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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs,

v.

United States of America,

Plaintiff-Intervenors,

v.

Anita Lohr, et al.,

Defendants,

Sidney L. Sutton, et al.,

Defendant-Intervenors,

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

**MENDOZA PLAINTIFFS' RESPONSE
TO TUSD NOTICE AND REPORT OF
COMPLIANCE: FCI SCORES AND
OBJECTION TO THE DISTRICT'S
REQUEST (DOC. 2264) THAT IT BE
AWARDED PARTIAL UNITARY
STATUS WITH RESPECT TO SECTION
IX, A OF THE USP**

Hon. David C. Bury

Maria Mendoza, et al.,

Case No. CV 74-204 TUC DCB

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson United School District No. One, et al.,

Defendants.

Pursuant to this Court’s Orders of September 6, 2018 (“9/6/18 Order”) (Doc. 2123), July 26, 2019 (Doc. 2243), and September 6, 2019 (Doc. 2271), Mendoza Plaintiffs submit this Response to TUSD’s Notice and Report of Compliance: FCI Scores (Docs. 2264 (“FCI Notice”) and 2264-1 (“FCI Report”) and the District’s accompanying request that it be awarded unitary status with respect to Section IX, A of the USP.

Argument

As detailed in this Court’s 9/6/18 Order, in the 2015-16 school year, “the District without notice or input from the parties or Special Master changed the FCI Index” from “original[] agreed to criteria” and subsequently failed to return to the original FCI formula even after this Court ordered it to do so on November 9, 2017.¹ (9/6/18 Order at 138:24-

¹ In what appears to be an implicit claim that the District’s FCI reporting that deviated from criteria agreed upon by the parties and Special Master was proper, TUSD asserts that “since [it] always reported the raw scores in each category before weighting, it has always been possible for anyone to calculate the scores based on original weights using the reports that the District submitted for the 2015-16 and 2016-17 school years with only a few minutes effort.” (TUSD Notice at 2:6-9; *see also* TUSD Report at 1.) While Mendoza Plaintiffs seriously question whether applying certain weights to multiple FCI categories to arrive at an FCI score for many dozens of schools would take “only a few minutes,” what is important here is that TUSD apparently continues to misunderstand a point this Court has repeatedly had to make: “in the context of data gathering, the parties should and this Court [does] defer to the Special Master’s data gathering directives related to his data

139:2.) This Court therefore ordered that a recalculation of FCI scores using original
 criteria be filed and that such “recalculation [] be based on the most recent FCI data.” (*Id.*
 at 139:11-12.)

The District’s FCI Report data², dated March 7, 2017, fails to comply with the
 9/6/18 Order because it does not reflect “the most recent FCI data” according to the
 District’s own documents and plan for facilities. On September 4, 2019, TUSD provided
 the Mendoza Plaintiffs with data on TUSD schools that expressly references “the 2018
 Facilities Condition Index” thus confirming there has been at least one FCI update
 following the development of the March 2017 data in the FCI Report. (*See* TUSD’s Data
 Chart attached as Exhibit A (“critical question” statement corresponding to the “Facility
 Condition” column).)

Further, according to TUSD’s Multi-Year Facilities Plan (Appendix IX to 2017-18
 TUSD Annual Report (Doc. 2136-1)(“MYFP”)), the FCI is a “living document[]” that is
 updated “on a continual basis” “as improvements to facilities are completed, or as systems
 are seen to be deteriorating.” (MYFP at 4.) Thus, because “FCI scores change
 frequently,” the USP-required “biennial update is merely a snapshot” “of the[] tool[] at the
 time the Multi-Year Facility Plan is updated.” (*Id.*) Thus, there may well exist a version

needs for monitoring the District’s progress under the USP.” (9/6/18 Order at 125:18-22;
see also id. at 130, n.53 (with respect to this Court’s order rejecting TUSD’s deviation
 from agreed upon discipline definitions and reporting, “[t]he Court has no intention of
 issuing this directive a 3rd time, without there being consequences for failure to comply
 with it.”); Doc. 2087 at 4:8-12 (“The Court here repeats what it has noted before... the
 Court will defer to [the Special Master] regarding data gathering...”)).

² The FCI Report makes reference to FCI data being attached as “Exhibit A”. (Doc. 2264-1
 at 2.) There is no Exhibit A attached but the FCI Report states, and Mendoza Plaintiffs
 have confirmed, that the FCI data to which the District refers is set forth in Appendix IX-1
 (Doc. 2136-1 at 1-4) to TUSD’s 2017-18 Annual Report. That FCI data is dated
 03/07/2017.

1 of the FCI data that is even more recent than “the 2018 Facilities Condition Index.” Yet,
2 notwithstanding the “frequent” updates to FCI scores, TUSD claims that the March 7,
3 2017 FCI data of approximately 2.5 years ago (and 1.5 years before this Court issued the
4 9/6/18 Order) complies with the 9/6/18 Order calling for recalculated FCI scores based on
5 “the most recent FCI data” and that it therefore should be granted unitary status. (*See* FCI
6 Notice.)
7

8 Because TUSD failed to comply with the Sept. 6 Order and because the Plaintiffs,
9 Special Master, and this Court therefore are unable to confirm that racially concentrated
10 schools do not have lower FCI scores than non-racially concentrated schools (a measure
11 upon which this Court conditioned its award of unitary status (9/6/18 Order at 139:7-12)),
12 Mendoza Plaintiffs respectfully ask that this Court deny TUSD’s request that it be granted
13 unitary status as to USP Section IX, A and that it order the District to refile FCI scores that
14 are compliant with this Court’s 9/6/18 Order.
15
16

17 Conclusion

18 For the reasons set forth above Mendoza Plaintiffs respectfully request the Court to
19 hold that the District has failed to comply with its 9/6/18 Order relating to FCI Scores and
20 deny the District’s request that it be granted partial unitary status with respect to Sections
21 IX, A of the USP.³ In an excess of caution, Mendoza Plaintiffs respectfully invite the
22 Court’s attention to their earlier objections to such requests by the District and to their
23 Motion to Stay (Doc. 2186), expressly incorporate herein the arguments set forth in those
24 pleadings, and also note this Court’s statement when it denied that Motion that it will not
25
26

27 ³ In expressly addressing the District’s submission with respect to Section IX, A of the
28 USP, Mendoza Plaintiffs do not intend to waive, and hereby retain, their claim that the
District has not yet attained unitary status with respect to any portion of the USP.

again reach the question of unitary status until after the District's Executive Summary
filing and the proceedings relating thereto.

Dated: September 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically submitted the foregoing
**MENDOZA PLAINTIFFS' RESPONSE TO TUSD NOTICE AND REPORT OF
COMPLIANCE: FCI SCORES AND OBJECTION TO THE DISTRICT'S
REQUEST (DOC. 2264) THAT IT BE AWARDED PARTIAL UNITARY STATUS
WITH RESPECT TO SECTION IX, A OF THE USP**
to the Office of the Clerk of the United States District Court for the District of Arizona for
filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Dated: September 20, 2019