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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

<p>15 Roy and Josie Fisher, et al.,</p> <p style="text-align: center;">16 Plaintiffs,</p> <p style="text-align: center;">17 vs.</p> <p>18 Tucson Unified School District No. 1, et al.,</p> <p style="text-align: center;">19 Defendants.</p>	<p>No. 4:74-cv-00090-DCB (Lead Case)</p>
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<p>20 Maria Mendoza, et al.</p> <p style="text-align: center;">21 Plaintiffs,</p> <p style="text-align: center;">22 vs.</p> <p>23 Tucson Unified School District No. 1, et al.,</p> <p style="text-align: center;">24 Defendants.</p>	<p>No. CV 74-204 TUC DCB (Consolidated Case)</p>
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26 **DISTRICT REPLY TO OBJECTIONS TO ITS**  
27 **NOTICE AND REPORT OF COMPLIANCE:**  
28 **TEACHER DIVERSITY PLAN, ATTRITION AND GYOP STUDIES**

1 The Court directed the District to file its 2018-19 Teacher Diversity Plan (TDP),  
 2 along with studies of attrition and the District's Grow-Your-Own programs, within 90  
 3 days of its order dated September 6, 2018 (ECF 2123). The District filed these reports  
 4 on December 6, 2018, as ordered. [ECF 2159-1, 2159-2 and 2159-3.] In each of these  
 5 related reports, the District carefully tracked the Court's order, to ensure that the District  
 6 complied with every remaining requirement for unitary status.

7 The Mendoza Plaintiffs' Response [ECF 2166] ignores what the District plainly  
 8 included in its reports, incorrectly manufactures disputes about data, and imagines new  
 9 requirements the Court plainly did not include in its order. The following addresses  
 10 each of Plaintiffs' misplaced claims in turn.

11 **I. Teacher Diversity Plan**

12 The Court assigned the District four TDP-related tasks: "continue[]  
 13 implementation of the TDP;" "evaluate additional incentive program(s) to add to the  
 14 TDP to increase its impact;" "determine what incentives, if any, to add for the 2018-19  
 15 school year;" and "prepare a report for the Special Master and the plaintiffs identifying  
 16 the option(s) considered, and explaining the rationale for its decisions." [ECF 2123 at  
 17 39, ¶¶23–28.] The District did all four. Plaintiffs do not argue otherwise.

18 Instead, the Mendoza Plaintiffs allege that the District's report on the TDP<sup>1</sup>  
 19 "abandons the agreed upon measures in the existing TDP." Not so. First and foremost,  
 20 the District has reported all teacher data by race/ethnicity, at every school in the District,  
 21 over the entire period. This data allows any party to apply whatever standard they  
 22 choose to that data.

23 The USP provides as follows:

24 The District shall identify significant disparities (*i.e.*, more than a 15  
 25 percentage point variance) between the percentage of **African American**  
 26 **or Latino** certificated staff or administrators at an individual school and  
 district-wide percentages for schools at the comparable grade level

27 <sup>1</sup> The report attaches a copy of the original TDP. This was intentional. The  
 28 modifications to the TDP each year have been simply added to the original plan, without  
 creating a new document.

1 (Elementary School, Middle School, K-8, High School). The assessment  
2 of significant disparities shall also take into account the percentage of  
3 African American and Latino students on each school campus. The  
4 District shall assess the reason(s) for the disparities and shall review and  
address, to the extent relevant and practicable, its hiring and assignment  
practices, including enforcing hiring policies and providing additional  
targeted training to staff members involved in hiring and assignment.  
(Emphasis added).

5 This the District has done. There are no requirements in the USP other than reviewing  
6 and addressing any “significant disparities.” The USP does not set out any number of  
7 schools with or without “significant disparities” required for unitary status, nor could  
8 there be and still pass constitutional muster, given that there has never been any finding  
9 that the District discriminated against African Americans or Latinos in any way in either  
10 hiring or assignment of teachers throughout the District.<sup>2</sup>

11 Yet the District has identified such “significant disparities” as existed, and  
12 addressed them with focused efforts at balancing individual school staffs to reflect the  
13 overall District teacher demographics at each school level. The TDP report shows the  
14 results of that effort. Although there are still ten of the 26 target schools that had  
15 “significant disparities” in African American or Latino teaching staffs, as defined by the  
16 USP, the number of teachers that would have to change to eliminate all significant  
17 disparities at target schools dropped from 27 in 16-17 to 18 in 17-18. Half of the  
18 remaining 10 target schools were only one teacher away from eliminating significant  
19 disparities. Half of the remaining ten target schools had made progress over the prior  
20 year, reducing the number of teacher changes needed to eliminate significant disparities.

21 The District’s HR staff has concluded that the general TDP incentive program  
22 has achieved close to its practical maximum effect. Moreover, elementary schools often  
23 have very small teacher groups – some as few as ten, and many less than 25. Data for  
24 groups that small is likely to be (a) volatile from year to year as a result of small random

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25 <sup>2</sup> Indeed, the evidence is to the contrary. Statewide in Arizona, only 13% of  
26 teachers are Hispanic, but at the District, 29% of teachers are Hispanic. Statewide in  
27 Arizona, 3% of teachers are African American, and also 3% at the District. The Tucson  
28 area population is only 5% African American. Tucson Population (2018-06-12),  
retrieved 2019-01-15, from <http://worldpopulationreview.com/us-cities/tucson>.

1 changes in personnel, and (b) so small that no valid conclusions can be drawn. A  
2 change in one or two teachers at a small school, unless they are replaced with teachers  
3 of the same race or ethnicity, can have massive impact on percentages, with the result  
4 that schools bounce in and out of compliance from year to year. The District observed  
5 this phenomenon, both within and outside the target group of schools. The District's  
6 HR staff is also concerned that in this small group setting, concern about meeting TDP  
7 targets may elevate race or ethnicity above acceptable levels of importance in hiring  
8 decisions, particularly given that there is no finding that the District has ever  
9 discriminated in the hiring of teachers

10 The Mendoza Plaintiffs argue that the data show less progress if one applies a  
11 15% disparity standard to *white* and *Latino* teaching staff, ignoring the number of  
12 African American teachers. The Mendoza Plaintiffs spend considerable amount of time  
13 attempting to show that the District agreed to this new (and counterintuitive) measure.  
14 But a careful review of the documents cited by plaintiffs shows only that they  
15 themselves advocated for that, that the District agreed to report the number of white  
16 teachers, and that the Special Master used that rationale when he selected the 26 schools  
17 to include in the Teacher Diversity Plan.<sup>3</sup> It does not show that the District agreed to  
18 measure USP compliance by ignoring the number of African American teachers and  
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20 <sup>3</sup> In reality, the Special Master “consider[ed] only the numbers and percentages of  
21 Anglo and Latino teachers” in determining which schools to target in the TDP because,  
22 despite falling short of the 15% standard, “the number of Anglo and Latino teachers in  
23 [9 of the exempted] schools now seems sufficient to perform the roles . . . that racially  
24 diverse faculties serve for their students, teachers and families.” [ECF 2166-1 at 9, 11.]  
25 Thus, the exemptions “achieve the objectives of the USP more productively than would  
26 rigid adherence to the 15% rule.” [ECF 2166-1 at 9, 13–14.] The only proposal the  
27 District’s TDP adopted was the proposal to limit the number of target schools to 26, and  
28 the TDP explicitly retained the USP’s definition of “significant disparities”:

“The Special Master proposed that 26 schools that currently have ‘significant  
disparities’ as defined in paragraph IV(E)(2) of the USP be the primary targets of this  
plan in SY2016-17, and the District has adopted that proposal for this plan.” [ECF 2159-  
1 at 9.]

1 instead counting the number of white teachers. Indeed, the District has never agreed to  
2 modify the USP, and it has not been modified.

3 But more importantly, it really does not matter whether this amount or that  
4 amount of progress has been made: what is indisputable is that the District has devoted  
5 substantial effort – and stipend dollars – in a serious, committed, multi-year effort to  
6 address diversity in its school staffing, to reduce “significant disparities” in that staffing,  
7 and that it will continue to do so. That is all that is required for termination of court  
8 supervision. To require more would amount to improper racial balancing for balancing’s  
9 sake.

## 10 **II. Teacher Attrition**

11 The Court ordered the District to study and report on ways to reduce teacher  
12 attrition. [ECF 2123 at 40.] The report shows that the overall attrition rate at the district  
13 has been trending consistently down over the last three years. More importantly, the  
14 attrition rate at TUSD is substantially below state and national average attrition rates, a  
15 signal achievement given the low salaries and more difficult working conditions in  
16 Arizona as a result of the overall low rank in public school funding in Arizona. The  
17 statewide attrition rate in Arizona is 24%; the national attrition rate is 16-17%. [ECF  
18 2159-2 at 3, and sources cited therein.] By contrast, the TUSD attrition rate is only  
19 12.7%.

20 The Hispanic teacher attrition rate is consistently lower than the overall average  
21 and lower than the attrition rate for white teachers. It is substantially lower than the  
22 national average for minority teachers. Although the African American attrition rate is  
23 higher than the overall average, both the rate and the gap to other rates are trending  
24 down. Again, most importantly, the African American attrition rate is substantially  
25 below the national average, and the gap between African American and white attrition  
26 rates is also less than the national average. *Id.*

27 The Mendoza plaintiffs argue that the attrition data in the Teacher Attrition study  
28 “materially conflict with data in the TUSD Annual reports.” [ECF 2166 at 2, 8–9.]

1 Plaintiffs are confusing two different sets of data. The table presented in the District's  
2 Attrition Report [ECF 2159-2 at 3] records the attrition rate for **classroom teachers**. In  
3 contrast, the data provided in the District's Annual Reports (DAR) calculates the  
4 attrition rate for all certificated staff. Certificated staff, as shown in Appendix IV-14 of  
5 the DAR, includes not only classroom teachers, but administrators, coordinators,  
6 counselors, curriculum specialists and others. The statistics for classroom teachers in  
7 the attrition report are accurate, and do not conflict with data in the District's annual  
8 report.

9 The District complied with the Court order, attrition results are better than state  
10 and national averages, there is no serious negative differential in attrition rates based on  
11 race or ethnicity, and thus there is no constitutional basis to continue supervision on  
12 attrition.

### 13 **III. Grow-Your-Own Programs**

14 The Court ordered "the District to review and assess the effectiveness of its  
15 GYOPs and determine whether other or additional programs exist that are more  
16 effective." On Plaintiffs' urging, the Court added "[t]he GYOP study should determine  
17 whether there is a viable pilot program for African-American administrators and, if  
18 possible, implement it this year." The District has complied in good faith. Still, Plaintiffs  
19 object to (a) the results of the study as they relate to the Leadership Preparatory  
20 Academy (LPA), and (B) what it sees as several GYO-related omissions. Both sets of  
21 objections are misplaced.

#### 22 **A. Plaintiffs' LPA-related objections seek to impose requirements that** 23 **are beyond the scope of the USP and the Court's jurisdiction.**

24 Plaintiffs are vexed that an increased proportion of teachers participating in the  
25 Leadership Prep Academy in SY 2017-18 were White. [ECF 2166 at 11-13.] Of the 36  
26 participants, 22 (61.1%) were White and 10 (27.8%) were African American or  
27 Hispanic. Plaintiffs somehow construe these numbers as both evidence of the District's  
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1 bad faith failure to implement the African American pilot program in SY2017-18, and  
2 justification to enforce financial support for Latino participants. [ECF 2166 at 13.]

3 This is an overreaction. First, the District's study addresses both recruitment  
4 efforts and financial supports to African American and Latino participants. [See Section  
5 I.C., "Leadership Prep Academy" Doc. 2159-3 at 3-4 (the District's current efforts);  
6 Section V, "Strategies for Moving Forward," ECF 2159-3 at 21("The LPA program . . .  
7 is a strong foundation on which to build or expand . . . a pilot [GYO program for  
8 African American administrators]. For SY19-20, the District will evaluate an expansion  
9 of the LPA program for District Level leadership positions, including the possibility of  
10 extending incentives such as hiring and retention stipends similar to those used for the  
11 TDP, and support for getting an administrator certification." ). The Court's order did not  
12 make the District's unitary status contingent on what the district reported, only that the  
13 district conduct a study and report on it. [ECF 2123 at 42.]

14 Second, in a program with only a few dozen annual participants, small changes in  
15 numbers of necessity produce large year-to-year fluctuations in percentages with are to  
16 be expected. Indeed, in the current school year, the numbers are nearly even: 13 (52%)  
17 White and 12 (48%) African American or Hispanic participants. LPA participants are  
18 drawn from a pool of teachers that is 64% White to 31% Hispanic. That means in years  
19 like 2018-19, with a disproportionately high percentage of minority participation, the  
20 LPA program is making classrooms more White; and because some administrators are  
21 off-site, this makes schools more White. This leads to the final point.

22 Third, the Court's jurisdiction is limited to correcting the vestiges of past  
23 discrimination. But "there is no assertion of discriminatory hiring practices in TUSD."  
24 [ECF 2123 at 38.] Thus, when it comes to staff hiring, Plaintiffs must somehow link any  
25 request for oversight to an indirect impact of an established discriminatory practice. *See*  
26 *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) ("The vestiges of segregation that are the  
27 concern of the law in a school case may be subtle and intangible but nonetheless they  
28

1 must be so real that they have a causal link to the de jure violation being remedied.”).  
 2 Plaintiffs have not done so.

3 **B. The District’s study and report address every issue related to GYOP**  
 4 **that the Court specified.**

5 Plaintiffs allege that the District’s GYOP Report ignores four of the Court’s  
 6 GYOP-related orders: that the District (1) “omitted assessment of recruitment efforts;”  
 7 (2) “d[id] not address proactive recruitment programs suggested by the Special Master,  
 8 such as those adopted by the military which seek out and groom individuals for  
 9 leadership from entry level positions through assigned career paths leading to the  
 10 District’s top administrative positions;” (3) did not “provide for incentives, including  
 11 monetary bonuses and stipends, to be applied in the GYOP to the maximum extent  
 12 possible;” and (4) “failed to include strategies resulting from the GYOP study in the  
 13 2018-19 TDP.” [ECF 2166 at 13–14.] Plaintiffs are mistaken. The District addresses  
 14 each alleged omission in turn.

15 **1. “assessment of recruitment efforts”**

16 The GYOP Report devotes whole sections of its study accomplishing this task. In  
 17 Section I, “GYO Programs at TUSD,” the District identifies all of its current recruitment  
 18 efforts. [ECF 2159-3 at 1–4]. And in Section IV(A), “Conclusions” on “Current District  
 19 Efforts,” the District assesses those efforts. [ECF 2159-3 at 19.]

20 **2. “proactive recruitment programs suggested by the Special**  
 21 **Master, such as those adopted by the military which seek out**  
 22 **and groom individuals for leadership from entry level positions**  
 23 **through assigned career paths leading to the District’s top**  
 24 **administrative positions”**

25 The GYOP Report describes a comprehensive administrative pipeline. Entry-  
 26 level employees can enter the pipeline through Make the Move or Arizona Teaching  
 27 Fellows and become a certified teacher. Certified teachers can participate in the  
 28 Leadership Prep Academy to become an administrator at any non-elected level, e.g.,  
 principal, assistant principal or central office directors. And the Leadership  
 Development Academy is there to help new administrators make the transition.



1                                   **3.     “incentives, including monetary bonuses and stipends, to be**  
2                                   **applied in the GYOP to the maximum extent possible”**

3                   The GYO Report addresses both current and future financial incentives for  
4                   GYOP participants. Current financial incentives include—

- 5                   •     Make the Move: The program offers tuition reimbursements, as  
6                   well as hiring and retention stipends upon certification. Dual  
7                   language participants are eligible for reimbursement for the Spanish  
8                   Proficiency exam costs and a stipend of a \$5,000 per year for three  
9                   additional years after attaining the endorsement. [ECF 2159-3 at 3-  
10                   4.]
- 11                   •     Arizona Teaching Fellows: Participants receive the following  
12                   stipends: \$1,000 upon beginning the program at UA college of  
13                   Education; \$1,800 throughout student teaching; \$400 upon  
14                   completing the first year of teaching, \$600 for the second, and  
15                   \$1,000 for the third. [ECF 2159-3 at 5.]
- 16                   •     Masters Cohort in Educational Leadership: Participants receive  
17                   financial assistance to get Masters degrees in education leadership.  
18                   [ECF 2159-3 at 6.]

19                   For the future, the District studied—

- 20                   •     Extending TDP-style financial incentives for teachers to earn  
21                   administrative certificates in the Leadership Prep Academy. [ECF  
22                   2159-3 at 21.]
- 23                   •     Financial aid for District graduates to study education in college
- 24                   •     Expanding Make the Move, which includes tuition reimbursement  
25                   and hiring/retention stipends. [ECF 2159-3 at 20.]
- 26                   •     Establishing the NAU cohort in 2019-20 supported by a tuition  
27                   reduction and a possible stipend upon completion. [ECF 2159-3 at  
28                   20-21.]

29                                   **4.     “including strategies resulting from the GYOP study in the**  
30                                   **2018-19 TDP”**

31                   Attempting to abide by the spirit of the Court’s instruction without conflating the  
32                   distinct roles of the TDP and GYOPs, the District included all these strategies in its  
33                   GYO Report. The District explained the reasoning for this slight reshuffling in footnote  
34                   2 of its TDP Report, repeated here:

35                                   The Court may have been intending that incentives similar to  
36                                   those used in the TDP be used to encourage teachers to  
37                                   become administrators, but the TDP is a program designed  
38                                   to incent existing professionals to move around within the  
39                                   District to improve diversity at particular sites; GYO

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programs are designed to encourage teachers or others to become administrators. The District reports on existing GYO programs to encourage teachers to become administrators (and possible extensions of those programs to include hiring and retention stipends) in the GYO Report/Addendum, filed herewith.

[ECF 2159-1 at 7.]

**Conclusion**

For the foregoing reasons, the District respectfully asks the Court find the District in compliance with its Order related to the Teacher Diversity Plan, Attrition, and GYOP Studies; and that it be awarded unitary status with respect to Sections IV, A, F.1 and I.3 of the USP.

DATED this 22<sup>nd</sup> day of January, 2019.

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**CERTIFICATE OF SERVICE**

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The foregoing document was filed with the Court electronically through the CM/ECF system this 22nd day of January, 2019, causing all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

s/ Diane Linn  
Employee of Steptoe & Johnson LLP