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12  
 13  
 14 UNITED STATES DISTRICT COURT  
 15 DISTRICT OF ARIZONA

16 Roy and Josie Fisher, et al., Plaintiffs,	4:74-cv-00090-DCB (Lead Case)
17 v.	
18 Tucson Unified School District No. 1, et al.,	
19 Defendants.	

20 Maria Mendoza, et al., Plaintiffs,	CV 74-204 TUC DCB (Consolidated Case)
21 v.	
22 Tucson Unified School District No. 1, et al.	
23 Defendants.	

24  
 25  
 26 **RESPONSE AND OBJECTION TO THE SPECIAL MASTER'S REPORT AND**  
 27 **RECOMMENDATION ON THE 16-17 SCHOOL YEAR [ECF 2096]**  
 28

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### Introduction and Summary

1  
2 Tucson Unified School District No. 1 responds and objects to the Special  
3 Master's Report and Recommendation following the 2016-17 school year [ECF 2096]  
4 (the "R&R") as follows:

5 Subject to and without waiving the general objections set forth below, the District  
6 advises the Court and the Special Master that it is deep into planning and execution of  
7 the Special Master's many completion steps set out in the R&R, and will of course  
8 comply with all of them that the Court may order. The District began its compliance  
9 effort upon receipt of preliminary drafts of the R&R from the Special Master in  
10 December, 2017 and January, 2018, and has worked with the Special Master to refine  
11 many of the completion steps set out in the R&R. Indeed, the District hopes to be able  
12 to report completion of a significant number of the steps even before the Special  
13 Master's reply to the parties' objections is due (on May 11, 2017). The District has  
14 specific objections to only three particular issues in the Report and Recommendation.  
15 These limited specific objections are set out in Section II below.

16 The District generally objects to the R&R to the extent it does not recommend  
17 immediate and complete termination of court supervision, on the grounds (i) this Court  
18 has already held that all vestiges of the discriminatory conduct which remained in 1977  
19 (pursuant to Judge Frey's findings of fact) were eliminated by 1986, and (ii) the District  
20 has complied in good faith with the Unitary Status Plan entered in 2013 [ECF 1713] as  
21 far as practicable, and certainly enough, in the circumstances, to render it highly  
22 improbable that the school district will suddenly begin operating a dual school system  
23 with respect to either plaintiff class if the Court terminates supervision (the underlying  
24 purpose of the *Green* requirement of good faith compliance). This objection is set forth  
25 in more detail in Section I(A) below.

26 The District generally objects to the R&R to the extent that the specific  
27 "completion steps" (over 70, some with multiple parts) recommended by the Special  
28 Master in the R&R represent new and additional requirements not found in the Unitary

1 Status Plan, “moving the goalposts” in an improper extension and expansion of the  
2 desegregation decree that is not tied to the specific constitutional violations found by  
3 Judge Frey and the vestiges of that conduct which remained in 1978, as set forth in  
4 Judge Frey’s findings (ECF 345). This objection is set forth in more detail in Section  
5 I(B) below.

6 Finally, the District also generally objects to the R&R to the extent that it does  
7 not recommend immediate and complete termination of court supervision in CV 74-204  
8 (the Mendoza case), on the grounds that, since Judge Frey expressly found that the  
9 District had never operated a dual school system with respect to Hispanic students, the  
10 *Green* factors and the requirement of good faith compliance with a comprehensive  
11 decree do not apply in that case. Since it is undisputed that the specific conduct that  
12 Judge Frey found to be discriminatory with respect to Hispanic students is no longer  
13 occurring, and has not occurred for decades, that is all that is required, and the decree,  
14 and supervision, in that case should be terminated. This objection is set forth in more  
15 detail in Section I(C) below.

### 16 17 General Objections

#### 18 **I. The District Objects to the R&R To The Extent That it Does not** 19 **Recommend Immediate and Complete Termination of Supervision Because** 20 **(A) No Vestiges of the Original *De Jure* Violations Remain, and (B) the** 21 **District Has Complied with the Unitary Status Plan in Good Faith.**

22 The District objects to the Report and Recommendation to the extent that it does  
23 not recommend immediate termination of court supervision because (1) all vestiges of  
24 the past discrimination were eliminated by 1986, and (2) the District has complied with  
25 the Unitary Status Plan in good faith as far as practical, and certainly to an extent that it  
26 is clear that the District will not suddenly revert to a dual school system, the underlying  
27 concern which gave rise to the good faith compliance requirement in *Green v. County*  
28 *School Bd.*, 391 U.S. 430 (1968).

1           **A. No Vestiges of the Original *De Jure* Violations Remain.**

2           “The vestiges of segregation that are the concern of the law in a school case may  
3 be subtle and intangible but nonetheless they must be so real that they have a causal link  
4 to the de jure violation being remedied.” *Freeman v. Pitts*, 503 U.S. 467, 496 (1992).  
5 The only findings of *de jure* violations in this case are set forth in Judge Frey’s Findings  
6 of Fact and Conclusions of Law, after a full evidentiary trial on the merits forty-one  
7 years ago, in January 1977. [ECF 345.]

8           Any analysis of whether any vestiges of past discrimination remain, then, must be  
9 founded on a clear understanding of (a) exactly what conduct Judge Frey found to  
10 violate constitutional standards, and (b) what vestiges of that conduct Judge Frey found  
11 remaining at the time of the trial in 1977. Judge Frey’s decision came ten years after the  
12 Supreme Court’s decision in *Green v. Board of Education*, 391 U.S. 430 (1968), and  
13 Judge Frey relied on that case in systematically and carefully analyzing what vestiges  
14 remained in 1977 as a result of the de jure violations he found, some of which were  
15 already at that point more twenty five years in the past.

16           After carefully considering the evidence presented, Judge Frey’s findings of *de*  
17 *jure* violations may be summarized as follows:

18           a.       The District failed to properly assign African American students to other  
19 schools when dismantling the prior segregated system in 1951, because it assigned too  
20 many African American students to schools that were heavily Hispanic.

21           b.       During the 1950s and 1960s, some elementary school siting decisions  
22 were made with segregative intent, resulting in higher concentrations of Hispanic  
23 students in some schools than if the decisions had been made properly.

24           c.       During the 1960s, some decisions to relieve individual school  
25 overcrowding were made with segregative intent, resulting in Hispanic students being  
26 assigned to schools with high Hispanic concentrations, and Anglo students being  
27 assigned to schools with lower Hispanic concentrations, despite the availability of  
28 closer, more integrative alternatives. [ECF 345]

1 Judge Frey was careful to limit his findings of violations. First, he found that the  
2 District had never operated a dual school system with respect to Hispanic and white  
3 students:

4 In light of the principles discussed above and the evidence  
5 presented, the segregative acts by the District and the  
6 existence of racial imbalance in the schools are insufficient  
7 for a finding that a Mexican-American/Anglo dual school  
8 system has ever been operated by the defendants. [*Id.*, p.  
9 221.]

10 He noted that the District had made substantial but not complete progress in  
11 eliminating the vestiges of the state-mandated segregation of black students which  
12 ended in 1951:

13 It appears that at the time Brown v. Board of Education,  
14 (Brown I) 347 U.S. 483 (1954), was decided in 1954, the  
15 District was in compliance with its mandate insofar as Blacks  
16 were concerned. . . . However, in light of the subsequent  
17 cases interpreting what the United States Supreme court  
18 meant in 1968 in Green v. County School Board, 391 U.S.  
19 430 (1968), when it stated, at page 438, that a dual system  
20 must be eradicated "root and branch", it now appears that all  
21 effects of the dual system which existed in 1950-51, were not  
22 effectively eradicated, notwithstanding considerable progress  
23 and attenuation. What effect remains is discussed elsewhere  
24 in these Findings. [*Id.*, pp. 119-120.]

25 Although most parts of the dual Black/non-Black school  
26 system were dismantled in 1951-52, and although most later  
27 decisions were made using neutral policy considerations, the  
28 District was under an affirmative duty to go beyond just  
neutral policy considerations in order to erase all effects of  
the past statutory segregation. It failed to do so. [*Id.*, p. 222.]

Moreover, Judge Frey's findings were primarily limited to elementary schools:

Except for Spring, no reasonable inference could be drawn  
that the imbalances present in the junior high schools at the  
time of trial resulted from segregative intent or acts on the  
part of the District. [*Id.*, p. 184.]

Except as to Spring Junior High, a conclusion or inference  
that the District has operated or is operating a dual or  
segregated junior high school system with respect to either  
Black students, Mexican-American students, or both, is not  
warranted by the evidence. [*Id.*, p. 186.]

There is no dual junior high school system within the District,  
even though Spring retains effects from former segregation as  
to Black students. [*Id.*, p. 189.]



1 The District has never operated a de jure segregated or dual  
system with respect to high schools. [*Id.*, p. 193.]

2 There has been no evidence presented from which it can  
3 rationally or reasonably be inferred that the District has  
4 operated a de jure segregated dual high school system or that  
5 there is a current condition of segregation in any high school  
in the District resulting from intentionally segregative State or  
District action. [*Id.*, p. 194.]

6 Finally, Judge Frey made it clear that most of the effects of the *de jure* violations  
7 had attenuated by the time of the trial forty years ago, and that the current racial makeup  
8 of most schools in the District was not the result of those *de jure* violations:

9 In summary of this section on segregation and desegregation  
10 within and/or by the District, a reasonable conclusion to be  
11 drawn is that the District is not operating a de jure segregated  
12 system, notwithstanding some segregative intent and actions.  
13 The District made a commendable and valiant effort to  
14 desegregate the dual or de jure system as to Blacks, at the  
15 time and under the circumstances, including the state of the  
16 law then existing. Viewed 25 years later under different  
circumstances, including a whole new array of legal  
decisions, it was inadequate. However, most of the effect  
from the earlier segregation of Black students, has attenuated  
during the past 25 years. As stated elsewhere in these  
findings, it appears that some effect may remain, as evidenced  
by the relatively large number of Black students remaining in  
the area of Spring, Roosevelt and University Heights. [*Id.*, p.  
70.]

17 In the final analysis, the only vestige of the prior discrimination which Judge  
18 Frey found continued to exist as of the time of trial was in the racial and ethnic makeup  
19 of students at nine schools in the District, five of which no longer exist as active  
20 schools:

21 Some effects of past intentional segregative acts by the  
22 District remain at these schools: Spring Junior High, Safford  
Junior High, University Heights, Roosevelt, Manzo, Jefferson  
Park, Cragin, Tully and Brichta. [*Id.*, p. 223.]

23 Judge Frey made no findings that any vestiges of the prior discrimination  
24 remained in the areas of academic achievement, administrators and certificated staff,  
25 transportation, discipline, extra-curricular activities, family and community engagement,  
26 facilities, or in the then-current analogs of technology or data systems.<sup>1</sup> Indeed, Judge

27 \_\_\_\_\_  
28 <sup>1</sup> In the “Comment” section of his findings, Judge Frey did note that “[i]t may well be  
appropriate at any future hearings in this case to determine whether there are any  
existing effects from such past discriminatory acts of the District, as found by the Court,



1 Frey found precisely the opposite with respect to academic achievement, transportation  
2 and extracurricular activities:

3 The single high school, Tucson High, had segregated  
4 homerooms prior to 1946. In that year, Superintendent  
5 Morrow eliminated this practice, along with other similar  
6 practices in athletics, choir, band, orchestra and all other  
7 school activities. [*Id.*, p. 42.]

8 Since 1969, all Black and Mexican-American students in the  
9 District could attend any school of their choice anywhere in  
10 the District, provided their attendance at such school  
11 improved the racial balance in that school; transportation to  
12 any such school would be furnished by the District. [*Id.*, p.  
13 200.]

14 Nearly ten years ago, this Court addressed whether the very limited vestiges of  
15 discrimination found by Judge Frey to exist in 1977 continued to exist. First, the Court  
16 noted:

17 As noted in the Court’s February 7, 2006, Order, Judge Frey  
18 made very limited, specific findings regarding student  
19 assignments and the existence of any vestiges of *de jure*  
20 segregation remaining in the district. [ECF 1239, p. 2.]

21 The Court then turned to the only vestiges found by Judge Frey – student  
22 assignment at the nine schools – and held that any vestiges existing in 1977 had been  
23 eliminated by 1986:

24 The Court finds that as to student assignments at Brichta,  
25 Manzo, and Tully, any vestiges of *de jure* segregation were  
26 eliminated to the extent practicable as of 1983.

27 The Court finds that as to student assignments at Safford  
28 Middle School, any vestiges of *de jure* segregation were  
eliminated to the extent practicable as of 1986. [ECF 1239,  
pp. 16, 18.]

Spring Junior High, University Heights and Roosevelt had been closed many  
years earlier, and in a subsequent order the Court adopted findings that student body

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which may not have been apparent to the Court.” [ECF 345, Ex. 1, p. 205] However,  
given the full and hotly contested trial, the extensive post-hearing briefing, the year that  
Judge Frey took to carefully assess the evidence and his detailed findings and  
conclusions spanning 223 pages, it is extraordinarily unlikely that anything escaped  
Judge Frey’s careful eye. Certainly no one since has suggested that Judge Frey missed  
any vestiges in his 1978 decision.

1 enrollment at Cragin and Jefferson Park by 1983 had met targets established in 1978.  
2 [ECF 1270, p. 6.]<sup>2</sup>

3 Accordingly, since the only causally-linked vestiges found by Judge Frey to exist  
4 forty years ago in 1977 (student assignment at the nine listed schools) had been  
5 eliminated by 1986, there can be no vestiges of discrimination existing today which are  
6 causally linked to the *de jure* discrimination which is the foundation of this case. In  
7 short, this is one of the “rare cases . . . where the racial imbalance had been temporarily  
8 corrected after the abandonment of *de jure* segregation” where it can be asserted with  
9 “confidence that the past discrimination is no longer playing a proximate role.”  
10 *Freeman, supra*, 503 U.S. at 503 (Justice Scalia, concurring).

11 Even in the absence of these findings, it is beyond genuine dispute that no aspect  
12 of school district operations retains any vestiges which are causally linked to any *de jure*  
13 discrimination found to have occurred from 45 to 70 years ago. A number of factors –  
14 the attenuation of impact noted by Judge Frey, the change in the racial and ethnic  
15 makeup of the District, the closure of schools and changes in student enrollment and the  
16 time period of the violations so very long ago – make it far “more likely than not” that  
17 there is no causal link today to the limited instances of discrimination found by Judge  
18 Frey to have occurred many years prior to the trial in 1977. As Justice Scalia noted in  
19 1992 (twenty five years ago), “[a]t some time, we must acknowledge that it has become  
20 absurd to assume, without any further proof, that violations of the Constitution dating  
21 from the days when Lyndon Johnson was President, or earlier, continue to have an  
22 appreciable effect upon current operation of schools. We are close to that time.”).  
23 *Freeman, supra*, 503 U.S. at 506. That time is long past in this case.

24  
25  
26  
27 <sup>2</sup> The factual findings of the Court’s 2007 and 2008 orders cited above were not set  
28 aside by the 9th Circuit in its subsequent decision remanding the matter for further  
supervision by the Court.

1           **B.     The District Has Complied In Good Faith with the Unitary Status**  
2           **Plan.**

3           At the Court’s request, the District recently prepared and filed a comprehensive  
4 analysis of its compliance with the USP since 2013 (the “Analysis”).<sup>3</sup> Requirement-by-  
5 requirement, that analysis sets out in detail how the District has complied, and continues  
6 to comply, in good faith with each requirement of the USP—a decree that the Special  
7 Master recognized as “the most comprehensive plan ever developed” in a desegregation  
8 case<sup>4</sup>—as well as the twenty related action plans that the District has developed and  
9 implemented pursuant to the requirements under the USP. Collectively, the USP and  
10 the action plans contain hundreds and hundreds of individual requirements.

11           While the District will not repeat the full Analysis here, it will summarize that  
12 evidence, and provide specific references to the record in support, showing that it has  
13 complied in good faith not just in the areas identified by the Special Master, but in every  
14 USP area.<sup>5</sup>

15                     **1.     USP Section II - Student Assignment.**

16           The District complies in good faith with USP Section II and its related action  
17 plans, including by:

- 18           • Implementing the four principal student assignment strategies: attendance  
19 boundaries,<sup>6</sup> pairing and clustering, magnet schools and programs, and open  
20 enrollment.
- 21           • Providing each student with the opportunity to attend an integrated school  
22 while continuing to assign<sup>7</sup> students initially based on the attendance area in  
23 which their parents reside.

24           <sup>3</sup> See generally ECF 2075 and ECF 2075-1 through ECF 2075-10, filed on October 2,  
25 2017, as a special annex to the District’s regulator annual report. A revised analysis of  
26 ALE compliance issues was filed on February 1, 2018, at the Court’s request [ECF  
27 2092].

28           <sup>4</sup> ECF 2096 at 4.

<sup>5</sup> The District has addressed all of the substantive areas of the USP, including those as to  
which the Special Master has recommended unitary status, because plaintiffs may object  
to those areas, and given the briefing schedule set by the Court, the District does not  
have the opportunity to respond to plaintiffs’ objections.

<sup>6</sup> See generally ECF 2075-2.

<sup>7</sup> ECF 2075-2 at 11, 23-29, 42-48.

- 1 • Staffing each USP-required Student Assignment position with a qualified individual.<sup>8</sup>
- 2 • Designing and implementing USP-compliant attendance boundary review and  
3 revision processes.<sup>9</sup>
- 4 • Establishing magnet schools and programs, for which the District recruits  
5 racially and ethnically diverse student bodies.<sup>10</sup>
- 6 • Maintaining an open enrollment/lottery system that allows all students to  
7 apply to attend any school (while also factoring in diversity).<sup>11</sup>
- 8 • Employing new and innovative strategies for marketing to and recruiting  
9 African American and Hispanic students.<sup>12</sup>

10 The District has supported its magnet schools in many ways (and sought to expand its  
11 magnet options), including:

- 12 • Developing, implementing, monitoring and evaluating individual Magnet  
13 School Plans each year that include school improvement processes;
- 14 • Conducting comprehensive data analysis of AZ MERIT results and progress  
15 towards integration, and then implementing actions needed to maintain or  
16 improve integration and each magnet site's state letter grades;
- 17 • Performing cross-departmental, standardized walkthroughs with Academic  
18 Directors;
- 19 • Providing in-depth professional development aimed at improving Tier 1  
20 instruction in the classroom; and
- 21 • Significantly expanding marketing and recruitment in connection with magnet  
22 schools and programs.
- 23 • Proposing more than a dozen new magnets, and implementing two new or  
24 expanded magnet operations since 2013, both of which<sup>13</sup> were racially  
25 concentrated and are now integrated magnet schools.

26 Though the Special Master complains about the racial composition of the  
27 Drachman and Borman schools, Drachman is already integrated and Borman is not even  
28 a magnet school. More important, there are 1995 more District students attending

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<sup>8</sup> ECF 2075-2 at 11-13.

<sup>9</sup> ECF 2075-2 at 13-17, 39-41.

<sup>10</sup> ECF 2075-2 at 17-23, 48-68.

<sup>11</sup> ECF 2075-2 at 23-29, 42-47.

<sup>12</sup> ECF 2075-2 at 30-31, 69-80.

<sup>13</sup> ECF 2075-2 at 53-54.

1 integrated magnet schools in SY 17-18 than SY 16-17 and nine of the District's thirteen  
2 magnet schools are integrated.

3 Fundamentally, unitary status is not dependent on whether the District achieves  
4 certain integration results, but rather is whether the District has complied in good faith  
5 with the USP. As the Special Master acknowledges, in Arizona, integration results  
6 largely dependent on factors outside of the District's control.<sup>14</sup> The District's  
7 commitment to the underlying principal of integration as shown through its efforts  
8 generally in the student assignment area, and all it has done over the past four  
9 years, illustrate that there is no risk that the District will return to 1951 and a *de*  
10 *jure* dual school system as soon as Court supervision is ended. That is the  
11 purpose underlying the "good faith" test articulated by the Supreme Court in  
12 *Green*, and as long as that underlying purpose is met, control of the District  
13 should be returned to local authorities in this entire area.

## 14 2. USP Section III – Transportation.

15 The District complies in good faith with USP Section III, including by:

- 16 • Utilizing transportation as a critical school integration component.<sup>15</sup>
- 17 • Offering free transportation to students enrolled in magnet schools and  
18 programs.<sup>16</sup>
- 19 • Providing information to prospective and enrolled families about the  
20 availability of, and eligibility for, transportation services.<sup>17</sup>
- 21 • Barring race- or ethnicity-based discrimination by private parties that provide  
22 transportation services for the District.<sup>18</sup>

23 The Special Master acknowledges that the District has "systematized and  
24 equitably provided support and implementation of USP goals related to student

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25 <sup>14</sup> As the Special Master observes, there are "considerable barriers to integration beyond  
the control of the District." *Id.*

26 <sup>15</sup> ECF 2075-3 at 4-6.

27 <sup>16</sup> ECF 2075-3 at 7-8.

28 <sup>17</sup> ECF 2075-3 at 8-10.

<sup>18</sup> ECF 2075-3 at 9.

1 transportation,” and that “[t]he District’s provision of transportation services deserves  
2 recognition as having satisfied the provisions of the USP.” [ECF 2096, p. 13.] [*Id.*]  
3 Indeed, the Special Master “identifies no further actions relating to transportation,” but  
4 defers a recommendation of unitary status until the Court releases from supervision  
5 other USP elements that require transportation.<sup>19</sup> Even if there were other USP areas  
6 that remain non-unitary, the Special Master does not explain why *supervision* over  
7 transportation, rather than the provision of transportation itself, is required to support  
8 those areas. As recognized by the Special Master regarding other areas of compliance,

9           If [the Court were required to retain jurisdiction over unitary  
10 areas because they were related to other areas], it would not  
11 be possible to award unitary status to almost any element of  
12 the USP because almost all actions are affected in some way  
13 or another by other actions. For example, professional  
14 development is required by almost all sections of the USP.  
15 And, multiple sections of the USP require evidence-based  
16 decision-making including disciplinary actions, PLCs, MTSS  
17 and program evaluation.

18           Withholding unitary status from provisions of the USP that  
19 the District has satisfied would negatively affect family and  
20 public confidence in the District falsely implying a lack of  
21 commitment and capability on the part of the TUSD  
22 Governing Board and staff.

23           Freeing the District from Court supervision when evidence  
24 indicates particular goals have been met will allow the  
25 District to focus on work yet to be completed. And, by  
26 clarifying what specifically the District needs to do to achieve  
27 unitary status with respect to specific requirements of the  
28 USP will give direction to the District and provide clarity to  
monitoring efforts.

29 [*Id.* at 6.] Each of these statements holds true for the District’s provision of  
30 transportation. Given that the District has complied in good faith with Section III of the  
31 USP, there is no reason to believe that the District will not provide transportation  
32 sufficient to support its other USP obligations. Consequently, this Court should award  
33 the District unitary status regarding transportation.

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34 <sup>19</sup> ECF 2096 at 14.

1                                   **3.     USP Section IV – Administrators and Certificated Staff.**

2           The District complies in good faith with USP Section IV and its related action  
3 plans, including by:

- 4           • Implementing plans and strategies to enhance the diversity of its ACS.<sup>20</sup>
- 5           • Staffing each USP-required ACS position with a qualified individual.<sup>21</sup>
- 6           • Implementing plans and strategies to improve outreach to, and recruitment of,  
7           Hispanic and African American ACS.<sup>22</sup>
- 8           • Adhering to all USP interviewing and hiring requirements.<sup>23</sup>
- 9           • Adopting measures to retain Hispanic and African American ACS.<sup>24</sup>
- 10          • Supporting new and struggling teachers while identifying and nurturing  
11          prospective African American and Hispanic District leaders.<sup>25</sup>
- 12          • Designing and implementing all of the professional development programs  
13          and activities required by the USP.<sup>26</sup>

14           The Special Master expressly finds with respect to both teacher diversity and  
15 beginning teachers that the District has *fully complied* with the USP.<sup>27</sup> In addition, he  
16 concludes with respect to teacher attrition that “[t]he rate of educator attrition in TUSD  
17 is not particularly high overall but that does not mean that it could not be lower.”<sup>28</sup>

18           However, the R&R is incorrect in certain material aspects of its description of  
19 District operations. For example, the Special Master claims that the District “has not  
20 undertaken a systematic study of the influences on attrition.”<sup>29</sup> But the District does in  
21 fact study the reasons for teacher attrition: it regularly conducts exit interviews for

22 <sup>20</sup> ECF 2075-4 at 6-7, 17-26, 94-98.

23 <sup>21</sup> ECF 2075-4 at 7-9.

24 <sup>22</sup> ECF 2075-4 at 9-13, 52-74.

25 <sup>23</sup> ECF 2075-4 at 13-17.

26 <sup>24</sup> ECF 2075-4 at 26-30, 61-65, 69-75.

27 <sup>25</sup> ECF 2075-4 at 33-38, 61, 75-76, 80-84, 87-90.

28 <sup>26</sup> ECF 2075-4 at 40-44.

<sup>27</sup> ECF 2075-4 at 15.

<sup>28</sup> ECF 2075-4 at 16

<sup>29</sup> ECF 2075-4 at 17.



1 teachers leaving the District, and analyzes the results.<sup>30</sup> The R&R also suggests that the  
2 the District assigns beginning teachers to start at racially concentrated or lower  
3 achieving schools.<sup>31</sup> However, the District does not assign any teachers to schools at all.  
4 Rather, teachers apply to the specific schools at which they wish to work, and the  
5 District is largely dependent on the available pool of applicants for vacant positions at  
6 each school. The USP does not, as the Special Master claims, “grant[] the  
7 superintendent the right to approve the appointment of beginning teachers,”<sup>32</sup> but in fact  
8 only grants that right with respect to first-year principals.<sup>33</sup>

9 As the Special Master repeatedly acknowledges, factors beyond the District’s  
10 control—including the nationwide teacher shortage and the extremely low pay for  
11 Arizona teachers—prevent the District from achieving ideal diversity results.<sup>34</sup> Again,  
12 where any vestiges of the past discrimination are already long gone, the only issue is  
13 whether the District has demonstrated that it is sufficiently committed in good faith to  
14 the constitutional requirement not to engage in *de jure* segregation, that a return to that  
15 practice is not likely. The District’s good faith, as shown through its efforts to comply  
16 with the USP in the area of administrators and certificated staff over the past five years,  
17 demonstrates that the Court does not risk return to *de jure* segregation by terminating its  
18 supervision in this area.

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21 <sup>30</sup> See, e.g., Certificated Attrition Rates, ECF 1962-1, pp. 217-26, ECF 2060-2, p. 30.

22 <sup>31</sup> ECF 2075-4 at 18.

23 <sup>32</sup> ECF 2075-4 at 18.

24 <sup>33</sup> See USP Section IV(E)(5) (requiring the District only to “make efforts” to reduce the  
25 number of beginning teachers hired at racially concentrated or lower achieving schools,  
26 but requiring the District to “avoid assigning first-year principals” to those schools  
27 subject to case-by-case exceptions made by the Superintendent).

28 <sup>34</sup> For example, the Special Master acknowledges that “there is a nationwide teacher  
shortage” (ECF 2096 at 15), that “TUSD has a difficult time competing for talent with  
districts that pay considerably more and that serve communities with much larger  
African American populations in the quality of life that goes with a large ethnic  
population” (ECF 2096 at 15 n. 7), and that “[t]he magnitude of this problem of  
inadequate salaries is stunning. Teachers in Arizona have declined in buying power  
more than almost any other state” (ECF 2096 at 15 n. 8).

1                                   **4.     USP Section V – Quality of Education.**

2             Section V of the USP exemplifies the Special Master’s USP description as “the  
3 most comprehensive plan ever developed.” It sets out seven broad areas to address the  
4 quality of education for District students, including: (A) Access to and Support in  
5 Advanced Learning Experiences (“ALE”); (B) OELAS Extension; (C) Dual Language  
6 Programs; (D) Exceptional/Special Education; (E) Student Engagement and Support; (F)  
7 Maintaining Inclusive School Environments; and (G) Reporting. As shown below, the  
8 District has complied in good faith with its required actions, and has gone far above and  
9 beyond. The District’s good faith compliance has been addressed each year in the  
10 District’s annual reports and in the District’s October 2017 Analysis of Compliance  
11 (ECF 2075 – 2075-10) and February 2017 Supplemental ALE Analysis (ECF 2092,  
12 2092-1).

13                                   **a.     Advanced Learning Experiences.**

14             The District’s compliance with the USP’s Advanced Learning Experience  
15 provisions are set out in detail provided in its Revised Analysis of Compliance with the  
16 USP’s ALE provisions. [ECF 2092, 2092-1.] For the convenience of the court, the  
17 District sets out below a summary of compliance with these provisions, along with  
18 citations to the more detailed explanations.

19                                   **i.     USP § V(A)(2)(a) - ALE Coordinator.**

20             The District has hired and maintained an ALE Coordinator to review, oversee  
21 and improve the District’s ALEs, as required by USP § V(A)(2)(a). [ECF 2075-5, pp. 9-  
22 10.]

23                                   **ii.    USP § V(A)(2)(b) - Initial Assessment of ALE  
24 Programs.**

25             As required by USP § V(A)(2)(b), the District undertook an extensive assessment  
26 of ALE programs, resources and practices in the District. [ECF 2075-5, pp. 10-11.]  
27  
28

1                                    **iii. USP § V(A)(2)(c) - Development of ALE Access and**  
2                                    **Recruitment Plan.**

3                                    Drawing on the findings and observations of the initial ALE assessment, TUSD  
4                                    created multiple committees, consulted with several experts and collaborated with the  
5                                    Plaintiffs and Special Master to develop the ALE Access and Recruitment Plan (“ALE  
6                                    Plan”) to increase African American and Hispanic enrollment in ALEs and support these  
7                                    students in successfully completing ALEs. [ECF 2075-5, pp. 11-12.]

8                                    **iv. USP § V(A)(2)(d) - The ALE Access and Recruitment**  
9                                    **Plan.**

10                                    The ALE Plan included all elements required by USP § V(A)(2)(d), including  
11                                    recommending accessible materials, coordinating with relevant administrators to  
12                                    distribute materials, holding community meetings and informational sessions regarding  
13                                    ALEs, providing professional development to administrators and staff to identify and  
14                                    encourage African American and Latino student to enroll in ALEs, ensuring equitable  
15                                    access to ALEs, and creating a claim process for complaints regarding practices that  
16                                    have the intent or effect of excluding students from ALEs in any way. [ECF 2075-5, pp.  
17                                    13-14.] The District reported on its compliance with each element of the ALE Access  
18                                    and Recruitment Plan in its Revised Analysis of Compliance with Unitary Status Plan.  
19                                    [ECF 2092, pp. 48 – 92.] As the Special Master stated in his ALE R&R:

20                                    The ALE action plan and a supplement to that plan identify  
21                                    numerous steps the District should take to recruit African  
22                                    American and Latino students suitable as to bring about an  
23                                    increase in the participation and support in ALE. **The**  
24                                    **District has implemented all of these provisions.** [ECF  
25                                    2041, p. 22. (Emphasis added).]

26                                    **v. USP § V(A)(3) - GATE Services.**

27                                    The District used the results of the ALE assessment and ALE Plan to increase  
28                                    participation in GATE services for African American and Latino students by increasing  
29                                    GATE testing, increasing the number of GATE offerings, modifying GATE services at  
30                                    schools, and requiring GATE teachers to be gifted endorsed or in the process of  
31                                    obtaining an endorsement. [ECF 2075-5, pp. 15-16.] More detailed descriptions of the

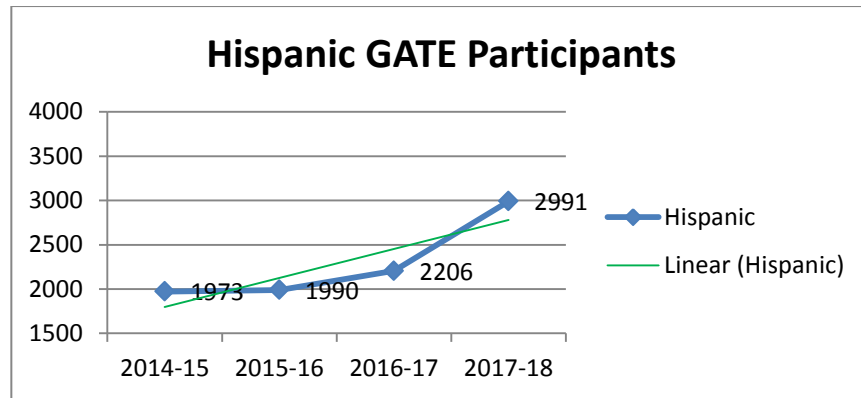
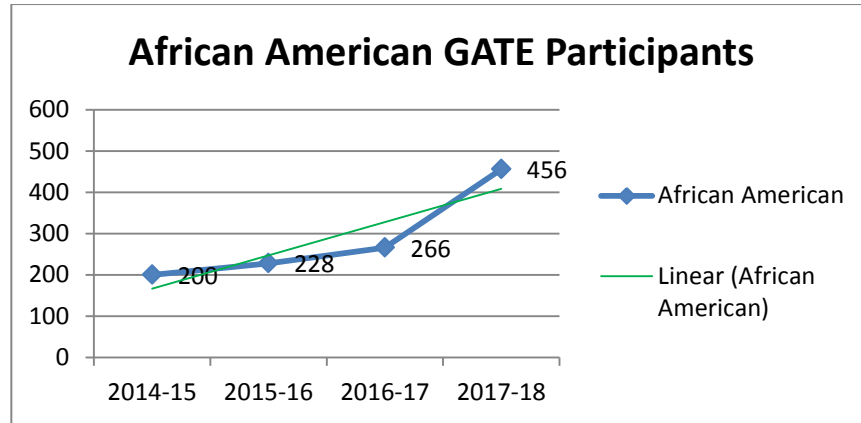
1 District's GATE efforts are listed in the District's 2016-17 Analysis of Compliance.  
2 [ECF 2075-5, pp. 241-52.]

3 Beginning in SY 15-16 and continuing through the present, the District began  
4 and continued whole-grade GATE testing for all 1st and 5th grade students as a means  
5 of identifying more qualified students for self-contained and pull-out services.  
6 Consequently, the District went from testing 5,093 students for GATE in SY 14-15 to  
7 9,061 students in 16-17, including more than doubling the number of African American  
8 students being tested (from 435 to 897) and increasing the number of Hispanic students  
9 being tested from 3,045 to 5,534 in the same time frame. [ECF 2075-5, p. 251.]

10 Additionally, to create additional access and participation, the District created an  
11 open-access GATE program at Tully Elementary, providing gifted instruction to all  
12 students in regular classrooms, with no qualifying (testing) requirement. The District  
13 also created additional self-contained GATE classes at Wheeler Elementary and  
14 Roberts-Naylor, providing additional opportunities for GATE participation, and it is  
15 working toward an open-access GATE program to create a pipeline that continues  
16 through the middle grades in preparation for high school.

17 As shown in the charts below, the District has increased GATE participation  
18 substantially over the last four years for African American and Latino students, from  
19 200 African American students in 2014-15 (4.9% of African American students) to 456  
20 African American students in 2017-18 (10.9% of African American students), and from  
21 1,973 Hispanic students (6.7% of Hispanic students) to 2,991 Hispanic students (10.7%  
22 of Hispanic students). These substantial increases demonstrate both the District's  
23 significant efforts and good faith compliance with USP's GATE requirements and  
24 remarkable growth and innovation.

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The Special Master acknowledges that enrollment in these programs is contingent on student scores on a cognitive test, and that the District took the remarkable measure of testing nearly all first and fifth grade students for qualification for these programs. [ECF 2096, p. 33.] Based on the District’s innovative efforts, the Special Master recognized “the number of African American students testing for GATE (District students in grades K-6) increased from 435 in 2014-15 to 917 in 2015-16, an increase of 482 (110.8%).” Similarly, the Special Master acknowledged “[t]he number of Hispanic students testing for GATE (District students in grades K-6) increased from 3045 in 2014-15 to 6343 in 2015-16, an increase of 3298 (108.3%).” [*Id.*] The Special Master further recognized “[t]here was a significant 57% increase [in] enrollment of African American students and a 41% increase in the number of Latino students in self-contained GATE.” [*Id.*]

Moreover, the Special Master recognizes in his R&R that lower participation by African American and Latino students, as compared with White students, in self-

1 contained GATE programs “is primarily a product of the inability of many of these  
2 students to perform well enough on the cognitive tests for admission,” that the District  
3 recognizes this problem and is actively utilizing innovative programs to address it, and  
4 that “the District’s efforts to enhance participation and outcomes in ALE has (sic)  
5 increased significantly.” [*Id.* at 29.]

6 Nevertheless, the Special Master recommends that the District **not** receive an  
7 award of unitary status regarding self-contained and pullout GATE, recommending  
8 instead that: (1) the District lower eligibility scores so that the District can reach the  
9 15% enrollment goal preferred by the Special Master; (2) teachers be trained and  
10 incentivized to participate in GATE programs; and (3) increase the number of cluster  
11 GATE programs to at least 10 schools by the 2019-2020 school year. [ECF 2096, pp  
12 34-35.]

13 As explained in detail in the District’s 2016-17 Annual Report, (ECF 2057-1, pp.  
14 190-93), the District *already* has implemented *numerous plans and strategies* to train,  
15 invite, and incent its teachers to become GATE certified, including funding the training  
16 and certification process.<sup>35</sup> The District has *already* increased its cluster GATE  
17 programs to 10 schools. Finally, although the District will continue to strive to increase  
18 the number of its GATE cluster programs, those programs can grow only as fast as  
19

20 \_\_\_\_\_  
21 <sup>35</sup> For example, the District: (1) facilitates multiple sessions of professional development  
22 each year for teachers to earn professional development hours toward obtaining a gifted  
23 endorsement; (2) provides additional gifted training for teachers in the District,  
24 including those working toward obtaining a permanent gifted endorsement; (3) provides  
25 days of gifted summer training; (4) sends teachers to the National Association of Gifted  
26 Children Conference as a part of their working toward receiving their gifted  
27 endorsements; (5) sends notices and support plans to teachers in GATE positions who  
28 held a provisional gifted endorsement or who were working toward obtaining a gifted  
endorsement; (6) sends teachers working on their gifted endorsement to the Phoenix  
Desert Summer Institute to earn 30 hours toward a gifted endorsement; and (7) recruited  
new teachers with GATE endorsements, including by working with the University of  
Arizona, attending job fairs, and holding a Teacher Recruitment Night with a special  
invitation for teachers to learn about GATE teaching opportunities, requirements for  
obtaining a gifted endorsement, and GATE program information. [ECF 2057-1, pp. 190-  
93.]

1 GATE certified teachers become available (through the District’s aggressive recruitment  
2 and/or training) in sufficient numbers to support new programs.<sup>36</sup>

3 In short, the District’s GATE programs and efforts are exemplary. As shown in  
4 the District’s Revised ALE Assessment, out of 13 comparable districts – those with  
5 more than 30,000 students, with more than 50% of those students being Hispanic, *none*  
6 *of these districts reached the 15% participation rule for either African American or*  
7 *Hispanic GATE participation*, none reached the 20% rule for African American GATE  
8 participation, and only 3 out of 13 reached the 20% participation rule for Hispanic  
9 GATE participation. [ECF 2091-1, pp. 6-7.] The Special Master’s recommendation  
10 sets an arbitrary standard completely detached from constitutional violations.

11 This is a clear example of what the Supreme Court warned against in *Freeman*,  
12 *Milliken* and *Dowell*, because the remedial actions recommended by the Special Master  
13 bear no relation to the specific *de jure* violation being remedied, but instead lead to  
14 never-ending court supervision to cure societal ills. *Freeman*, 503 U.S. at 495-96  
15 (attempting to cure societal conditions not found to be caused by district’s *de jure*  
16 violations “would require ongoing and never-ending supervisions by the courts”);  
17 *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (decrees directed at conditions not found  
18 as constitutional violations exceed appropriate limits); *Board of Educ. of Oklahoma City*  
19 *Public Schools v. Dowell*, 498 U.S. 237, 247 (1991); *cf. People Who Care v. Rockford*  
20 *Bd. of Educ.*, 111 F.3d 528, 534 (7<sup>th</sup> Cir. 1997) (“[T]he remedy must be tailored to the  
21 violation, rather than the violation’s being a pretext for the remedy. Violations of law  
22 must be dealt with firmly, but not used to launch the federal courts on ambitious  
23 schemes of social engineering. Children, the most innocent of the innocent persons  
24 occasionally brushed by draconian decrees, should not be made subjects of utopian  
25 projects.”) (citations omitted); *see also Horne v. Flores*, 557 U.S. 433, 450 (2009) (“If

26 \_\_\_\_\_  
27 <sup>36</sup> In the District’s cluster GATE programs, students who do not qualify for self-  
28 contained GATE services are placed full time in classrooms with students who did  
qualify for these services and receive instruction by a gifted-endorsed teacher using  
gifted strategies. [ECF 2057-1, p. 177.]



1 [a federal consent decree is] not limited to reasonable and necessary implementations of  
2 federal law,’ it may ‘improperly deprive future officials of their designated legislative  
3 and executive powers.’”) (citation omitted).

4 **vi. Advanced Academic Courses.**

5 In addition to the substantial growth in GATE services, the District used the  
6 results of the ALE assessment to increase participation in Advanced Academic Courses.  
7 As demonstrated in the District’s February 2018 Revised Analysis, access to and  
8 support within all advanced academic courses is equitable. [ECF 2092, 2092-1.]

9 **(1) Advanced Placement (AP)**

10 AP enrollment grew from 2,521 students in SY 12-13 to 3,173 students in SY 16-  
11 17. The percentage of Hispanic students enrolled in Advanced Placement classes  
12 increased from 46 percent in SY 15-16 to 47 percent in SY 16-17. Enrollment of African  
13 American students in AP classes has steadily increased since the inception of the USP,  
14 though it decreased slightly for SY 16-17. [ECF 2092-1, pp. 56-57.] For the second  
15 consecutive year, the District was honored by the College Board with placement on the  
16 7th Annual AP District Honor Roll. The District is one of only four districts in Arizona  
17 to receive this recognition and the only district in the state to win the award for the  
18 second year in a row. The award analyzed all exams taken for the 34 AP courses  
19 offered in the District for three years, from SY 13-14 to SY 15-16, and required that  
20 certain criteria be met:

- 21
- 22 • Increase participation/access to AP by at least 4 percent in large  
23 districts, at least 6 percent in medium districts, and at least 11  
24 percent in small districts;
  - 25 • Increase or maintain the percentage of exams taken by  
26 black/African American, Hispanic/Latino, and American  
27 Indian/Alaska Native students; and
  - 28 • Improve or maintain performance levels when comparing the  
2016 percentage of students scoring a 3 or higher to the 2014  
percentage.

1 As part of this award, the College Board also recognized the District for  
2 achieving these results with a 30 percent or greater enrollment of underrepresented  
3 minority students (Black/African American, Hispanic/Latino, American Indian/Alaska  
4 Native). [*Id.*]

5 Additionally, as acknowledged by the Special Master, the most recent national  
6 data shows the District's African American and Latino students doing substantially  
7 better on AP tests than their counterparts throughout the state. [ECF 2096, p. 42.]

8 Nevertheless, despite TUSD's award-winning AP program and significant  
9 growth in AP participation and success, the Special Master recommends that the District  
10 not receive an award of unitary status because he believes the District should study why  
11 there is low student interest in AP classes at one of the District's ten high schools and  
12 there was a one-year decrease in AP enrollment at another of the District's ten high  
13 schools. [ECF 2096, p. 43.] But the District has studied why Catalina's AP  
14 participation is lower when compared with other high schools in the District. One  
15 reason why its AP participation is lower is because Catalina has a high ELL population,  
16 and Arizona's laws still require these students to participate in the four-hour block,  
17 which makes it nearly impossible to participate in AP classes. Regarding Tucson High,  
18 African American AP enrollment has actually grown over the past four years, and  
19 though Latino enrollment has fluctuated and recently decreased, the minor decrease does  
20 not indicate any institutional issues. Nevertheless, the District has also investigated  
21 potential causes for decreased AP participation and potential steps it could take to  
22 increase AP participation.

23 These two recent individual school issues have no relationship whatsoever to  
24 the constitutional violations found by Judge Frey or the vestiges of that conduct which  
25 Judge Frey found remaining in 1978. The District has complied in good faith with the  
26 USP's AP requirements and has been remarkably successful in improving its AP  
27 program over the life of the USP. The District has complied in good faith with the  
28 USP's AP provisions.

## (2) Pre-AP Courses

1  
2 Pre-AP Honors classes exist in grades 6-12 in science, social studies, and  
3 language arts. These courses prepare students to enroll in and successfully complete  
4 other types of advanced academic courses in high school. The District met its goal for  
5 both the African American and Hispanic populations at middle school sites (8 percent  
6 African American and 52 percent Hispanic). The District also met its goal for Hispanic  
7 students in K-8 schools (69 percent), which is nearly 10 percent higher than the goal,  
8 and grades 9-12, with an enrollment of 58 percent—7 percent higher than the goal.  
9 [ECF 2091-1, p. 60.]

10 The District met the Special Master's recommended 15-percent goal for Pre-AP  
11 Advanced courses in K-8 schools for both African American and Hispanic students and  
12 in comprehensive middle schools for Hispanic students. The District met the 15-percent  
13 enrollment goal (7 percent) for middle school African American students, who made up  
14 7 percent of enrollment. [ECF 2091-1, p. 61.] The District also succeeded again in  
15 increasing enrollment of ELL students in pre-AP advanced and pre-AP honors programs  
16 from 12-13 to 16-17 (from .44% and .21% to 3.02% and 2.10%, respectively. [ECF  
17 2057-1, pp. 18-19; ECF 2057-1, p. 220.] Still, the Special Master recommended against  
18 an award of unitary status for pre-AP advanced courses without any explanation. [ECF  
19 2096, p. 38.]

20 The Special Master recommends that the District conduct “further investigation”  
21 to determine why students in some schools “succeed in these high school credit courses”  
22 while “this is not the case in several schools.” To further investigate, the Special Master  
23 recommends identifying those schools with the highest percentage of African American  
24 and Latino students and the smallest differences between participation among students  
25 of different races to determine what makes these schools more successful than others.  
26 [Id. at 39.] But the Special Master already determined that the District complied with all  
27 prior requirements for studies and reports included in the extensive reporting  
28 requirements of the USP, ALE Plan and ALE Supplement. [See ECF 2041, p. 22; USP

1 Section V(G), ECF 1713, pp. 42-44 (requiring reporting that encompasses the reports  
2 the Special Master now recommends).]

3 In addition to complying with the USP's investigation and reporting  
4 requirements, the District submitted a Revised Analysis of Compliance related to ALEs.  
5 [ECF 2092-1.] This Revised Analysis included the exact "further investigation" the  
6 Special Master now says is necessary, including a school by school analysis of all ALE  
7 participation by race. [*Id.*] Indeed, the Special Master includes the results of this further  
8 investigation in his Report and Recommendation. [ECF 2096-8.] Specifically, the  
9 Special Master's Report and Recommendation includes the list of all schools with  
10 middle-school grades and the participation of each racial/ethnic group in each ALE for  
11 the past three years. [*Id.*]

12 For example, the District provided a report of middle school students taking  
13 courses for high school credit broken down by race for each school for school years  
14 2015-16, 2016-17 and 2017-18. [ECF 2096-8, at 1.] Similar reports for pre-AP advanced  
15 and pre-AP honors are also provided. [ECF 2096-8, pp. 2-3.] The District prepared  
16 these reports, as well as school-by-school reports for every school in the District detail  
17 ALE participation, including participation in ALEs available to middle grade students,  
18 in its Revised ALE Analysis. [ECF 2092-1.] Although the District will continue to  
19 collect and review this information to continually improve the quality of education for  
20 its students, no continued Court supervision in this area is justified.

### 21 (3) Middle School Courses for High School Credit

22 Middle school courses for high school credit offer students the ability to gain  
23 credits toward their high school diploma while still enrolled in middle school. Although  
24 scheduling and population issues interfere with all K8 and middle schools offering all  
25 possible ALEs, all ALEs are provided equitably, and none are provided, limited or  
26 denied on the basis of race or ethnicity. [ECF 2092-1, pp. 19-20.] The primary course  
27 used is Algebra 1, but some sites offer other courses such as Spanish, Integrated  
28 Science, and Geometry. The District met the 15% Rule for Hispanic students in both

1 middle and K-8 schools, but did not meet the goal for African American students. [ECF  
2 2092-1, p. 66.]

#### 3 (4) Dual Credit

4 The District works in collaboration with Pima Community College and the  
5 University of Arizona to provide dual credit classes at its high schools. The District met  
6 the 15% Rule for Hispanic students (65 percent). The District fell just short of the goal  
7 for African American students (7 percent). Again, all courses are provided equitably  
8 and none are provided, limited or denied on the basis of race or ethnicity. [ECF 2091-1,  
9 p. 62.]

#### 10 (5) International Baccalaureate

11 In SY 16-17, two schools offered the IB Programme: Cholla Magnet High School  
12 and Safford Magnet K-8. Safford offered the IB curriculum for all K-5 students. At  
13 Cholla, students can take individual IB classes or complete a Certification or Diploma  
14 program. The District met the 15% Rule for African American and Hispanic students at  
15 Safford and for Hispanic students at Cholla. The number of students who enrolled as IB  
16 Certificate or Diploma candidates at Cholla doubled from 84 students (Class of 2017) to  
17 170 (Class of 2018). [ECF 2092-1, p. 63.]

#### 18 vii. USP § V(A)(5) - University High School

19 The Special Master's R&R acknowledges that "University High School is  
20 considered one of the best high schools in America" and that it "is also among the most  
21 racially and ethnically diverse 'exam schools.'" [ECF 2096, p. 45.] He also  
22 acknowledges that UHS has increased its African American and Latino student  
23 enrollment by 18% and 20%, respectively, over the past three years. He further  
24 acknowledges that the District provides considerable academic support for all students  
25 who need it, and that "African American and Latino students are successful at UHS."  
26 [*Id.* at 46.]

1 Over the past five years, the District has:

- 2 • successfully expanded access to University High School by reviewing and
- 3 revising the process for admitting students into UHS to ensure all students
- 4 have an equitable opportunity for admission;
- 5 • administered the appropriate UHS admission tests for all 7<sup>th</sup> grade students,
- 6 consulting with experts, the Special Master and Plaintiffs in the process;
- 7 • required middle school counselors to review UHS admission requirements
- 8 with all students in 6<sup>th</sup> and 7<sup>th</sup> grade and provide those students application
- 9 materials;
- 10 • conducted specific UHS-related outreach to students and parents about the
- 11 program's offerings;
- 12 • encouraged and trained school personnel to recognize, identify, recruit and
- 13 encourage African American and Latino students to enroll, stay in and be
- 14 successful at UHS; and
- 15 • conducted tests of alternate multiple measure assessments, ultimately settling
- 16 on the nationally normed ACT Engage assessment as an additional measure
- 17 offered to students who meet the minimum test score and minimum GPA but
- 18 do not earn the requisite admission points. [ECF 2092-1, pp. 64-66.]

14 UHS had more National Hispanic Scholars in 16-17 than any other high school in the  
 15 country (48), according to a congratulatory phone call UHS received from the College  
 16 Board. [*Id.* at 75.] The District has met the all of the requirements of the Unitary Status  
 17 Plan with respect to UHS.

18 **viii. USP § V(A)(2)(a) - ALE Access and Recruitment Plan**  
 19 **and Supplemental ALE Plan.**

20 The District developed the ALE Plan and Supplemental ALE Plan, which include  
 21 strategies to identify and encourage African American and Latino students to enroll in  
 22 ALEs, increase the number of these students enrolling in ALEs, and support these  
 23 students in successfully completing ALEs. As the Special Master found, the District  
 24 complied with all aspects of these ALE plans. [ECF 2092-1, pp. 48-53; ECF 2041, p. 22  
 25 (“The ALE action plan and a supplement to that plan identify numerous steps the  
 26 District should take to recruit African American and Latino students suitable as to bring  
 27 about an increase in the participation and support in ALE. The District has implemented  
 28 all of these provisions.”).] The District’s compliance with these requirements are

1 detailed in each correlating section of the Analysis of Compliance. [ECF 2075 – 2075-  
2 10.]

3 **b. USP § V(B) - OELAS Extension.**

4 The District pursued the Arizona Department of Education Office of English  
5 Language Acquisition Services (“OELAS”)-approved reading block extension in April  
6 2013. [ECF 2075-5, p. 19.] Eventually, the District opted to pursue the Structured  
7 English Immersion (“SEI”) model, based on the Arizona State Board of Education  
8 approving refinements to the four-hour ELD block for K-12, which allowed the District  
9 flexibility within the 4-hour ELD block that no longer required the District to pursue an  
10 OELAS extension in order to fulfill the USP goals of providing ELLs rigorous  
11 mainstream courses and limiting their separation from other students. The District  
12 continues to work with Arizona lawmakers to allow flexibility to fulfill the USP’s goals  
13 of providing ELLs rigorous mainstream courses and limiting their separation from other  
14 students. [*Id.*] The District complied with all USP provisions regarding OELAS. [*Id.*]

15 **c. USP § V(C) – Dual Language.**

16 The District built and expanded its Dual Language program to provide more  
17 students with opportunities to enroll and to encourage and recruit new and certified staff  
18 to teach in Dual Language programs. [ECF 2075-5, pp. 19-30.] The District has made  
19 tremendous progress, both with its Two Way Dual Language Plan (and Handbook) and  
20 with various additional strategies, including professional development, site  
21 implementation, development and recruitment of bilingually-endorsed teachers, and  
22 parent outreach and supports, complying in every way with the USP. [*Id.* at 254-82.]  
23 The Special Master acknowledges the presence of obstacles to additional success out of  
24 the District’s control (the Arizona legislature and the shortage of qualified teachers). In  
25 efforts to expand despite these headwinds, the District created incentive programs to  
26 encourage new and current staff to become certified and teach in the Dual Language  
27 program, it developed the Two Way Dual Language Handbook to support teachers and  
28 administrators, it hosted a Dual Language symposium with national Dual Language



1 experts, and it partnered with the National Hispanic Cultural Center and University of  
2 Arizona to recruit and support teachers. [ECF 2075-5, pp. 20-30.] The District has  
3 satisfied USP requirements for Dual Language.

4 **d. USP § V(D) - Exceptional/Special Education.**

5 The District has gone above and beyond the USP requirements by establishing  
6 standards based on the Arizona Department of Education's guidance documents and  
7 assessing the effectiveness of those standards on a quarterly basis, allowing the District  
8 to address discrepancies and challenges on a regular basis and nearer in time to when  
9 they occur. Based on scientific research, the ExEd Department undertook a major  
10 initiative to adopt and maintain inclusive practices and models at all school sites  
11 targeted at increasing the amount of time students with disabilities receiving instruction  
12 within the general education setting. [ECF 2075-5, pp. 30-36.] The Special Master  
13 recognized that the District has met the USP's goals for exceptional education. [ECF  
14 2096, pp. 53-54.]

15 **e. USP § V(E)(1) - Student Engagement and Support.**

16 The District developed strategies to improve student engagement and support to  
17 attempt reduce the achievement gap and racial and ethnic disparities in academic  
18 achievement, dropout and retention rates, discipline, access to ALEs, and other areas  
19 where disparities existed or could exist. [ECF 2075-5, pp. 37-182.] Those strategies  
20 included academic and behavioral support, the Dropout Prevention and Graduation Plan,  
21 district-wide student support strategies, multi-tiered system of supports, school-wide  
22 support strategies, elementary, K8 and high school level strategies, strategies and  
23 programs aimed at helping African American and Hispanic students and their families,  
24 student support departments, socially and culturally relevant curriculum, including  
25 culturally relevant courses ("CRCs"), culturally responsive pedagogy, multicultural  
26 curriculum teacher and curriculum development strategies and programs, mentoring  
27 strategies and programs, college collaboration strategies and programs, and many others.

28 [Id.]

1 As part of its compliance in these areas, the District:

- 2
- 3 • Created, implemented, supported and improved CRCs, including by piloting  
4 CRCs in SY 13-14, preparing and fulfilling a CRC Implementation Plan,  
5 improving the quality of and access to CRCs, and substantially increasing  
6 student participation each year; [ECF 2075-5, p. 80.]
- 7 • The District created the role of Culturally Responsive Pedagogy and  
8 Instruction Director, consistently consulted with Culturally Responsive  
9 Pedagogy (“CRP”) experts, and provided consistent CRP professional  
10 development to continually implement culturally responsive practices that  
11 explore novel approaches to address student achievement and engagement.  
12 [ECF 2075-5, pp. 85-90.]
- 13 • Created, implemented and improved multicultural curriculum (“MC”),  
14 providing a range of opportunities for students to conduct research, improve  
15 critical thinking and learning skills, and participate in a positive and inclusive  
16 climate in classes. The MC Department regularly reviews curriculum maps,  
17 develops recommendations to enhance the curriculum to embrace equitable  
18 inclusion, utilizes the Anti-bias Framework in core curriculum development,  
19 and constantly improves CR materials and professional development. [ECF  
20 2075-5, pp. 90-93.]
- 21 • Created, supported and improved an African American Student Services  
22 Department (“AASSD”) and Mexican American Student Services Department  
23 (“MASSD”) to improve the academic achievement and education outcomes  
24 of the District’s African American and Latino students, using strategies to  
25 reduce disparities in achievement, graduation and discipline.
- 26 • Created and implemented the recommendations of an African American  
27 Academic Achievement Task Force. [ECF 2075-5, pp. 132-48.]

18 A detailed description of the District’s good faith compliance in this area spans  
19 145 pages of its Analysis of Compliance, listing and describing efforts, strategies and  
20 programs more extensive than any other District in the country of which the District and  
21 undersigned counsel are aware. [See ECF 2075-5, pp. 37-182.] This is another USP  
22 area that exemplifies the Special Master’s declaration that “[t]he USP is the most  
23 comprehensive plan ever developed to remedy the vestiges of past discrimination and  
24 segregation.” [ECF 2096, p. 4.]

25 The Special Master acknowledges that “TUSD may be the only school district to  
26 make CRP integral to its conception of effective teaching regardless of the subject being  
27 taught” (ECF 2096, p. 48) and that “[t]he District has worked to infuse multicultural  
28 content in the District’s curriculum,” he wants more, though his suggested “completion

1 plans” are for the parties to develop more plans, rather than a remediation of a  
 2 constitutional violation. Again, this runs contrary to the Supreme Court’s instructions  
 3 for desegregation decrees to remedy specific constitutional violations and promptly  
 4 return control to local authorities. *Freeman*, 503 U.S. at 495-96; *Milliken*, 433 U.S. 267,  
 5 282; *Dowell*, 498 U.S. 237, 247. The District has complied with all USP requirements,  
 6 and should be declared unitary this area.

7 **f. USP § V(F) - Inclusive School Environments.**

8 The District worked to improve and maintain inclusive school environments,  
 9 including the adoption of policies reflecting its commitment to inclusion, non-  
 10 discrimination and equity for all students. [ECF 2075-5, pp. 183-98.] These policies,  
 11 programs and efforts included a comprehensive review of school environments and  
 12 related policies, district-wide training, teacher, staff and administrator training, and  
 13 policy changes to improve the inclusiveness of school environments. [*Id.*] The District  
 14 also worked with students on inclusive environments built around positive relationships,  
 15 student empowerment and culturally relevant materials and it worked with each school  
 16 to highlight the contributions of diverse groups. [*Id.*] The District also improved the  
 17 inclusiveness of its school environments by providing regular support through the  
 18 AASSD and MASSD. [*Id.*] The District complied in good faith with the USP’s  
 19 Inclusive School Environments requirements. [*Id.*]

20 **5. USP Section VI – Discipline.**

21 The District complies in good faith with USP Section VI, including by:

- 22 • Working to reduce racial and ethnic disparities in the administration of school  
 23 discipline and strengthening approaches to classroom management and  
 student behavior.<sup>37</sup>
- 24 • Implementing a revised version of the Guidelines for Student Rights and  
 25 Responsibilities.<sup>38</sup>
- 26 • Staffing each USP-required Discipline position with a qualified individual.<sup>39</sup>

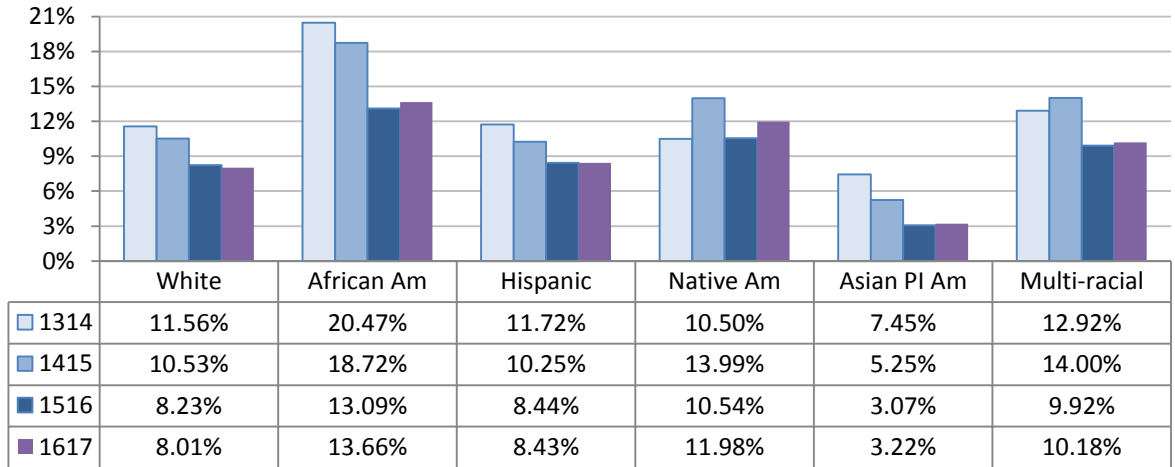
27 <sup>37</sup> ECF 2075-6 at 3-12, 38-42.

28 <sup>38</sup> ECF 2075-6 at 13-21.

- Developing a discipline data reporting system and related processes to review, analyze, and utilize discipline data.<sup>40</sup>

The District’s reduction in discipline (both in absolute levels and in the relative disparity) has been significant, as shown in the chart below:

**Total Discipline Rates by Ethnicity from 2013-14 to 2016-17**



The Special Master observes that “African American students were more than twice as likely to be suspended either short-term or long-term than were Anglo students.” But the District’s discipline rates for African American and Hispanic students are far better than the national average. The District’s disparity in out-of-school suspensions (OOS) for African American students is less than half the national average:

<sup>39</sup> ECF 2075-6 at 19, 22-29.

<sup>40</sup> ECF 2075-6 at 30-38, 42-45.

National figures from U.S. Dept. of Education Office of Civil Rights:<sup>41</sup>

Race / Ethnicity	White	AA	Hispanic
Total Enrollment	25,163,839	7,738,909	12,367,854
Number of students with 1 or more OOS Suspension	843,381	1,042,991	554,498
Percentage of students with 1 or more OOS Suspension	3.35%	13.47%	4.48%
Ratio of Minority Discipline to White Discipline		4.02 to 1	1.34 to 1

TUSD SY 16-17<sup>42</sup>

Race / Ethnicity	White	AA	Hispanic
Total Enrollment	10,438	4,905	30,801
Short Term OOS Suspensions	349	309	1055
Long Term OOS Suspensions (includes DAEP)	59	63	194
Total OOS Suspensions	408	372	1249
% of population with OOS Suspensions	3.9%	7.6%	4.1%
Ratio of Minority Discipline to White Discipline		1.95 to 1	1.05 to 1

There is no meaningful disparity with respect to Hispanic students, also far better than the national average. The absolute level of discipline is also lower in this District than the national average: nationally, over 13% of African American students receive an out of school suspension each year, while at TUSD the number is less than 8%.

Simply put: (a) an African-American student in this District is far less likely to receive an out of school suspension in this district than in most other school districts around the country, and (b) the disparity in African discipline in this district is less than half what it is in most other school districts around the country. It is time to stop focusing on anecdotes, to start celebrating achievements, and most definitely to stop court supervision. The District will continue to work to improve equity, and reduce disparity even further, but it can and should do that on its own, under local control.

Although the Special Master's R&R recognizes the District's substantial success in reducing discipline over the life of the USP, he recommends that the Court delay a declaration of unitary status regarding discipline, and lists a series of new requirements in order for the District to be declared unitary regarding discipline. [ECF 2096, p. 59.]

<sup>41</sup> Most recent available national enrollment and out-of-school suspension data retrieved at [https://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2013\\_14](https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2013_14), on April 10, 2018.

<sup>42</sup> TUSD figures are from its Response to RFI No. 1664, chart e-mailed to Special Master and plaintiffs on November 14, 2017.

1 The Special Master says there are two main reasons why he does not recommend unitary  
2 status for the District in the area of discipline: (1) slow-down in progress for discipline  
3 statistics (for some ethnicities) combined with continued disproportionality in discipline  
4 and (2) insufficient evidence to be confident that the District has established the  
5 framework to continue to make progress in reducing discipline and disproportionality in  
6 discipline. [ECF 2096, pp. 62-63.] Stated another way, because the District's  
7 significant reductions in discipline and disproportionality slowed down for one year  
8 after continued substantial improvement throughout the life of the USP, and because the  
9 District has not eliminated the nation-wide issue of disparate discipline toward African  
10 American students (though it does significantly better than the national rates), the Court  
11 should declare the District is not unitary regarding its discipline practices. However,  
12 this cannot be the standard. It cannot be that a school district can achieve excellent  
13 results over the life of a desegregation decree and do better than comparable school  
14 districts only to be denied unitary status because one year's data is not as good as the  
15 prior years' data. The District has complied with its obligations under Section VI of the  
16 USP and i.

#### 17 **6. USP Section VII – Family and Community Engagement.**

18 The District complies in good faith with USP Section VII and the FACE Plan,  
19 including by:

- 20 • Maintaining four state-of-the-art Family Centers to serve as the hubs of the  
21 District's FACE efforts, including by distributing information to families on a  
22 wide variety of District services.<sup>43</sup>
- 23 • Adopting strategies to increase family engagement both district-wide and at  
24 individual schools, including strategies for teachers and administrators to  
25 learn from families about student learning.<sup>44</sup>
- 26 • Staffing each USP-required FACE position with a qualified individual.<sup>45</sup>
- 27 • Providing translation and interpretation services.<sup>46</sup>

28 <sup>43</sup> ECF 2075-7 at 6-11, 20-21, 40-43.

<sup>44</sup> ECF 2075-7 at 4-5, 11-12, 14-20, 27-48.

<sup>45</sup> ECF 2075-7 at 5-6, 13-14.

1 Although the Special Master concludes that “family engagement activities that  
 2 are carried out by the Family Centers and central offices responsible for family  
 3 engagement appear to satisfy requirements for supporting family engagement” and  
 4 recommends unitary status for those activities,<sup>47</sup> he declines to recommend full unitary  
 5 status because of perceived shortcomings in “two-way” family engagement. In fact, the  
 6 only requirement with which the Special Master argues the District has not evidenced  
 7 compliance— SAIL training—is fully addressed in the District’s Analysis.<sup>48</sup> The Court  
 8 should grant full unitary status for Section VII.

9 **7. USP Section VIII – Extracurricular Activities.**

10 The District complies in good faith with USP Section VIII and the  
 11 Extracurricular Equitable Access Plan, including by:

- 12 • Providing equitable access to extracurricular activities, including sports,<sup>49</sup>  
 13 leadership, and other interests, with opportunities for interracial contact.
- 14 • Assessing extracurricular activities, including by surveying parents and  
 15 students about their preferred offerings.<sup>50</sup>
- 16 • Providing transportation to support extracurricular activities, including  
 17 equitable voluntary tutoring.<sup>51</sup>
- 18 • Tracking and reporting on student participation in extracurricular activities.<sup>52</sup>

18 The Special Master’s R&R recognizes that the District “appears to be doing  
 19 extensive work in the development of student leadership and character development that  
 20 sets it apart from many other Districts.” [ECF 2096, p. 71.] He also acknowledges that:

- 21 • Interviews, review of student participation data, and review of reports reflect  
 22 equitable access and increased student participation as well as the  
 23 implementation of a District wide data reporting system for extracurricular  
 participation. (Emphasis added.)

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24 <sup>46</sup> ECF 2075-7 at 20-23.

25 <sup>47</sup> ECF 2096 at 69.

26 <sup>48</sup> ECF 2075-7 at 44-45, 49-50; *see also* ECF 2075-5 at 76-77, 194-96.

27 <sup>49</sup> ECF 2075-8 at 5-9.

28 <sup>50</sup> ECF 2075-8 at 17-19, 22.

<sup>51</sup> ECF 2075-8 at 11-14, 20-22.

<sup>52</sup> ECF 2075-8 at 15-16, 23.



- 1 • The District has improved the parent survey participation.
- 2 • There is no reason to doubt that the District is allocating resources equitably. For example, the District has changed the way schools can raise funds for
- 3 team sports needs or activity.
- 4 • It appears that the District has pursued the implementation of the USP's
- 5 provisions with respect to extracurricular activities fairly.

6 [*Id.* at 71-72.]

7 Nevertheless, he recommends that the District not be declared unitary until it  
8 provides even more information and conducts even more studies. [*Id.* at 72.] He does  
9 not dispute that the District has already complied with all reporting requirements in the  
10 USP, and in fact acknowledges that the District has complied with these requirements.  
11 The DOJ likewise acknowledged that the District has fully complied with the USP  
12 regarding extracurricular activities:

13 The United States does not oppose the District's motion for unitary status  
14 as to extracurricular activities, facilities and technology. The District has  
15 set forth evidence that it has complied in good faith with the requirements  
16 of these portions of the USP. The Special Master has not identified any  
17 non-compliance with the USP in these areas, and the United States' compliance monitoring efforts have not uncovered any evidence to the contrary. Moreover, there is no evidence of ongoing discrimination in these areas. Finally, these areas are not so intertwined with other aspects of the USP that they cannot be dismissed without negatively impacting its full implementation.

18 [ECF 2014, p. 6.] (Emphasis added). The District has succeeded in its efforts and  
19 policies to provide extracurricular activities on an equitable basis and to encourage  
20 participation by African American and Hispanic students. That is all that is required.

21 For example, in holding that the District Court did not err in granting unitary  
22 status in the area of extracurricular activities, the Fourth Circuit Court of Appeals stated:

23 The Board's evidence showed that such activities are available in all  
24 schools, and there are no race-based barriers to participation. Moreover,  
25 students throughout the District are adequately informed about the  
26 availability of extracurricular activities.

27 *Everett v. Pitt County Bd. of Educ.*, 788 F.3d 132, 148 (4th Cir. 2015); see also *United*  
28 *States v. Franklin Parish Sch. Bd.*, No. 70-15632, 2013 WL 4017093 at \*4-5 (W.D. La.  
Aug. 6, 2013) ("All students are free to participate in or try out for any activity on a

1 completely voluntary basis and without any racial barriers or other requirements set by  
2 the District. The District has received no complaints regarding access to extracurricular  
3 activities.”).

4 Similarly, TUSD has made and continues to make extracurricular activities  
5 available in all schools without any race-based barriers to participation. Likewise,  
6 students throughout TUSD are adequately informed about the availability of  
7 extracurricular activities. [Doc. 1958-1, p. 366.] The District remains unitary in its  
8 provision of extracurricular activities.

### 9 **8. USP Section IX – Facilities and Technology.**

10 The District complies in good faith with USP Section IX and the related action  
11 plans, including by:

- 12 • Developing the Facilities Condition Index and Educational Suitability Score,  
13 which the District uses to assess schools’ facilities biennially.<sup>53</sup>
- 14 • Adhering to the Multi-Year Facilities Plan when prioritizing repairs and  
15 improvements.<sup>54</sup>
- 16 • Developing the Technology Conditions Index , which the District uses to  
17 assess schools’ technology biennially.<sup>55</sup>
- 18 • Adhering to the Multi-Year Technology Plan when designing and launching  
19 District technology initiatives.<sup>56</sup>
- 20 • Training teachers and administrators on how best to use technology to  
21 facilitate student learning.<sup>57</sup>

22 The Special Master observes with respect to Facilities that “[t]here is no evidence  
23 that racially identifiable schools have lower FCI or ESS scores than integrated schools,”  
24 and that the IC Committee “concluded that the FCI scores . . . corresponded very closely  
25 with the ratings of the IC.”<sup>58</sup> These results have come from the District’s extensive

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26 <sup>53</sup> ECF 2075-9 at 1-6.

27 <sup>54</sup> ECF 2075-9 at 6-8.

28 <sup>55</sup> ECF 2075-9 at 6-11.

<sup>56</sup> ECF 2075-9 at 11-15.

<sup>57</sup> ECF 2075-9 at 18-24.

<sup>58</sup> ECF 2096, p. 73.

1 efforts to implement the Facilities provisions of the USP. The District assesses school  
2 facilities biannually using the FCI and ESS measurement criteria to ensure that its  
3 facilities are as educationally effective as possible.<sup>59</sup> To address facilities that the  
4 metrics identify as needing the most attention, the District has developed and  
5 implemented the MYFP to prioritize repair and improvement projects.<sup>60</sup> The District  
6 has complied with the USP with respect to facilities as far as practical.

7 Addressing Technology, the Special Master concludes that “[t]he District should  
8 be granted unitary status with respect to technology” except for professional  
9 development aspects.<sup>61</sup> The District has implemented a “train-the-trainer” technology  
10 professional development model—which involves providing for *at least* one classroom  
11 teacher at each school to serve as a Teacher Technology Liaison.<sup>62</sup> Moreover, the  
12 District has met its objective in increasing the number of teachers that meet District  
13 technology proficiency in the classroom, implemented instructional technology training  
14 at school sites, and began holding an annual districtwide Teaching and Learning Summit  
15 to provide training based on input gathered from teachers across the District on lessons  
16 incorporating technology in the classroom.<sup>63</sup> Further, the District has dedicated itself to  
17 equitably equipping its teachers with the best technology conditions possible to enhance  
18 student learning through its one-of-a-kind TCI instrument and comprehensive MYTP.<sup>64</sup>  
19 The District has complied with the USP regarding technology, more than adequately to  
20 support the purpose underlying the *Green* good faith compliance requirement for unitary  
21 status.

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22  
23  
24 <sup>59</sup> ECF 2075-9, p. 6-7.

25 <sup>60</sup> ECF 2075-9, pp. 8-10.

26 <sup>61</sup> ECF 2096, p. 76.

27 <sup>62</sup> ECF 2075-9, pp. 12-13.

28 <sup>63</sup> ECF 2075-9, pp. 18-21.

<sup>64</sup> ECF 2075-9, pp. 10, 12-18.

1                   **9.     USP Section X – Accountability and Transparency.**

2                   As set forth in detail in its Assessment,<sup>65</sup> the District complies in good faith with  
3 USP Section X, including by:

- 4                   • Utilizing EBAS, which not only meets USP standards, but exceeds national  
5 standards.<sup>66</sup>
- 6                   • Training and evaluating District personnel on the use of EBAS.<sup>67</sup>
- 7                   • Developing and implementing a detailed process for developing a budget that  
8 allocates funds necessary to implement the USP.<sup>68</sup>
- 9                   • Following the Notice and Request for Approval process whenever  
10 necessary.<sup>69</sup>
- 11                  • Maintaining a webpage containing all USP-required elements.<sup>70</sup>

12                  The Special Master states in the SMAR that “the development of EBAS [and related  
13 components] deserves recognition[.]”<sup>71</sup> Indeed, the District has developed a state-of-  
14 the-art student information system that not only far exceeds the USP’s requirements, but  
15 far exceeds that which is employed by virtually every other school district in the United  
16 States. This achievement demonstrate that the District has complied in good faith with  
17 Section X of the USP.

18                  Accordingly, the District has complied with the USP in good faith. The Supreme  
19 Court established the “good faith” requirement in the *Green* case not for the pure  
20 pleasure of making a school district jump through hundreds of hoops in a game of  
21 “gotcha” when finding a non-compliance, not for the purpose of solving persistent  
22 nationwide ills with roots beyond the school district’s conduct, and not even for the  
23 purpose of engineering a better school district, however laudable that may be.

24 <sup>65</sup> See generally ECF 2075-10.

25 <sup>66</sup> ECF 2075-10 at 2-13.

26 <sup>67</sup> ECF 2075-10 at 13-15.

27 <sup>68</sup> ECF 2075-10 at 16-18.

28 <sup>69</sup> ECF 2075-10 at 19.

<sup>70</sup> ECF 2075-10 at 20.

<sup>71</sup> ECF 2096 at 78.

1           Once the vestiges of prior discrimination are gone, as here, the purpose is limited  
2 to ensuring that the school district is sufficiently committed to its constitutional  
3 obligations that when the Court terminates supervision, it will not suddenly revert to a  
4 *de jure*, intentionally dual school system. The District's conduct over the past five years,  
5 including the massive effort at compliance detailed in its annual reports and the  
6 comprehensive assessment, the District's current demographic makeup and the  
7 community in which it lives, all leave no doubt that a return to 1951 is simply  
8 impossible here. The District has complied in good faith with the requirements of the  
9 USP; the underlying purpose articulated in *Green v. Board of Education* has been met.  
10 The District is in unitary status and the Court should terminate supervision immediately.  
11 The District objects to the R&R to the extent that it does not so recommend.<sup>72</sup>

12  
13  
14  
15  
16 \_\_\_\_\_  
17 <sup>72</sup> The District also objects to the Report and Recommendation to the extent it does not  
18 recommend immediate termination of supervision on the following additional grounds.  
19 As noted above (p. 3 *et seq.*), Judge Frey found that most of the vestiges of the  
20 improper conduct had attenuated through the passage of time by early 1977, when the  
21 trial was held. The only vestiges of that conduct remaining in 1977 were in the racial  
22 and ethnic makeup of 9 schools, at which minority enrollment remained higher than it  
23 would have been in the absence of the conduct found to be improper. All of those  
24 remaining enrollment vestiges were eliminated by 1986. There is also no dispute that the  
25 District complied with the decree up to that point. Supervision should have been  
26 returned to the District at that point in 1986, and it is of no consequence to the  
27 legitimacy of continued federal court supervision that the District failed to file a petition  
28 seeking termination at that time.

23 Further, the District had no constitutional duty to battle residential resegregation after  
24 that point, whether or not the case remained pending. *Pasadena City Bd. of Educ. v.*  
25 *Spangler*, 427 U.S. 424, 436 (1976). Finally, all of the conduct on which this Court  
26 relied in failing to find good faith by the District in its 2008 decision, (a) post-dated the  
27 point (in 1986) when which federal supervision should have ended, and (b) appeared to  
28 relate to state law concerns regarding justification for use of state authorized tax  
revenues under 15 A.R.S. §910(G), and were thus not proper subjects for consideration  
in the good faith analysis in 2008. Accordingly, because supervision should have been  
terminated in 1986, it should be terminated now. The District recognizes that this  
objection could have been articulated at an earlier point, but respectfully asserts the  
objection now, both because it should be considered in deciding whether to terminate,  
modify or extend the current decree now, and for appellate purposes.

1 **II. The District Generally Objects on the Grounds That Special Master's**  
2 **Completion Steps Are New Requirements Not in the Unitary Status Plan**  
3 **and Not Causally Related to Any Finding of Discrimination.**

4 The Special Master's Report and Recommendation contains some seventy (70)  
5 additional requirements which the District must complete before he will recommend  
6 complete unitary status, the majority of which are new requirements not set out in the  
7 Unitary Status Plan.<sup>73</sup> There are more than 15 new studies or reports, most of which  
8 must be completed before the end of the current school year. There are at least eight  
9 requirements to develop a new plan, and numerous requirements for implementation  
10 throughout the 18-19 school year. The District generally objects that these are new  
11 requirements, which, taken together, unfairly "move the goalposts" and essentially  
12 amount to a whole new desegregation decree, with a level of intensity and complexity  
13 greater than most initial decrees. The District further objects that none of these are even  
14 nominally tied to the limited vestiges of past discrimination found by Judge Frey to  
15 remain in 1978 (which all were eliminated by 1986), and many relate to areas in which  
16 Judge Frey expressly found there was no causal connection to the past discrimination.

17 **III. The District Generally Objects to Continued Supervision in Case No. 74-cv-**  
18 **204 (the Mendoza case).**

19 Judge Frey expressly found that the District had not operated a dual school  
20 system with respect to Hispanic students:

21 In light of the principles discussed above and the evidence  
22 presented, the segregative acts by the District and the  
23 existence of racial imbalance in the schools are insufficient  
24 for a finding that a Mexican-American/Anglo dual school  
25 system has ever been operated by the defendants. [*Id.*, p.  
26 221.]

27 There were only two types of conduct that Judge Frey found improper with  
28 respect to Hispanic students: certain school siting decisions, and assignment of students  
from overcrowded schools, in a manner that intentionally increased racial concentration.  
The conduct described by Judge Frey ended in the 1960s. There is no evidence that it  
has resumed, and any lingering effects of that conduct have either been attenuated by

<sup>73</sup> The District has gone through the report and recommendation, and compiled a list of  
the requirements contained in that report, attached hereto as Exhibit A, for convenience.

1 time as noted by Judge Frey, or, in the 9 schools still affected in 1977 (5 of which are  
2 now closed) eliminated by District policy by 1986. Where a district has engaged in  
3 specific prohibited discriminatory acts, but has not operated a dual school system, that is  
4 all that is required.

5 The additional requirements for termination of court supervision in a  
6 desegregation case, first laid down by the Supreme Court in *Green v. County School*  
7 *Bd.*, 391 U.S. 430 (1968), were premised on the prior operation of a dual school system.  
8 The language of *Green* itself, and its rationale, were clearly limited to circumstances in  
9 which the school district had operated a dual system as to the plaintiff class.  
10 Accordingly, the District is entitled to entry of judgment terminating supervision in the  
11 Mendoza case (No. 74-cv-204).

12 The mere fact that the Mendoza case was consolidated with the *Fisher* case (No.  
13 74-cv-90) does not change this. Judge Frey noted that, although the cases were  
14 consolidated for pretrial and trial, “the cases retain their separate identities.” [ECF 345,  
15 p. 7. This is consistent with law under Rule 42(a), which holds that consolidation does  
16 not merge the cases into one, and that consolidated cases retain their separate identities,  
17 such that a judgment in one is immediately appealable regardless of the procedural  
18 status of any other consolidated action. This was most recently reaffirmed by the  
19 Supreme Court in *Hall v. Hall*, 584 U.S. \_\_\_, 138 S.Ct. 1118, (Slip. Op. March 27,  
20 2018). The Supreme Court noted that, under the former consolidation statute (former 28  
21 U.S.C. § 734, later replaced by Rule 42(a)), it was well settled that “consolidation is  
22 permitted as a matter of convenience and economy in administration, but does not merge  
23 the suits into a single cause, or change the rights of the parties, or make those who are  
24 parties in one suit parties in another,” quoting *Johnson v. Manhattan R. Co.*, 289 U. S.  
25 479, 496–497 (1933). *Id.*, Slip Op. at 10. The Supreme Court confirmed that this  
26 definition of consolidation carried over unchanged into Rule 42(a) when it replaced the  
27 consolidation statute in 1937. *Id.*, Slip Op. at 17. Accordingly, since there was no  
28 finding of a dual school system with respect to the Mendoza plaintiffs, and the improper



1 conduct found by Judge Frey relating to the Mendoza plaintiffs abated over 50 years  
2 ago, the District is entitled to immediate termination of the Mendoza case. The District  
3 thus objects to the Special Master's Report and Recommendation to the extent it does  
4 not recommend immediate termination of the Mendoza case.

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## Specific Objections

### **IV. The District Objects to New ALE Participation Rate Requirements.**

The Special Master recommends that the District be required to meet “the 15% goal” for participation in each ALE, despite his recognition that “[t]he District has implemented all of the[] provisions” of the ALE action plan and ALE supplement. [*Id.* at p. 26; ECF 2041, p. 22.] While the District is happy to set its own aspirational goals for participation at 15%, setting those goals as a requirement for termination of Court supervision is an entirely different matter. Neither the original Unitary Status Plan nor ALE Action Plan nor the ALE Supplement contains this requirement. Although the District has willingly set ambitious goals in addition to complying with what is the most comprehensive consent decree ever formulated, the Court should not condition a declaration of unitary status on specific statistical results, particularly when those results are beyond the District’s control and only partially influenced by the District’s efforts, and when the District has complied in good faith with the actions it was required to take (as acknowledged by the Special Master). *See Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738, 747-48 (“as the district court correctly observed, the proper standard under *Freeman* is not statistical outcomes, but rather good-faith compliance with the 1992 Plan . . . to the extent practicable”).

### **V. The District Objects to Any Requirement to Set A Required ELL Graduation Rate.**

After acknowledging the District’s strong work and successes in the areas of dropout prevention, graduation, retention and absenteeism, the Special Master recommends that the District be declared unitary in these areas except regarding ELL students. [ECF 2096, p. 53.] For ELL students, the Special Master recommends not declaring the District unitary because data “vary from year to year,” and he would like to see more information to compare the efforts and successes. [*Id.*] This is not a finding that the District has not complied in good faith with the USP. Indeed, the recommended completion plan of having the parties meeting together to discuss a practicable

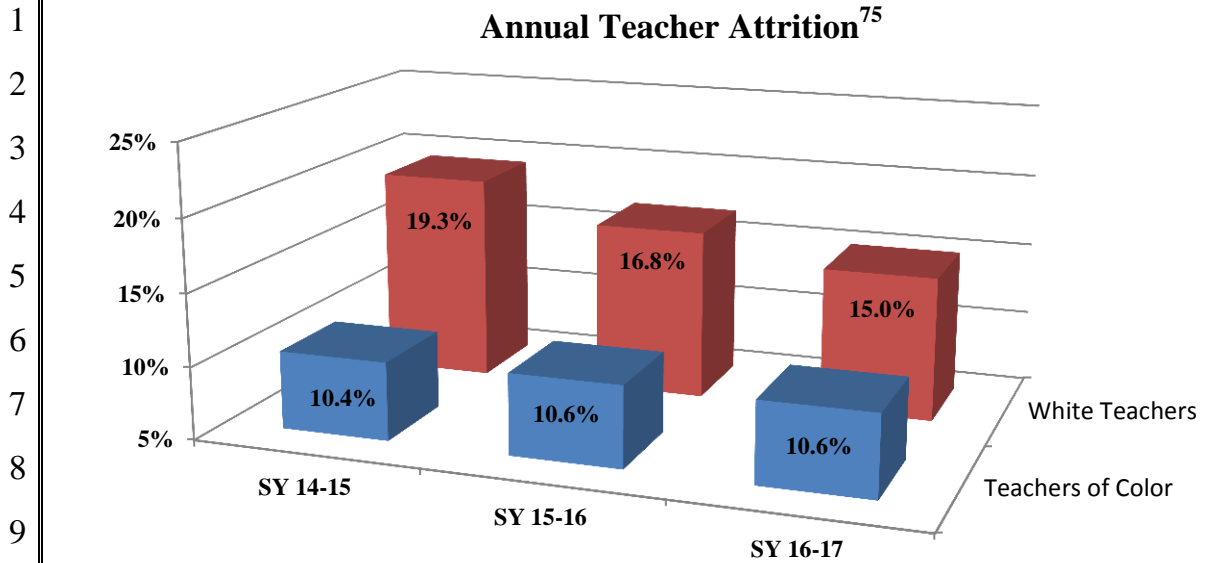
1 graduation rate for ELL students is completely detached from constitutional violations,  
2 and will lead to continued disputes and Court supervision rather than returning a unitary  
3 district to the control of local authorities. The District objects to the Special Master's  
4 recommendation to not declare the District unitary regarding ELL dropout prevention,  
5 graduation, retention and absenteeism.

6  
7 **VI. The District Objects to Further Requirements in Teacher Attrition.**

8 The Special Master does not take issue with the District's teacher attrition rate or  
9 its compliance with related USP provisions. Yet he asks the Court to impose a brand-  
10 new obligation on the District to enlist a third party to conduct an extensive interview  
11 process (beyond the District's existing exit survey process) and develop a report on  
12 strategies to reduce teacher attrition in the coming school year. [ECF 2096 at 19.] The  
13 Special Master justifies this onerous new requirement on his conclusion that, while the  
14 District's teacher attrition rate is not high, "that does not mean it could not be lower."  
15 [*Id.* at 16.] It is remarkable just how far that logic strays from the purpose of Court  
16 supervision in this case.

17 As an initial matter, despite there being no USP requirement that the District  
18 maintain a certain teacher attrition rate, the Special Master has recognized that "[t]he  
19 rate of educator attrition in TUSD is not particularly high overall[.]" [*Id.*] Not only that,  
20 the District's attrition rate for teachers of color has been even better than its attrition rate  
21 for white teachers. While nationally teachers of color have an attrition rate that is almost  
22 four percentage points *higher* than the rate for white teachers,<sup>74</sup> the District's attrition  
23 rates for teachers of color have been at least four percentage points *lower* than its rates  
24 for white teachers over the past three school years:

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27 <sup>74</sup> See Desiree Carver-Thomas and Linda Darling-Hammond, *Teacher Turnover: Why It*  
28 *Matters and What We Can Do About It*, LEARNING POLICY INSTITUTE, at 20 (Aug.  
2017), available at [https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher\\_Turnover\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher_Turnover_REPORT.pdf).



What's more, the District has achieved a favorable teacher attrition rate despite the well-chronicled nationwide teacher attrition problem and the *near-crisis-level* teacher attrition problem in Arizona.<sup>76</sup>

Moreover, although the Special Master purports to identify a “disconnect between the very significant proportion of teachers who say, in an annual survey, that they want to continue to work in TUSD and the proportion of teachers who actually leave the District,” ECF 2096 at 16, that perceived disconnect is illusory. Simply because a teacher leaves the District does not mean he or she is unhappy with the District. Rather, teachers leave the District for many reasons unrelated to District conduct or policy, such as retirement or to follow a spouse who relocates for her own

<sup>75</sup> For purposes of comparison with national data, the District has combined the attrition rate data for African American, Hispanic, Asian or Pacific Islander, and American Indian/Alaskan teachers into one attrition rate for Teachers of Color.

<sup>76</sup> See, e.g., Valerie Strauss, *Why it's a big problem that so many teachers quit – and what to do about it*, WASHINGTONPOST.COM (Nov. 27, 2017), available at <https://www.washingtonpost.com/news/answer-sheet/wp/2017/11/27/why-its-a-big-problem-that-so-many-teachers-quit-and-what-to-do-about-it/> (explaining the nationwide teacher attrition problem and specifically pointing out Arizona and the Southwest as problem areas); *'We continue to worsen': Nearly 2,000 Arizona teaching jobs remain vacant well into school year*, TUCSON.COM (Dec. 19, 2017), available at [http://tucson.com/news/local/we-continue-to-worsen-nearly-arizona-teaching-jobs-remain-vacant/article\\_1c8d665a-a422-5c7b-95b9-98afe0cb0c6f.html](http://tucson.com/news/local/we-continue-to-worsen-nearly-arizona-teaching-jobs-remain-vacant/article_1c8d665a-a422-5c7b-95b9-98afe0cb0c6f.html) (describing the near-crisis-level teacher attrition problem in Arizona).

1 career-related reasons. The District knows this is true because, despite the Special  
2 Master's incorrect claim that "[t]he District has not undertaken a systematic study of the  
3 influences on attrition," [*Id.* at 17], the District studies teacher attrition on a consistent,  
4 ongoing basis. And the District's exit survey data from the past three years indicates that  
5 the majority of teachers who leave the District do so for non-TUSD-specific reasons,  
6 such as family relocation or their own or others' health.

7 Of course, this is all beside the point. The Court is not supervising the District to  
8 ensure that the District lowers its teacher attrition rate as far as it possibly can. Rather,  
9 where vestiges of past discrimination have been eliminated, the Court may retain  
10 supervision over the District only so long as needed to ensure that the District will not  
11 revert to an unlawful dual school system upon termination of that supervision. At  
12 bottom, there simply is no justification to impose a brand-new, burdensome teacher  
13 attrition requirement on the District.

### 14 Conclusion

15 For the reasons set forth above, the District generally objects to the Special  
16 Master's Report and Recommendation to the extent it does not recommend full unitary  
17 status and immediate termination of court supervision. Subject to and without waiving  
18 that objection, the District specifically objects only to three particular completion steps  
19 in the Report and Recommendation. Nonetheless, the District is not waiting for an order  
20 from the Court, but is working hard on all of the completion steps set forth in the Report  
21 and Recommendation pending further orders from the Court.  
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DATED this 11<sup>th</sup> day of April, 2018.

**STEPTOE & JOHNSON LLP**

By /s/ P. Bruce Converse  
P. Bruce Converse  
Paul K. Charlton  
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**TUCSON UNIFIED SCHOOL DISTRICT  
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No. 1

**CERTIFICATE OF SERVICE**

1  
2 The foregoing document was lodged with the Court electronically through the  
3 CM/ECF system this 11<sup>th</sup> day of April, 2018, causing all parties or counsel to be served  
4 by electronic means, as more fully reflected in the Notice of Electronic Filing.  
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6  
7 /s/ Diane Linn  
8 Employee of Steptoe & Johnson LLP  
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