-flag the existence of  
25 discrimination depending on a multitude of other variables. (Order (Doc. 1771) at 8.)  
26 The Court ordered TUSD to "begin consulting with the Plaintiffs and the Special Master"  
27 regarding how to comprehensively measure the effectiveness of the ALE Action Plan to

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28 <sup>1</sup> See USP (Doc. 1713), edited for typographical errors.

1 determine whether TUSD has attained unitary status in regard to its obligation to increase  
2 access for minority students in ALEs. *Id.* The Court required TUSD to establish the end-  
3 goal to be achieved in SY 2016-17 and work back from there to set the annual goals. *Id.*  
4 at 8.

5 The Court rejected the notion of an aggregate rule for measuring the efficacy of  
6 the ALE Action Plan, and ordered TUSD to develop goals for increasing participation of  
7 minority students, including ELLs, in the individual ALE programs to the extent  
8 practicable for each ALE. The Court ordered TUSD to work in consultation with the  
9 Plaintiffs and the Special Master to develop comprehensive goals for attaining unitary  
10 status in ALEs and, accordingly, file a Supplement to the ALE Action Plan.

11 On April 14, 2015, TUSD filed the Supplemental ALA Action Plan. Again, the  
12 Plaintiffs Mendoza object. Again, TUSD has proposed an aggregate measurement of the  
13 effectiveness of its plan to increase the number of minority students enrolling in and  
14 successfully completing ALEs. TUSD proposes to show it has obtained unitary status in  
15 the area of ALEs when it reaches a “not less than” 15% goal for 2016-2017 for 80% (37  
16 out of 46) of the individual ALE programs. (Supp. ALE Action Plan (Doc. 1788) at 6.)  
17 TUSD will apply the 20% Rule to ALEs in SY 2015-2016, but will increase participation  
18 in SY 2016-2017 in ALE’s to not less than 15% of the minority group’s enrollment rate  
19 in the District, and by SY 2017-2018, minority participation in ALEs will be not less than  
20 10%. In reply to the Mendoza objection, TUSD clarifies that it did not intend to  
21 predetermine the standard by which unitary status should be evaluated. (Reply (Doc.  
22 1797) at 1 n.1.)

23 So perhaps, the Court should grant the Mendoza Plaintiffs’ request to “direct the  
24 Special Master to work with the parties to formulate a standard to determine whether the  
25 District achieves unitary status with respect to ALEs.” (Mendoza Objection (Doc. 1795)  
26 at 16.) But, this directive was already given by the Court on February 13, 2015. The  
27 Court sees little point in repeating this directive. TUSD asserts it extended personal  
28 invitations to both plaintiff groups to participate in developing the Supplement, and both

1 declined. (Supp. ALE (Doc. 1788) at 2.) The Mendoza Plaintiffs complain that they  
2 were not consulted about the new goal and first learned of it upon reviewing the  
3 Supplement. (Objection (Doc. 1795) at 3 n.1.) As a result, the Supplement offers  
4 nothing more than the original ALE Action Plan, a disputed standard for measuring the  
5 efficacy of the ALE Action Plan to increase access in ALEs and improve minority  
6 students' successful completion of ALE programs.

7 What is clear is that TUSD has an ALE Action Plan by which it believes it will  
8 increase participation by minority students in ALEs so as to attain unitary status by SY  
9 2016-2017. And, the Plaintiffs Mendoza believe that the ALE Action Plan fails to  
10 sufficiently increase the number and success of minority students in these programs, i.e.,  
11 TUSD could do more if it wanted in good faith to eliminate the vestiges of discrimination  
12 in these programs to the extent practicable. The Mendoza Plaintiffs give several  
13 examples of impediments not being addressed by TUSD, such as: fewer minority  
14 students compared to nonminority students take and pass the AP placement tests.  
15 (Objection (Doc. 1795) at 9-10.) TUSD has only considered increasing ELL numbers in  
16 four ALE programs which involve dual language instruction, but the Mendoza Plaintiffs  
17 believe there is evidence that ELL students are successfully participating in others. *Id.* at  
18 11-16.

19 Given the proximity of the SY 2016-2017 deadline, the Court is not inclined to  
20 afford more time for the parties to continue to disagree over the sufficiency of TUSD's  
21 ALE Action Plan. The Court finds the better approach is to call for an R&R from the  
22 Special Master as soon as the data becomes available for SY 2016-2017. The R&R  
23 should be a comprehensive assessment of the original ALE Plan of Action and the  
24 Supplement, and include UHS and ELLs, to determine whether TUSD is on a projectory  
25 to meet the requirements set out in the USP ALE provisions. If not the Special Master's  
26 report should include recommendations for specific measures which could practicably be  
27 undertaken by TUSD, acting in good faith, to implement the provisions of the USP which  
28 require TUSD to improve minority student access to ALEs and improve the completion

1 rate of minority students in these programs. The Court requests this R&R, pursuant to  
2 the oversight, monitoring, and reporting responsibilities assigned to the Special Master in  
3 the USP § X.E and the January 6, 2012 Order.


4 **Accordingly,**

5 **IT IS ORDERED** that the ALE Action Plan is not adopted by the Court.

6 **IT IS FURTHER ORDERED** that as soon as data becomes available to SY  
7 2016-2017, the Special Master shall file an R&R with the Court, which shall be a  
8 comprehensive review of the original ALE Action Plan and the Supplement and include  
9 UHS and ELL goals, and report to the Court whether TUSD is on a projectory to meet the  
10 requirements set out in the ALE provisions in the USP. If not, the Special Master's R&R  
11 shall include recommendations for specific measures which could practicably be  
12 undertaken by TUSD, acting in good faith, to implement the provisions of the USP aimed  
13 at improving minority student access to ALEs and improving the completion rate of  
14 minority students in these programs.

15 Dated this 26th day of January, 2016.

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David C. Bury  
United States District Judge