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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,

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

Special Master's Response Re: Limited Objections to 2015-16 SMAR

1 On August 15, 2017, this Court issued an Order declining to review objections
2 made to the Special Master's 2015-16 Annual Report (SMAR). (Order (Doc. 2050));
3 2015-16 SMAR (Doc. 2026)). The Court adopted the Special Master's recommendation
4 that the objections be taken up in the context of the SY 2016-17 annual reports, which for
5 the first time were to include a component for reporting on the status of the District's
6 progress towards compliance with the Unitary Status Plan (USP). The Court noted that
7 the District should take care to review the concerns of the Plaintiffs and the Special
8 Master expressed in the 2015-16 SMAR Objections, likewise consider all objections
9 made by the parties and the Special Master over the lifetime of the USP, and especially
10 where alternative remedies have been suggested, address them if warranted in the SY
11 2016-17 comprehensive USP compliance report.

12 The 2016-17 District's Annual Report (DAR) was filed on September 1, 2017
13 (Docs. 2057-2068), and correspondingly on October 2, 2017, the District filed a Report
14 of Analysis of Compliance with Unitary Status Plan (USP Compliance Report). (Doc.
15 2075). The Court did not order and did not expect further briefing regarding the
16 objections made by the parties to the 2015-16 SMAR, but on October 4, 2017, the
17 District filed "An Annex" to its 2016-17 Annual Report (DAR) (2015-16 SMAR Annex)
18 (Doc. 2076.) In the 2015-16 SMAR Annex, the District expressly reports on its review of
19 the concerns expressed by the Special Master in the 2015-16 SMAR and the Plaintiffs
20 Objections to the 2015-16 SMAR.

21 The Court understands that the District must have filed the 2015-16 SMAR Annex
22 in an abundance of caution to comply with the directives of the Court, but in doing so has
23 in fact acted contrarily. In the interest of judicial economy, the Court devised the 2016-
24 17 DAR and SMAR briefing scheme to facilitate its comprehensive 2016-17 review of
25 USP compliance so that all evidence and arguments would be found in one location, the
26 2016-17 DAR, organized to expressly track each USP provision for USP compliance,
27 with the 2016-17 SMAR and subsequent objections mirroring this format. The Court
28 intended for the District, at its discretion and as it deemed warranted, to address in the

1 2016-17 DAR and USP Compliance Report any concerns expressed in the 2015-16
2 SMAR, the Plaintiffs' Objections to it or any other objections expressed through any
3 other communications.

4 The Court imagines that the District did do this, given the comprehensive nature
5 of the 2016-17 DAR and USP Compliance Report. And if not, the District retains the
6 ability to address further any issue omitted from the 2016-17 DAR because the District is
7 afforded an opportunity to object subsequent to the 2016-17 SMAR, to respond to
8 Objections from the Plaintiffs, and Reply. (Order (Doc. 1350) at 10, ¶ 4.)

9 The Court would simply strike the 2015-16 SMAR Annex but for the Special
10 Master's Response asking the Court to issue rulings on four of the 2015-16 SMAR
11 Objections.

12 The Special Master filed a Response (Docs. 2077, 2080 (to correct exhibit)) to
13 the "2015-16 SMAR Annex to the 2016-17 DAR." He reports that since his
14 recommendation, adopted by the Court, that objections made to his 2015-16 SMAR be
15 addressed in the context of the 2016-17 DAR and SMAR, four issues he hoped to resolve
16 without Court intervention remain unresolved which have implications for students and
17 USP data gathering that should be addressed sooner than the anticipated 2018 briefing
18 and disposition scheduled for the 2016-17 DAR and SMAR. Those four issues are: 1)
19 the enrollment process for children of District employees in oversubscribed schools; 2)
20 the categorization of disciplinary actions, particularly those that involve exclusionary
21 practices; 3) reasons for and implications of changes in the criteria by which students
22 ethnic identities are determined, and 4) comment and review related to the Facility
23 Condition Index. Subsequent to filing his Response, the Special Master filed a Notice of
24 Withdrawal, withdrawing issues one and three. (Notice (Doc. 2083) (noticing parties
25 have reached agreement).

26 In ruling on issues two and four, the Court has reviewed and considered relevant
27 arguments made in thirteen documents: 1) the 2015-16 SMAR (Doc. 2026); Fisher
28 Objection to 2015-16 SMAR (Doc. 2031); TUSD Response to 2015-16 SMAR (Doc.

1 2033); Supplemental 2015-16 SMAR (Doc. 2039); Mendoza Response to Supp. (Doc.
2 2045); Mendoza Objection to 2015-16 SMAR (Doc. 2047); Mendoza Response to TUSD
3 (Doc. 2048); SM Response (Doc. 2049); District’s 2015-16 SMAR Annex (Doc. 2076);
4 Mendoza 10/10/17 Memo (Doc. 2079-1); SM Response (Doc. 2080); District’s 9/3/17
5 Memo (Doc. 2080-1),¹ and Mendoza’s Objection to 2015-16 SMAR Annex (Doc. 2085).²

6 In considering these issues, the Court notes that issues two and four, in part, relate
7 to data gathering and record keeping continuity necessary for monitoring the District’s
8 compliance with the USP. The Court repeats here what it has noted before: The USP
9 charges the Special Master with monitoring progress under the USP, and the Court will
10 accordingly defer to him regarding data gathering needed for him to carry out these
11 responsibilities. (USP (Doc. 1713) (revised to correct typographical errors); (Doc. 1450)
12 (original filed February 20, 2013) at § X.E, *see also* (USP § I.D.)

13 Categorizing Disciplinary Actions Involving Exclusionary Practices.

14 The Special Master and the Mendoza Plaintiffs complain that the District has
15 reclassified in-school disciplinary interventions as “not exclusionary,” and therefore
16 exempt from USP provisions which apply to exclusionary discipline, including due
17 process procedures afforded under the USP and the Constitution.

18 The USP, Appendix A, defines the term “exclusionary discipline” as: “any
19 disciplinary consequence that removes a student from classroom instruction including,
20 but not limited to, in-school suspension, out-of-school suspension, placement in an
21 alternative setting or program, and expulsion.”

22 According to the District’s 2015-2016 SMAR Annex, filed on October 4, 2017, it
23 did not change this definition. It reported that its consultants advised, “in the context of

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25 ¹ The District filed a Notice of Intent to Reply by November 3, 2017, but did not
26 file a Reply.

27 ² This is the type of convoluted record the Court had hoped to avoid when it
28 directed that these issues be briefed, if necessary, in the context of the 2016-17 annual
reports.

1 the then-developing Code of Conduct” that In-School Intervention (ISI) should not be
2 deemed exclusionary. The District surmised the Mendoza Plaintiffs’ objection was a
3 mistaken extrapolation: 1) the District’s proposed change for future treatment of ISI
4 meant the District had changed the definition of exclusionary discipline, and 2)
5 accordingly, due process guarantees previously afforded ISI, when they were considered
6 exclusionary discipline, had disappeared. 2015-16 SMAR Annex (Doc. 2076), 3-4.)
7 According to the District, “its existing In-School Intervention (ISI) Manual (an
8 expression of existing policy) describes ISI as exclusionary discipline, contrasting the
9 *existing* policy (where ISI is described as exclusionary) with the *proposed* Code of
10 Conduct (where the outside consultant and Working Group recommended that ISI should
11 not be deemed exclusionary).” *Id.* at 4 (emphasis in original). The District explained that
12 because the District’s Alternative Educational Program (DAEP) is an option for students
13 who have been suspended, they have already been provided the formal due process
14 procedures for exclusionary discipline discussed in the Guidelines for Student Rights and
15 Responsibilities (GSSR). And, any student who receives any level of discipline, even the
16 lowest levels of discipline, is afforded due process. *Id.* at 5 (citing “District Policy JK), *but*
17 *see* (SM Response, District’s 9/13/2017 Memo (Doc. 2080-1) at 3 (admitting to
18 regulatory changes, but asserting no changes to the overarching policies JK or JI adopted
19 pursuant to the USP).

20 The Special Master responded that the District has in fact changed its
21 classification of ISI from exclusionary to “not exclusionary” discipline, which not only
22 jeopardizes compliance with the USP, Appendix A, but the District’s change in data
23 gathering and reporting also affects his ability to monitor the District’s progress. Without
24 continuity in data, it is difficult to correctly calculate the extent of declines in the amount
25 of serious student misbehavior. (SM Response (Doc. 2080) at 4.)

26 According to the Special Master, the District has been reporting in four categories:
27 “in-school discipline, in-school suspension, short-term out of school suspension and long-
28 term out of school suspension.” (2015 SMAR at 23.) He reported a dramatic drop in the

1 amount of overall disciplinary actions between 2014-2015 and 2015-16, with the biggest
2 changes in in-school suspension which dropped by 78% and long-term suspension which
3 dropped over 50%. He attributes the drops, in part to the changes in the GSRR that
4 allowed in-school suspension by introduction in 2015 of the District Alternative
5 Educational Program (DAEP) for disciplinary offenses that previously would have
6 required out-of- school suspension.

7 The District is to be commended on this clear reduction in out-of-school
8 suspensions, but the District goes too far to classify its long-term placement of a student
9 in DAEP as a school transfer and not a removal of a student from classroom instruction.
10 DAEP is not classroom instruction even though efforts are made to keep the student
11 abreast of their classroom instruction.

12 TUSD contracts with Higher Ground, an organization providing services in the
13 juvenile justice system, to provide a social and emotional learning (SEL) program
14 intended to improve students' capacity for self-management, impulse control, and other
15 so-called executive functions that contribute to positive behaviors both in school and in
16 the community. (R&R Re: 2017-18 USP Budget (Doc. 2070) at 6.) By the District's
17 own admission, DAEP is an alternative "option for students who have already been
18 suspended and who have already been provided the formal due process procedures for
19 exclusionary discipline discussed in the GSSR." (2015-16 SMAR Annex (Doc. 2076) at
20 5) (emphasis added). To be clear, if the option is not taken, the student is suspended from
21 school. (SM Response, District's 9/13/2017 Memo (Doc. 2080-1) at 5-6.)

22 The Court finds that DAEP is by definition an "exclusionary discipline" because it
23 is an in-school suspension of regular classroom instruction and is an alternative program
24 for out of school suspension.

25 Any confusion regarding due process rights should be rectified in accordance with
26 this Court's finding that exclusionary discipline is: "any disciplinary consequence that
27 removes a student from classroom instruction including, but not limited to, in-school
28 suspension, out-of-school suspension, placement in an alternative setting or program, and

1 expulsion.”

2 ////

3 Comment and Review Related to the Facility Condition Index

4 The Court adopts the Special Master’s recommendation that the District return to
5 the formula for determining the Facility Condition Index (FCI) for schools that the parties
6 approved prior to the 2015-16 school year. The FCI is used to assess the condition of
7 facilities at each school, which when coupled with the Educational Suitability Score
8 (ESS) for the school, facilitates the development of priorities for allocating resources to
9 schools most in need of repairs and improvements. The District unilaterally changed the
10 FCI on the basis that it was an inconsequential change. Given the importance of the FCI
11 in determining facility improvement projects, USP § IX, the Court does not see how it
12 could be considered an inconsequential change, especially since the rating system was
13 jointly developed by the parties and the Special Master in the first place. At the very
14 least, the change jeopardizes the continuity in data gathering and annual assessments and,
15 therefore, jeopardizes the reliability of conclusions related to USP compliance.

16 **Accordingly,**

17 **IT IS ORDERED** that the Court’s Order (Doc. 2050) adopting the Special
18 Master’s recommendation regarding the 2015-16 SMAR (Doc. 2026) is amended to
19 adopt his recommendations related to the 2015-2016 SMAR in part as follows:

20 1. The District shall retain continuity in reporting on four categories, “in-
21 school discipline, in-school suspension, short-term out of school suspension and long-
22 term out of school suspension,” with exclusionary discipline defined as: “any disciplinary
23 consequence that removes a student from classroom instruction including, but not limited
24 to, in-school suspension, out-of-school suspension, placement in an alternative setting or
25 program, and expulsion.”

26 The Court finds that DAEP is by definition an “exclusionary discipline” because it
27 is an in-school suspension of regular classroom instruction and is an alternative program
28 for out of school suspension

1 2. The District shall return to the formula for determining the Facility
2 Condition Index (FCI) for schools that the parties approved prior to SY 2015-16, and the
3 Special Master shall assess USP compliance accordingly.

4 **IT IS FURTHER ORDERED** that all other issues raised in the 2015-16 SMAR
5 and corresponding objections may be reurged in the context of the 2016-17 annual
6 reports and USP Compliance Report.

7 Dated this 8th day of November, 2017.

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12 Honorable David C. Bury
13 United States District Judge
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