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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA**

14 Roy and Josie Fisher, et al.,
15 Plaintiffs,
16 v.
17 Tucson Unified School District No. 1, et al.,
18 Defendants.
19 Maria Mendoza, et al.,
20 Plaintiffs,
21 v.
22 Tucson Unified School District No. 1, et al.,
23 Defendants.

4:74-cv-0090-DCB
(Lead Case)

4:74-cv-0204 TUC DCB
(Consolidated Case)

24 **DISTRICT RESPONSE**
25 **TO FISHER PLAINTIFFS' OBJECTION (2276)**
26 **TO NOTICES OF COMPLIANCE (2258 - 2267)**

1 The Fisher Plaintiffs filed a single document combining objections to all of the
2 notices of compliance filed by the District on August 30, 2019. The District has responded
3 separately to the extent that combined objection addresses specific notices of compliance.
4 However, the primary objections raised by the Fisher Plaintiffs are not specific to a
5 particular plan: the Fisher Plaintiffs assert that achievement gap between black and white
6 students, and the disparity in discipline rates for black and white students, are both
7 widening. Neither contention is true. The Fisher Plaintiffs' assertions are inaccurate and,
8 moreover, do not reflect any failings by the District to address the Court's directives in
9 the USP and the various completion plans.

10 **A. The Achievement Gap Is Not Widening.**

11 Halley Freitas, Ph.D., senior director of assessment and program evaluation,
12 curriculum, and instruction for the District, studied and prepared a report on longitudinal
13 data on District student academic performance in AzMERIT testing, disaggregated by
14 grade level and race/ethnicity (the "Freitas Report"). A copy of that report is attached as
15 Exhibit A hereto.¹ The Freitas Report is uniquely informative because, unlike prior
16 studies of academic performance in the District by race/ethnicity, it compared
17 performance of the same cohort of more than 2,000 students during five consecutive
18 years, tracking them from third grade through seventh grade.

19 The Freitas Report documented and concluded that student performance across
20 races and ethnicities conformed to the same pattern: improvement in elementary grades
21 followed by a decline in the middle school grades, as to mean percent proficiency. And

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23 ¹ The Freitas Report was prepared at the request of counsel for the Fisher Plaintiffs, prior
24 to the report by Dr. Hendricks attached to the Fisher Plaintiffs' objection (which refers to
25 the Freitas Report). Apparently, the Fisher Plaintiffs retained Dr. Hendricks after counsel
received the Freitas report and determined that it did not support the argument he wished
to make.

1 although there is a gap between achievement for black and Hispanic students and
2 achievement for white students, Dr. Freitas' study showed that the gap is not widening.
3 Over the five years of data, mean English language arts ("ELA") scores improved by an
4 average of 10.8 points per year for black students, 11.5 points per year for Hispanic
5 students, and 11.8 points per year for white students. Likewise, mean math scores
6 improved over that period by an average of 27.1 points per year for black students, 26.6
7 points per year for Hispanic students, and 28.5 points per year for white students. Dr.
8 Freitas noted that, although achievement gaps between black/Hispanic students and white
9 students existed at all grade levels compared in her study, the rates of improvement over
10 the five-year period were "comparable" and "fundamentally equivalent" for the three
11 racial groups. Again, the Freitas Report found no widening of the achievement gaps.

12 The Special Master has reviewed the Freitas Report and has found it to be credible
13 and accurate. He has confirmed Dr. Freitas' conclusion that the study shows increases
14 and decreases in student achievement over the studied period that are substantially the
15 same for white, black, and Hispanic students.

16 The Fisher Plaintiffs, citing a report by their own expert, Robert Hendrick, Ph.D.,
17 contend the contrary: that the data in the Freitas Report actually shows a widening of the
18 achievement gap over time. This is not true.

19 First, the Fisher Plaintiffs misstate Dr. Hendrick's conclusions. They assert that he
20 found that, by seventh grade, "African American students are more than two (2) years
21 behind Anglo students" (ECF 2276 at 6:28-7:3). In fact, Dr. Hendrick noted that the black
22 students' seventh grade mean math score was somewhere between the mean score the
23 white students had achieved in fifth grade and that they achieved in sixth grades (what he
24 described as a 1.5-year gap). He does not substantiate his measurement of this "gap" over
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1 time but, regardless, he went on to note that “the academic gap in Math does show some
2 tendency to decrease . . . in middle [school] grades.”²

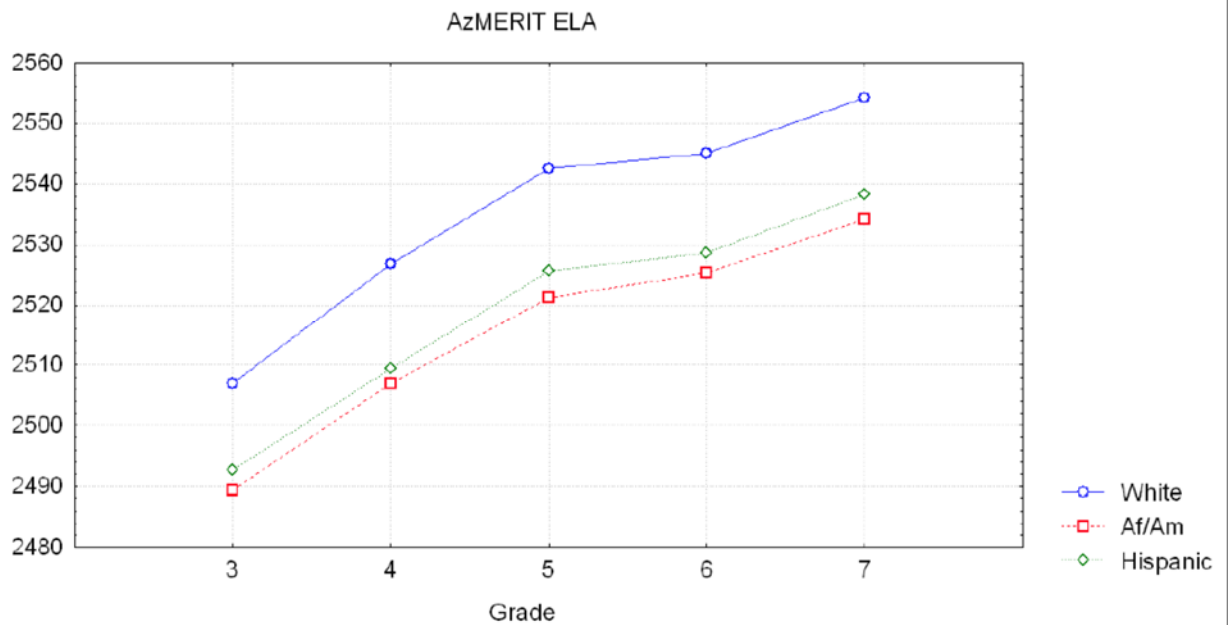
3 Second, and more important, the conclusions Dr. Hendrick put forward based on
4 Dr. Freitas’ data³ are incorrect. Specifically, Dr. Hendrick opines that the achievement
5 gap is increasing based on (a) his unsubstantiated claims about how many years the gap
6 represents and (b) the fact that mean ELA scores increased over the studied period by 43
7 points for black students (from 2493.5 to 2536.5) and by 47 points for white students
8 (from 2510.2 to 2557.2), while mean math scores increased by 108.5 points for black
9 students (from 3506.6 to 3615.1) and by 114 points for white students (from 3529.2 to
10 3643.2). In short, although scores for both black and white students increased
11 substantially over the four years, white students’ scores increased by 4 more points for
12 ELA and 5.5 more points for math.

13 Those differences are completely insignificant. According to Dr. Freitas, they are
14 so small that they could be attributable to measurement errors or could be the result of
15 aggregating mean scores with different sized populations. Increasing or decreasing 4 or 5
16 scale score points typically impacts proficiency level designations only marginally, unless
17 they are on the cusp on another performance level. For reference, 4 or 5 points is likely
18 the difference of one question on the test. It is inconceivable to think that a difference of
19 one question per year could reflect the loss of a full year’s worth of academic achievement
20 over the five years studied, and Dr. Hendrick does not substantiate that assertion.

22 _____
23 ² Dr. Hendrick posits that there is a gap of more than two years in *ELA* achievement by
seventh grade. That measurement is also not substantiated.

24 ³ It should be noted that Dr. Hendrick does not challenge the data underlying Dr. Freitas’
report. He states that “the study is well conceived” and that the “accuracy of the mean
25 scale score change is correct.”

1 This conclusion is confirmed by a more recent study by Dr. Freitas, also involving
 2 cohorts, but this time using all students enrolled in the grade (without regard for
 3 continuous enrollment in TUSD during the period covered by the study). The results
 4 mirrored Dr. Freitas' first study, involving only those students continuously enrolled over
 5 the period: the achievement gap is present when students are first tested, it is persistent,
 6 and it does not widen materially:



The complete results are set out in Exhibit B attached hereto.

In conclusion, there is no evidence that the achievement gap in the District is widening, and the Freitas Report shows that, although black and Hispanic students score somewhat lower than white students do, the groups progress academically at essentially the same rates.

It must also be noted that the achievement gap is undisputedly a national phenomenon, not one specific to the District. School districts across the country have been grappling with the achievement gap for decades. *See, e.g., School Composition and the Black-White Achievement Gap*, NAT'L CTR. FOR EDUC. STATISTICS (June 2015),

1 https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_
2 [bw_achievement_gap_2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf).

3 Moreover, the achievement gap — which is already present when students enter
4 kindergarten — is largely, and perhaps primarily, influenced by socioeconomic factors.
5 *See, e.g.*, Roland G. Fryer & Steven D. Levitt, *Falling Behind: New evidence on the black-*
6 *white achievement gap*, EDUCATION NEXT (Fall 2004, Vol. 4, No. 4), *available at*
7 <https://www.educationnext.org/fallingbehind> (“[A]djusting the data for the effects of
8 socioeconomic status reduces the estimated racial gaps in test scores by more than 40
9 percent in math and more than 66 percent in reading.”); *Hoots v. Pennsylvania*, 118 F.
10 Supp. 2d 577, 600 (W.D. Pa. 2000) (“Differences in the socioeconomic backgrounds of
11 black and white students are reflected nationally in an achievement gap. This gap appears
12 at all ages in virtually every school system throughout the United States in reading,
13 mathematics and science.”); *Coal. to Save Our Children v. State Bd. of Educ. of State of*
14 *Del.*, 90 F.3d 752, 778-79 (3d Cir. 1996) (noting that “pervasive socioeconomic
15 conditions . . . account for discrepancies among the races in educational performance”
16 and that “[b]ecause the environment outside school is so strong, cumulative, and varied,
17 schools cannot overcome such environmental/differences among children”).

18 In fact, as the Special Master has noted, “[n]umerous researchers have studied how
19 much of the variance in student achievement can be accounted for by measurable
20 variations in school characteristics. The consensus is that schools, on average, account
21 for less than a third of the variance in student achievement.” (ECF 2014 at 9-10.)

22 Achievement discrepancies that (a) exist nationwide nationwide, (b) are caused by
23 socioeconomic factors for which the District is not responsible, and (c) are already present
24 by the time children begin their education in the District as kindergarteners, are simply
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1 not problems that are tied to prior segregative conduct by the District. Although the
2 District is vigorously combatting the achievement gap and making strides to reduce it, the
3 continuing existence of the gap is not a fact that may be held against the District in
4 determining whether unitary status is appropriate.

5 **B. The Discipline Disparity is *Decreasing*, and Low Disciplinary rates in**
6 **the District Outshine the National Averages.**

7 The Fisher Plaintiffs cite figures representing the *percentage* of all disciplinary
8 actions in the District that were taken against black students to argue that the disparity in
9 discipline between black and white students is widening. These figures, which represent
10 percentages of the whole student population, are misleading. They fail to reflect the facts
11 that: (a) the rate of disciplinary actions against black students has decreased dramatically
12 and (b) the difference in discipline rates between black and white students has similarly
13 contracted.

14 The problem with comparing percentages of disciplinary actions as a whole, as the
15 Fisher Plaintiffs do, is that it such comparisons do not translate when there have also been
16 changes to the student population makeup. As the Fisher Plaintiffs note, the percentage
17 of the District-wide student body made up of black students increased from 8% in
18 SY2012-13 to 9% in SY2017-18. The Fisher Plaintiffs' assertion that there was "no
19 improvement" in discipline disparity as to in-school suspensions and short-term out-of-
20 school suspensions between SY2012-13 and SY2017-18 is thus facially incorrect —
21 although black students made up similar percentages of all such disciplinary actions in
22 the two years referenced by the Fisher Plaintiffs, the fact that their percentage of the
23 student body as a whole increased by a full percentage point over that time period shows
24 that the discipline disparity *decreased*.

1 Disciplinary figures produced by the District with its recent Annual Report show
2 just how far the District has come in reducing disciplinary actions taken against black
3 students. While there was a 9% difference in discipline *rates* for black versus white
4 students in SY2013-14, that has been *cut in half* to a current difference of 4.60%. In fact,
5 discipline rates for black students in the past two years (10.39% and 10.93%, respectively)
6 were lower than the discipline rate for white students in SY2013-14 (11.56%).⁴
7 (ECF 2298-1 at VI-150.)

8 The disparities in out-of-school suspensions, a particularly noteworthy
9 disciplinary action (because it limits in-person educational time), has also been
10 dramatically reduced. In SY2014-15, black students were 3.2 times more likely than white
11 students to have a short-term suspension, and 3.5 times more likely to have a long-term
12 suspension. By SY2018-19, a mere four years later, the likelihood ratio had dropped to
13 **1.7 times for short-term suspensions and 2.1 times for long-term suspensions.** (ECF
14 2298-1 at VI-151).

15 The Fisher Plaintiffs claim that the “District and the Special Master agree that a
16 Black child is three and one half (3 ½) times more likely to be disciplined than an Anglo
17 Child.” (ECF 2276 at 2:21-22.) Actually, that is the ***national*** average discipline disparity,
18 not the TUSD discipline disparity, which, as noted above, is far less. *See, e.g.,* Marilyn
19 Elias, *The School-to-Prison Pipeline*, 43 *Teaching Tolerance* 39, 39-40 (2013) (“African-
20 American students, for instance, are 3.5 times more likely than their white classmates to
21 be suspended or expelled . . .”). But again, in the District, the disparity is much less than
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24 ⁴ There is virtually no difference in discipline rates between Hispanic and white students.
25 In fact, Hispanic students are less likely than white students to receive a short-term
suspension. (ECF 2298-1 at VI-150-51.)

1 that national average for long-term suspensions and less than half of that for short-term
2 suspensions.⁵

3 The District's significant reduction in the discipline disparity (especially compared
4 to the national disparity), coupled with the low levels of discipline black students
5 experience overall in the District compared to national averages, show that any remaining
6 disparities in discipline within the District are not connected to prior conduct by this
7 specific school district half a century ago. Because the vestiges of discrimination the
8 District is charged with eliminating *must be tied to specific prior conduct by the District*,
9 the remaining, and ever shrinking, disciplinary gap is not a fact that may negatively
10 impact the District's forthcoming application for unitary status.

11 **Conclusion**

12 The District respectfully submits that it has complied with the Court's orders and
13 has met the requirements of the USP with regard to the areas addressed in the District's
14 various notices and reports of compliance with completion plans (ECF 2258 - 2267). The
15 District requests that the Court grant unitary status in the areas of District operations
16 addressed therein.

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⁵ The Fisher Plaintiffs also contend that it is unclear how effective the District's
24 implementation of certain AASSD strategies proposed by Trayben and Associates have
25 been. (ECF 2276 at 7:17-28.) The vast improvement in statistics in this area shows how
effective the District's efforts as a whole have been.

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Dated this 7th day of October, 2019.

Respectfully submitted,

/s/ P/ Bruce Converse

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District No. 1

CERTIFICATE OF SERVICE

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I hereby certify that on the 7th day of October, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to all CM/ECF registrants.

/s/ P. Bruce Converse