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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Roy and Josie Fisher, et al.,
16 Plaintiffs,
17 v.
18 United States of America,
19 Plaintiff-Intervenors,
20 v.
21 Anita Lohr, et al.,
22 Defendants,
23 Sidney L. Sutton, et al.,
24 Defendant-Intervenors,

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

**MENDOZA PLAINTIFFS' OBJECTION
TO TUSD NOTICE OF FILING
DOCUMENTS REQUIRED BY BUDGET
ORDER, EXHIBIT B – CROSS OVER
BENEFITS PROGRAM REPORT (DOC.
2297-2)**

Hon. David C. Bury

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1 Maria Mendoza, et al.,

Case No. CV 74-204 TUC DCB

2 Plaintiffs,

3 United States of America,

4 Plaintiff-Intervenor,

5 v.

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

7 Defendants.

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11 Pursuant to this Court’s Order of September 10, 2019 (“Budget Order”) (Doc.
12 2272), Mendoza Plaintiffs submit their objection to the Cross Over Benefits Program
13 Report (“Cross Over Ratios”) that the District filed as Exhibit B (Doc. 2297-2) to its
14 Notice of Filing Documents Required by Budget Order [2272] (Doc. 2297) and request
15 that the District be ordered to revise its Cross Over Ratios filing to comply with this
16 Court’s Budget Order directive that it “establish [cross over benefit program] link[s] to the
17 USP” to justify the use of 910G funds, address the questions or issues expressly raised by
18 this Court as to certain cross over benefits programs, and comply with the Budget Order
19 requirement that proposed ratios “tak[e] into account the restriction that 910G funding may
20 not supplant M&O funding.” (Budget Order, Doc. 2272, at 14:25-28, 15:10-23, 19:13-19.)
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ARGUMENT

The District’s Cross Over Ratios Fail to Reflect “Appropriate Ratio[s]... Based on Linkage and USP Program Priorities” and, Instead, Reflect a Generalized Approach Similar to That Which This Court Described as Resulting in a “Misuse of Desegregation Funding”

In the Budget Order, in response to a dispute concerning the use of 910G funds to fund 100% of a cross over benefit program (EBAS), this Court stated the following:

[T]he District may not supplant general M&O funding with 910G funding. This hard and fast rule arose because of the District’s historic misuse of desegregation funding... based on the assertion it was a majority minority district. It is not unreasonable for the Plaintiffs, the Special Master, and this Court to require the District to *tie the use of 910G funding to USP programs*, especially in areas of overlap where all students are benefitting from a program. If the District wants to use 910G funds, it *must prioritize the benefit to be first for the Plaintiffs* and then for the remainder of students.”

(Budget Order at 13:18-14:2 (emphasis added).)

This Court, having rejected an approach that relied on a broad generalization to justify the use of 910G funds, went on to provide examples of how a “tie” or “link” to the USP reflecting a prioritized benefit to the Plaintiff classes could be established to justify 910G funding. Specifically, to guide the District in its preparation of proposed ratios for cross over benefit programs, this Court described a number of specific uses of EBAS, the full costs of which could be paid with 910G funds (*id.* at 14:19-28), expressly asked several questions directed at determining whether the proposal for a 7th period at Gridley

1 Elementary School sufficiently “link[s] to the USP” (*id.* at 14:25-15:19), and explained
2 that one express shuttle, the Magee Drachman express bus, “would be an example of a
3 misallocation of 910G funding” because it “moved five students from east to west without
4 any readily apparent integrative improvement in either the sending or receiving schools.”
5 (*Id.* at 15:25-16:4). Plainly, this Court sought explanations demonstrating a “link between
6 individual cross over benefits programs and the goals of the USP.” (*Id.* at 14:28.)
7

8 Rather than provide such explanations, in the Cross Over Ratios TUSD offers a
9 number of generalities that it then applies broadly across all cross over benefit programs.
10 For example, TUSD describes what it apparently used as a general “rule of thumb”: “[f]or
11 [cross over] programs which provide benefits to all students, the District has proposed a
12 maximum 910G funding ratio of 70%, as the overall District student population is 61%
13 Latino and 9% African American.” (Cross Over Ratios at 2.) Mendoza Plaintiffs submit
14 that this proposal closely resembles the very approach that this Court described as resulting
15 in the “District’s historic misuse of desegregation funding to operate the District [which
16 was] based on the assertion it was a majority minority district” (Budget Order at 13:19-20),
17 except that TUSD now proposes to use its majority minority district status to justify the
18 use of 910G funds to pay 70 percent, rather than 100 percent, of costs across many
19 programs. What TUSD apparently misunderstands is that the “misuse” of 910G funds
20 would again result from the application of such a broad generalized proposal across a
21 variety of different programs regardless of how each of these separate programs “links” to
22 the USP.¹ Therefore, for example, notwithstanding that it would be required to have a
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28 ¹ Further, that TUSD frames its proposed ratios as “maximum” funding ratios does not
make proper the approach the District has applied.

1 Student Code of Conduct and to train staff on that Code, it proposes to allocate a
2 maximum of 70% of the cost associated with the Code to the 910G budget *along with*
3 *100% of discipline training for sites* (as if no discipline training would occur in the District
4 were there not a USP).²

5 TUSD further explains that “[i]n some circumstances, more exact measures are
6 possible: schools with 7-period day schedules are 76% Latino and African American, and
7 thus the proposed 910G funding limit for the 7-Period Day Program” --which presumably
8 includes the 7-period schedule at Gridley Elementary School -- is 76%. (Cross Over
9 Ratios at 2-3.) Significantly, this proposal also relies on a generalization (of all schools
10 with 7-period day schedules) and involves no “priority criteria that justify” the use of 910G
11 funds that this Court said the “District must identify.” (Budget Order at 15:20-23.) Thus,
12 tellingly, under this TUSD proposal, 910G funds could be used to pay for 7 period
13 schedules at any TUSD school regardless of whether they “prioritize benefits to be first for
14 the Plaintiffs... .”³ (*Id.* at 14:1-2.) Further, the proposal would notably result in 910G
15 funds paying 76% of the cost of a 7 period schedule at Gridley, notwithstanding that that
16 school’s combined Latino and African American student population is 49% and that TUSD
17 wholly failed to provide any answers to the express questions this Court raised after it
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24 ² Such allocation of 100% of the cost of certain programs and activities to the 910G budget
25 is a subject discussed further below.

26 ³ Under this District proposal, Mendoza Plaintiffs understand that 910G funds could be
27 used at a school that does not reflect a prioritizing of benefits to the Plaintiff classes, and
28 that the demographics at such a school would simply be included in the calculation of the
average racial/ethnic demographics of 7 period schools overall (and accordingly affect the
percentage of costs for 7 period schedules that could be paid for with 910G moneys across
all 7 period schedule schools).

1 “question[ed] the 910G allocation for a 7th period at Gridley.” (Budget Order at 15:3-5,
2 15:8-10.)

3 For these reasons, the District has failed to comply with this Court’s order that it
4 “must identify priority criteria” that “prioritize[s] the benefit to be first for the Plaintiffs,
5 then for the remainder of students.” (*Id.* at 14:1-2.) TUSD has further failed to provide the
6 kind of individual program “links” to the goals of the USP that this Court plainly
7 contemplated; instead, it has proposed general funding formulas that would apply across
8 multiple cross over benefit programs. Mendoza Plaintiffs accordingly respectfully request
9 that TUSD be ordered to revise its Cross Over Ratios to clearly identify priority criteria
10 that reflects prioritization of benefits to the Plaintiff classes, and provide “links” between
11 cross over benefit programs and the USP (without relying on overly-broad generalizations
12 based on student demographics of TUSD taken as a whole).⁴
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17 ***TUSD Failed to Provide the Information This Court Expressly Called for in***
18 ***the Budget Order***

19 As referenced in the section above, in the Budget Order, this Court provided
20 examples of proper and improper uses of 910G funds for cross over benefit programs, and
21 detailed questions, issues, or information necessary to determine the propriety of 910G
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25 ⁴ Mendoza Plaintiffs recognize that there could be a cross over program (or programs) for
26 which it may be appropriate for 910G funding to reflect enrolled student race/ethnicity
27 ratios. However, the point here is that the District must not use a general formula based on
28 such student demographic data across a broad range of unspecified cross over benefit
programs. Indeed, as Mendoza Plaintiffs believe this Court contemplated, TUSD should
identify each cross over benefit program for which such ratio is proposed, and for each
program, provide sufficient justification or USP “link” to understand why the ratio is
proposed.

1 funding as to certain cross over benefit programs. Unfortunately, the District has failed to
2 address the questions and issues raised by this Court.

3 First, with respect to EBAS, this Court stated that the “District may not use 100
4 percent 910G funding for EBAS...” but then listed a number of uses of EBAS for which
5 100 percent funding would be appropriate, including uses related to “delivery of student
6 support services in minority racially concentrated schools and for underachieving minority
7 students” and “assessing the effectiveness of USP programs.” (Budget Order at 14:19-25.)
8 The Court then ordered that because TUSD “intends to use more [than 50 percent 910G
9 funding as agreed to by the Plaintiffs and Special Master], the EBAS expenditures become
10 an issue and the District must establish a link to the USP.” (*Id.* at 14:25-28.) TUSD
11 notably does not mention EBAS anywhere in the portion of the Cross Over Ratios
12 document providing explanation for the District’s proposed ratios (*see* Cross Over Ratios
13 at 2), but does provide a proposed 910G funding ratio (70%) for EBAS in the proposed
14 ratio chart (*id.* at 3). Thus, the District has failed to provide any explanation of how this
15 ratio relates to the EBAS uses this Court identified as proper for 100 percent 910G
16 funding, any basis for its 70% 910G funding ratio (beyond application of its generalized
17 approach based on District demographics), any reasoning for how the District went from
18 proposing 100 percent 910G funding for EBAS to 70 percent funding,⁵ or any “link” to the
19 USP.
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26 ⁵ To the extent TUSD proposes 70% 910G funding for EBAS based on “the overall
27 District student population [being] 61% Latino and 9% African American” (*id.* at 2), such
28 explanation fails to establish a “link” to the USP, does not address this Court’s
identification of proper EBAS uses, or provide any reasoning to understand why the ratio
is appropriate.

1 Second, as referenced in the section above, this Court found that the relatively low
2 percentage of Latino and African American students (and high percentage of white
3 students) at Gridley Elementary School was “enough to question the 910G allocation for a
4 7th period at” the school. (*See* Budget Order at 15:3-7.) This Court then expressly raised a
5 number of issues or questions relevant to determining the propriety of such allocation
6 based on benefit to the Plaintiff classes, including identification of all 7 period schools,
7 whether all racially concentrated schools have 7 period schedules, and whether 7 period
8 programs are being located at schools with the largest Black student populations. (*Id.* at
9 15:8-19.) The District failed to answer each of these questions and, tellingly, does not
10 once reference Gridley Elementary School in the entirety of the Cross Over Ratios
11 document.
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14 Third, this Court stated that the “District must identify priority criteria that justify...
15 [910G funding] including the transfer of \$632,000 in 910G funding from transition school
16 programs to magnet transportation and incentive transportation. The link being readily
17 apparent for the former... but not so for alleged incentive transportation, which may or
18 may not be integrative.” (*Id.* at 15:20-25.) The District failed to provide any USP link for
19 this transfer of funds; instead TUSD makes the following general statement: “[T]he
20 District measured the percentage of its transportation costs attributable to USP mandated
21 transportation, leading to a proposed 910G funding limit for transportation to 54% of total
22 transportation costs.” (Cross Over Ratios at 2.)
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25 Accordingly, TUSD has failed to comply with this Court’s Budget Order. Mendoza
26 Plaintiffs therefore respectfully request that TUSD be ordered to revise the Cross Over
27 Ratios document to address the above-discussed questions and issues raised by this Court.
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***TUSD's Cross Over Ratios Must Comport With This Court's Orders
Prohibiting the use of 910G Funds to Supplant Other Funds***

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3 Perhaps as a result of the District's failure to provide program-specific justifications
4 that "link" to the USP under the Budget Order, the District makes a number of general
5 statements governing a broad range of cross over benefit programs that seemingly conflict
6 with the Budget Order's directive that TUSD's ratios "take into account the restriction that
7 910G funding may not supplant M&O funding." (Budget Order at 19:13-19.) Specifically,
8 TUSD asserts the following:
9

10 [T]here are a group of programs directly related to integration
11 (magnet schools, lottery, MORE Plan, CSA Integration initiatives)
12 that are clearly programs which provide cross-over benefits, because
13 all students service a benefit from increased integration and
14 diversity, but the District nonetheless believes that for this group of
15 programs, at the core of the USP, 910G funding should not be
16 limited to a percentage of these program costs.⁶
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19 (Cross Over Ratios at 2.)
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21 Based on this approach, the District proposed that 29 of the 45 programs listed in
22 the Cross Over Ratios receive 100% maximum funding from the 910G budget.

23 Perhaps most glaring is the District's assignment of a maximum of 100% 910G
24 funding to many activities that plainly do not warrant such an approach. Particularly
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27 ⁶ TUSD makes a similar but seemingly broader statement in its Notice of Filing Remaining
28 Documents Required by Budget Order that it "objects to any percentage limit on funding
of a program that otherwise qualifies for funding under 910(G), to the extent that the limit
is based on cross-over benefits." (Doc. 2297 at 2:13-15)

1 notable in that regard is the multi-year facilities plan. The District asserts that it has met its
2 obligations under the USP as those obligations relate to its facilities and that racially
3 concentrated schools do not have lower FCI scores than non-racially concentrated schools.
4 The most recent FCI data, filed as part of the District's 2018-19 Annual Report (Appendix
5 IX-2 to 2018-19 Annual Report, Doc. 2308-1, at 13) confirms this. Therefore there likely
6 is no justification for allocating *any* 910G funds to facilities maintenance going forward
7 and certainly not the major change the District is proposing from the actual 2018-19
8 budget split of 44% 910G and 56% "non-910G" as reported in the Cross Over Ratios at 3.
9 Similarly, notwithstanding that all school systems should stress restorative practices and
10 PBIS as central to their approaches to student discipline, the District proposes a maximum
11 allocation of 100% of the costs of these programs to the 910G budget. (Cross Over Ratios
12 at 3.)

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15 Additionally, TUSD suggests that all teachers at magnet schools (indeed, all costs
16 associated with such schools) may be fully funded with 910G funds, notwithstanding that
17 such funding would constitute supplantation where those positions "would otherwise be
18 funded to some extent from other sources." (*See* 10/22/14 Order (Doc. 1705) at 3:8-19;
19 *see also id.* at 2:15-3:7 (detailing that the "District agreed to use 910(G) funding to
20 'supplement' and not 'supplant' other funding sources" under the USP requirement for the
21 development of a "methodology and process for allocating funds... pursuant to A. R. S. §
22 15-910(G)...".) Accordingly, Mendoza Plaintiffs object to TUSD's Cross Over Ratios to
23 the extent that they propose or suggest that the District may use 910(G) funds to supplant
24 other funding sources.
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CONCLUSION

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For the reasons set forth above, this Court should require the District to revise its Cross Over Ratios to comply with this Court’s Budget Order, including that it “identify priority criteria” and “establish a link to the USP” for cross over benefits programs, and that it address the questions and issues raised by this Court, as detailed above.

Dated: October 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, I electronically submitted the foregoing **MENDOZA PLAINTIFFS' OBJECTION TO TUSD NOTICE OF FILING DOCUMENTS REQUIRED BY BUDGET ORDER, EXHIBIT B – CROSS OVER BENEFITS PROGRAM REPORT (DOC. 2297-2)** 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: October 11, 2019