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12
13 **UNITED STATES DISTRICT COURT**

14
15 **DISTRICT OF ARIZONA**

16 Roy and Josie Fisher, et al.,
 17 Plaintiffs,
 18 v.
 19 United States of America,
 20 Plaintiff-Intervenors,
 21 v.
 22 Anita Lohr, et al.,
 23 Defendants,
 24 Sidney L. Sutton, et al.,
 25 Defendant-Intervenors,

Case No. 4:74-CV-00090-DCB

**MENDOZA PLAINTIFFS' REPLY TO
THE RESPONSE BY TUCSON UNIFIED
SCHOOL DISTRICT TO MENDOZA
PLAINTIFFS' OBJECTIONS TO THE
SPECIAL MASTER'S REPORT AND
RECOMMENDATION REGARDING
ADVANCED LEARNING
EXPERIENCES**

Hon. David C. Bury

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1 **THE VESTIGES OF DISCRIMINATION IN THIS CASE ARE NOT LIMITED TO**
2 **“THE ASSIGNMENT OF STUDENTS AT NINE SCHOOLS”. THE DISTRICT**
3 **MUST ELIMINATE THE VESTIGES OF DISCRIMINATION TO THE EXTENT**
4 **PRACTICABLE WITH RESPECT TO ALL *GREEN* FACTORS, INCLUDING**
5 **QUALITY OF EDUCATION.**

6 TUSD asserts that its obligations with respect to ALEs are limited and need not
7 include “academic results” (ALE Response at 3:20) because Judge Frey found that “the
8 only vestige of the prohibited conduct remaining in 1978 was in enrollment levels at nine
9 schools.” (*Id.* at 2:11-12.) But the scope of the District’s obligation to remove the vestiges
10 of discrimination is considerably greater, as the Ninth Circuit made plain when it reversed
11 this Court’s 2009 order granting unitary status. *Fisher v. Tucson Unified School District*,
12 652 F. 3d 1131, 1135¹ (9th Cir. 2011) (in assessing whether a school district has
13 eliminated the vestiges of past discrimination, a district court must “ ‘look not only at
14 student assignments, but ‘to every facet of school operations’....”)

15
16 Most tellingly with respect to the issues now before this Court, before it remanded
17 with the direction that this Court maintain jurisdiction until it is “convinced that the
18 District has eliminated ‘the vestiges of discrimination....to the extent practicable’ with
19 regard to all of the *Green* factors” (*id.* at 1144), the Ninth Circuit expressly enumerated
20 areas with respect to which this Court had “stated concerns about whether the District had
21 sufficiently eliminated the effects of past *de jure* segregation.” Among them was the
22 District’s failure to have reviewed “program effectiveness in order to ensure quality
23 education for minority students.” (*Id.* at 1142; *see also id.* at 1140: “the District had
24 ‘failed to review student achievement as a measure for program effectiveness’ despite the
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27 ¹ Quoting *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237,
28 250 (1991), in turn quoting *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U. S. 430,
435 (1968).

1 fact that ‘ongoing review of program effectiveness is the only way to ensure that
2 ...program changes address demographic segregation and the quality of education for
3 minority students.’”) Thus it is clear that the Ninth Circuit fully understood -- and
4 expected-- that this Court would consider quality of education and “academic results”
5 when it determined whether TUSD had eliminated the vestiges of its past discrimination.
6

7 Further, this Court, when it adopted the USP, reviewed the Ninth Circuit’s opinion
8 and expressly rejected the very argument the District makes in its ALE Response. In its
9 Order, this Court wrote that “[a]ccording to the District, the only findings of fact and
10 conclusions of law establishing the constitutional violation at issue in this case were those
11 dated June 4, 1978.” (Doc. 1436, filed 2/6/2013, at 8:5-7.) This Court then said: “This is
12 an old argument seen and rejected by the Court in 2006.” (*Id.* at 8:9.) It next added: “As
13 noted by the Plaintiffs Mendoza, it would be error for the Court to adopt the District’s
14 assertion that certain *Green* factors are not at issue in this case now because they were not
15 in issue in 1978.” (*Id.* at 9:6-7.) This Court then concluded: “Given the express directive
16 of the court of appeals that this Court, upon remand, shall consider all of the *Green* factors,
17 **including quality of education**...this Court finds them all at issue now. (*Id.* at 9:10-12;
18 citations omitted; emphasis added.)
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22 This Court should once again reject the District’s old argument and admonish
23 TUSD not to waste the Plaintiffs’ and the Court’s time (and the District’s money) by
24 invoking a meritless claim in an effort to avoid the full scope of its obligations in this
25 desegregation case.
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1 **ASSESSMENT OF TUSD’S PERFORMANCE OF ITS QUALITY OF**
2 **EDUCATION ALE OBLIGATIONS MUST INCLUDE “OUTCOME” OR**
3 **“RESULT”, THAT IS, PARTICIPATION AND COMPLETION RATES**

4 In its ALE Response, citing *Hampton v. Jefferson County Bd. of Educ.*, 102 F.
5 Supp. 2d 358, 361 (W. D. Ky. 2000), the District argues that the two prongs of the unitary
6 status test (good faith and elimination of the vestiges of discrimination) are subject to two
7 different tests. Then, because it wrongly contends that its quality of education/ALE
8 obligations are not covered by the vestiges of discrimination prong, TUSD says that this
9 Court should focus only on “behavior and process” – that is, whether it has followed the
10 “required steps under the USP” regardless of outcome. (ALE Response at 3:9-10 and
11 4:17-18.) Indeed, it asserts that, while it does not “object to” goals for participation in
12 ALEs (*id.* at 4:15-18), its USP compliance should not be assessed based on whether those
13 goals are attained. However, because the vestiges of discrimination prong does indeed
14 apply to its quality of education/ALE obligations, under *Hampton* this Court also must
15 focus on “outcome or result”. Therefore, and as more fully explained below, this Court
16 should sustain the Mendoza Plaintiffs’ objections to the ALE R&R to the extent it fails to
17 address (1) the relative participation in ALEs of white as compared to African American
18 and Latino students and (2) the completion and success rates in ALEs of African American
19 and Latino students.
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23 **THE TUSD RESPONSES TO THE MENDOZA OBJECTIONS ARE**
24 **INADEQUATE; THE MENDOZA OBJECTIONS SHOULD BE SUSTAINED**

25 Equal Access to ALEs

26 TUSD misstates the objection to the Special Master’s Report and Recommendation
27 Re: Advanced Learning Experiences (“ALE R&R”). (ALE Response at 5-8.) Mendoza
28

1 Plaintiffs do not argue that there must be absolute parity in the rates of participation of
2 white, Latino, and African American students in ALEs and certainly do not ask that the
3 “District [be required to] discourage ALE participation among White students.” (*Id.* at 7:8-
4 9.) Rather, they argue that it was error for the Special Master to have failed to consider
5 rates of participation of white students in ALEs in assessing whether the District is
6 complying with its USP obligation to “**ensure** that African American and Latino students
7 have equal access to [ALEs].” (USP Section V, A, 1; emphasis added.)
8
9

10 Mendoza Plaintiffs have demonstrated that during the pendency of the USP the rate
11 of participation of white students in ALEs has increased at a greater rate than that of
12 African American and Latino students. (*See* Mendoza Plaintiffs’ ALE R&R Objections at
13 3-4.) They therefore argued in their Objections (at 4:14-19) – and reiterate here – that this
14 data should have triggered reflection by the District (and in the absence of such reflection,
15 an inquiry by the Special Master) as to why the programs and initiatives the District has
16 put in place to encourage greater ALE participation appear to be more successful with its
17 white students than its African American and Latino students and whether changes should
18 be made to those programs and initiatives to increase the rate of African American and
19 Latino participation.
20
21

22 That Mendoza Plaintiffs are asking for such analysis should come as no surprise
23 given this Court’s findings in its 2008 Order that the District had “exacerbated the
24 inequities of ...racial imbalances because its failure to assess program effectiveness has
25 impeded its ability to use its resources to the extent practical to secure to its minority
26 students equal access to educational opportunity. (Order dated 4/24/2008, Doc. 1270, at
27 27:13-16.)
28

1 Goals for UHS and the Issue of the Latino Attrition Rate

2 The District's effort to support the Special Master's failure to set (or require the
3 District to set) goals for UHS flies in the face of the express language of the USP and an
4 explicit Court Order, and therefore should be rejected.

5
6 The USP explicitly calls for the setting of annual goals for **all** ALEs (and makes no
7 exception for UHS). Section V, A 2, states that the ALE Coordinator "shall have
8 responsibility for...developing annual goals...for progress to be made in improving access
9 for African American and Latino students...to all ALE programs." Further, this Court
10 explicitly referenced that USP Section in its Order of January 27, 2016 (Doc. 1895 at 2:14)
11 before it directed the Special Master to file an R&R with the Court that "shall...include
12 UHS...goals." (*Id.* at 5:7-9.)

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15 In the ALE Response, TUSD states that it should be held "accountable for [its]own
16 actions" (ALE Response at 8:20) but fails to address (or "account for") the fact that
17 enrollment of African American and Latino students at UHS in 2016-17 fell short of the
18 goals it set for itself in 2014 but now disavows². (*See* Mendoza Plaintiffs' ALE Objections
19 at 5:16-22.)

20
21 Further, even as the District discusses increases in the enrollment of Latino and
22 African American students at UHS, it ignores the fact that the percentage increases it
23 references mask very small numerical increases, particularly for African American
24 students, and that the relative percentage of African American and Latino students at UHS
25 as compared to the entire TUSD high school population is essentially unchanged. Thus,
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² Notwithstanding the express language of the USP set forth above, TUSD asserts that
"goals are separate and apart from USP requirements." (ALE Response at 8:12-13.)

1 according to data the District recently provided concerning enrollment (RFI #1541, a copy
2 of which is attached as Exhibit 1), African American UHS enrollment increased by seven
3 students (from 28 to 35) between the 2013-14 school year and the current school year
4 even as the absolute number of African American students attending high school in the
5 District increased. Further, while 9% of the total TUSD high school enrollment is African
6 American (up from 8% in 2013-14), the percentage of African American students in the
7 UHS student body has essentially held constant at three percent since 2013-14. And, while
8 the percentage of Latino students in the UHS student body has increased from 31% in
9 2013-14 to 35% this year, that increase appears to mirror the increase in the total number
10 of Latino students enrolled in District high schools (from 56% to 60%).

13 Based on the foregoing and the argument and data set forth in the Mendoza
14 Plaintiffs' ALE R&R Objections, this Court should direct the Special Master to provide a
15 recommendation of goals for UHS enrollment.

17 In its response, presumably to address the Mendoza Plaintiffs' objection that the
18 ALE R&R also fails to include specific measures to counter the increased Latino attrition
19 rate at UHS (Mendoza Plaintiffs' ALE R&R Objection at 6:6-16), the District discusses a
20 program to mentor first generation students. (ALE Response at 9:10-15.) Mendoza
21 Plaintiffs therefore modify their objection to ask that the Special Master be directed to
22 assess whether this is an effective "specific measure" to remedy increased attrition and to
23 determine if other specific measures are warranted and, as requested in the objections (at
24 6:13-16 and note 7), to determine whether and to what extent UHS is implementing all of
25 the UHS support strategies set forth in the ALE Plan.

1 Goals for ELLs in ALEs

2 Mendoza Plaintiffs reiterate their request that the Special Master be directed to
3 promptly determine the bases for the progress that the District appears to have made in
4 increasing the participation of Spanish-speaking ELLs in pre-AP courses and assess
5 whether these techniques can be applied to other ALEs and to non-Spanish-speaking
6 ELLs, consult with experts, and propose specific goals to the parties to be used to measure
7 TUSD progress in implementing the portions of the USP relating to increasing the access
8 of ELLs to ALEs as well as specific measures to achieve these goals³.

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10
11 As this Court has recognized, the USP explicitly calls for the development of annual
12 goals to improve the “access for African American and Latino students, **including ELL**
13 **students, to all** ALE programs.” (USP, Section V, A, 2, a; emphasis added.) (Order dated
14 February 13, 2015, Doc. 1771, at 8:5-6: “TUSD suggests that it is not possible to place
15 ELL students in ALEs, yet ELLs were expressly identified in the USP for increased
16 participation.” And at 9:21-24: “IT IS FURTHER ORDERED that TUSD shall develop
17 goals for increasing participation of ELL students in specific ALE programs, where
18 practicable, and provide explanation to the Plaintiffs and the Special Master as to how
19 these goals were derived.”)

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21
22 In its most recent Order relating to ALEs, this Court addressed the Supplement to
23 the ALE Action Plan that the District filed in April, 2015. With respect to ELL
24 participation, it stated that “TUSD has only considered increasing ELL numbers in four
25 ALE programs which involve dual language instruction, but the Mendoza Plaintiffs believe
26

27 ³ Contrary to the assertion in the ALE Response (at 9:26-27), Mendoza Plaintiffs did not
28 argue that the Special Master should have recommended a “15% goal” for ELL participation.

1 there is evidence that ELL students are successfully participating in others” (Order dated
2 January 27, 2016, Doc. 1895, at 4:15-17.) The Court then directed the Special Master to
3 file an R&R that, per this Court’s Order, was to have included “ELL goals”. (*Id.* at 5:9.)
4

5 Acknowledging the failure of the ALE R&R to have set ELL goals, the District now
6 says that it is willing to “work with the other parties and special master to determine such
7 goals.” (ALE Response at 10:9-11.) Mendoza Plaintiffs respectfully suggest that had the
8 District wanted to “work with the other parties and the special master” on this issue, it
9 could have started the process years ago, and certainly after the Court issued its Order of
10 January 2016. Given the passage of time and the absence of any meaningful outreach by
11 the District, Mendoza Plaintiffs have requested the relief that is set forth in the first
12 paragraph of this section and the Mendoza Plaintiffs’ ALE Objections (at 7:16-16).
13
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15 Completion Rates

16 The District is wrong when it asserts that the Special Master did not err when he
17 equated “completion rates” with “participation results”, that is, the level of African
18 American and Latino participation in ALEs. (ALE Response at 12:10-12.) As this Court
19 has recognized, the USP “requir[es] TUSD to support minority students’ successful
20 completion of ALEs”. (Doc. 1895 at 2:8-9, citing USP Section V, A, 2, c.) Nor can there
21 be any doubt that this Court was referring to outcomes, not levels of participation, when it
22 directed the Special Master to address “provisions of the USP aimed at improving...the
23 completion rate of minority students in these programs.” (Doc. 1895 at 5:10-14.)
24 Accordingly, this Court should sustain the objection to the inadequate discussion of
25 completion rates in the ALE R&R.
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1 Remaining Objections

2 The ALE Response does nothing to change the fact that the number of students
3 receiving the IB diploma and/or college credits remains relatively low. Accordingly, the
4 Special Master erred in not recommending “specific measures” to improve the completion
5 rates of African American and Latino students in the program. (Mendoza Plaintiffs’ ALE
6 Objections at 8:1-17.)

7
8 The ALE Response points to the hundreds of pages in the TUSD Annual Reports
9 relating to the ALE portion of the USP and effectively challenges the Plaintiffs, the Special
10 Master, and the Court to “go find” what it says is evidence that it implemented the portions
11 of the ALE Action Plan specifically called out in the ALE Objection Addendum. (Doc.
12 2069-1.) Mendoza Plaintiffs suggest that such a response is not helpful and stand on their
13 objection that the record before this Court on the ALE R&R does not support the Special
14 Master’s finding that the District has implemented “all provisions” of the ALE Action
15 Plan.

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17
18 The District argues that the Mendoza Plaintiffs should not have addressed
19 expansion of the AVID program in their ALE Objections because AVID is not an ALE
20 even as it acknowledges that “it is an important part of the support for students in ALE
21 programs.” (ALE Response at 13:5.) That TUSD plans to expand the program to one
22 additional elementary school and one additional high school does not resolve the Mendoza
23 Plaintiffs’ objection which was and remains that, given the success of that program and the
24 need to provide support so that more African American and Latino students will enroll in
25 and successfully complete ALEs, the ALE R&R should have recommended a more
26 aggressive expansion, particularly in TUSD middle and K-8 schools.
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1 **CONCLUSION**

2 For the reasons set forth above and in the ALE Objections, this Court should sustain
3 the Mendoza Plaintiffs’ objections to the ALE R&R. Mendoza Plaintiffs separately
4 address in an Addendum served herewith the District’s “Suggested Revisions to the ALE
5 R&R” since the “suggested revisions” do not constitute a response to the Mendoza
6 Plaintiffs’ objections but are, as the District itself acknowledges, separate “corrections”
7 that it now proposes to the R&R.
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13 Dated: October 13, 2017
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CERTIFICATE OF SERVICE

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I hereby certify that on I electronically submitted the foregoing MENDOZA PLAINTIFFS' REPLY TO THE RESPONSE BY TUCSON UNIFIED SCHOOL DISTRICT TO MENDOZA PLAINTIFFS' OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING ADVANCED LEARNING EXPERIENCES to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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