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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' MOTION TO STRIKE TUSD NOTICE OF COMPLIANCE WITH SPECIAL MASTER'S REPORT AND RECOMMENDATION RE ALE POLICY MANUAL AND RENEWED REQUEST THAT IT BE GRANTED UNITARY STATUS WITH RESPECT TO SECTION V.A OF THE USP (DOC. 2424) OR, IN THE ALTERNATIVE, PERMIT THE WITHIN RESPONSE THERETO**

25  
26  
27 Hon. David C. Bury  
28

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.

8  
9  
10 **MOTION TO STRIKE**

11 In its Notice of Compliance with Special Master’s Report and Recommendation Re  
12 ALE Policy Manual (“ALE Filing”) (Doc. 2424), the District, without waiting for the  
13 Court to rule on the Mendoza Plaintiffs’ response and objection (Doc. 2283) to the ALE  
14 Policy Manual on file with the Court (Doc. 2267) or the Special Master’s R&R relating  
15 thereto (Doc. 2376), has identified five recommendations contained in that R&R, asserted  
16 that it has implemented those recommendations (or will), and on that basis, renewed its  
17 request for partial unitary status with respect to the USP provisions governing ALEs (USP  
18 Section V.A). This Court’s October 2, 2019 Order setting forth the case management  
19 briefing schedule for this matter (Doc. 2312) provides for no briefing after submission of  
20 the Special Master’s Report and Recommendation.  
21  
22

23 It would be inequitable for the Court to consider the District’s renewed request for  
24 partial unitary status without permitting plaintiffs an opportunity to respond particularly  
25 given the fact that what is conspicuously missing from the TUSD submission is any  
26 discussion of participation in and completion of ALEs by the District’s Latino and African  
27  
28

1 American students. Yet, this Court plainly stated that those factors would be critical to its  
2 assessment of whether the District has attained unitary status with regard to its obligations  
3 concerning ALEs. Accordingly, Mendoza Plaintiffs respectfully request that this Court  
4 strike the ALE Filing. In the alternative, they ask the Court to consider the following  
5 objection.  
6

7 **RESPONSE**

8 The District's Failure to Demonstrate Satisfactory Participation in and Completion  
9 of ALEs Precludes an Award of Partial Unitary Status in this Area of its Operations

10 In its 9/6/18 Order (Doc. 2123), the Court articulated the test it would apply to  
11 determine if TUSD had attained unitary status with respect to ALEs. Reiterating earlier  
12 rulings, it wrote, *inter alia*:  
13

14 The USP ALE goal is to improve the academic achievement of  
15 African-American and Latino students in the District by ensuring  
16 these students have equal access to ALEs. The Court has adopted  
17 definitions as follows: ...participation [is] the number of students  
18 enrolled in ALE courses and includes completion, defined as the  
19 number of students passing ALE courses and number of students  
20 taking and passing requisite certification tests necessary for  
21 African-American and Latino students to secure the benefit of  
22 participating in the ALE programs....

23 The Court has held that "increases" for the purpose of assessing  
24 the effectiveness will be actual percentage increases made  
25 district-wide and at individual schools, and it will consider  
26 comparable data for White students to address concerns that ALE  
27 increases are merely an "all boats rising" phenomena. The  
28 Court adopted a "not less than" 15% Rule to be applied  
29 district-wide as a rule-of-thumb indicator of possible  
30 discrimination in an ALE program.

31 Doc. 2123 at 50:19-23; citations to prior orders omitted. (*See also*: "In assessing the  
32 District's behavior and process related to the ALE provisions in the USP, §V, the Court

1 will consider three factors: the 15% Rule as limited herein, the strategy assessment matrix,  
2 and actual increases or decreases in ALE enrollment, participation, or completion.

3 Accordingly ... IT IS ...ORDERED adopting the “Not less than” 15% Rule as a rule-of-  
4 thumb-red-flag for when discrimination may exist in a particular ALE program district-  
5 wide.”<sup>1</sup> (Order dated 10/24/17, Doc. 2084, at 18:4-8, 19:1-3.)  
6

7 Given the Court’s clear statements concerning the test that it intended to apply, it is  
8 surprising that neither the District’s ALE Filing nor the Supplemental Petition for Unitary  
9 Status (“Supp. Pet.”) (Doc. 2406) and TUSD’s earlier ALE submission (Doc. 2267), both  
10 of which are referenced in the ALE Filing, address the current status of ALE enrollment  
11 under the 15% Rule or the relative participation of White students in ALE programs.  
12

13 The only reference to these matters in the District’s Annual Report for the 2018-19  
14 Academic Year (“2018-19 DAR”) (Doc. 2298-1)<sup>2</sup> is the apparently inaccurate statement  
15 that the District “met and exceeded the 15% Rule in fifteen of 28 goals.” (Doc. 2298-1 at  
16 V-57, citing Appendix V-3, V.G.1.c ALE Supplementary Goals Summary, a copy of  
17 which is attached as Exhibit A).<sup>3</sup> Regardless of whether the numbers are 15 of 28 or 13 of  
18  
19

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20 <sup>1</sup> Notwithstanding this clear ruling, the Special Master in his R&R (Doc. 2376 at 8:4-15)  
21 treats the issue of the standard against which the District’s performance is to be measured  
22 as still open. As this Court’s clear orders, including those quoted above, have determined,  
23 it is not. Given the Special Master’s discussion on this topic, the Mendoza Plaintiffs add  
24 that it is not their position that the District must “achieve parity across all races.” (*Id.* at  
25 8:6-7.) They understand that the test to be applied is that articulated by this Court in its  
26 prior orders, particularly Docs. 2084 and 2123.

27 <sup>2</sup> In his R&R, the Special Master appears to rely on data in the 2018-19 DAR. That DAR,  
28 filed October 1, 2019, was not available to the Mendoza Plaintiffs when they filed their  
response to the District’s ALE Policy Manual on September 20, 2019 (Doc. 2283). For  
clarity going forward, and to avoid having the plaintiffs and the District cite different data,  
an issue noted by the Special Master in his R&R (Doc. 2376 at 2:8-15), Mendoza Plaintiffs  
rely on data filed as part of the 2018-19 DAR herein unless another source is specifically  
identified.

<sup>3</sup> Mendoza Plaintiffs say apparently inaccurate because in their review of the cited  
Appendix they identified 32 goals (exclusive of dual language which they understand the

1 32 what is telling is the District's omission of any discussion of its failure to have  
2 overcome the indicator of possible discrimination measure in 13 (or 19) of the reported  
3 ALE categories. Nor is there any discussion of the District's progress (or lack thereof) in  
4 meeting the 15% Rule for ALE enrollment. Attached as Exhibit B is the District's  
5 comparable report for the 2016-17 school year. (Doc. 2061-1, Appendix V-11, ALE 40<sup>th</sup>  
6 Day Enrollment ALE Supplementary Goals Summary – ALL ALE.) By Mendoza  
7 Plaintiffs' count, the 2016-17 report indicates that the District met or exceeded the 15%  
8 Rule measure for 15 of 32 goals – or two more than, based on the Mendoza Plaintiffs'  
9 count, it succeeded in doing in the 2018-19 school year.

12 A chart on page 48 of the Supp. Pet. (Doc. 2406) provides absolute but not relative  
13 numbers for participation in GATE broken down by race/ethnicity from 2016-17 to 2018-  
14 19. A comparison of the numbers in that chart with District enrollment numbers reveals  
15 that the percentage of White students participating in GATE increased from 14.4% in  
16 2016-17 (1372 of 9550) to 19.7% in 2018-19 (1760 of 8923<sup>4</sup>) or an increase of 5.3%. By  
17 contrast, the percentage of Latino students participating in GATE only increased 4%, from  
18 8% in 2016-17 (2278 of 28,822) to 12% (3249 of 27,148).<sup>5</sup>

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21 District to have omitted as well) and noted that the District reported exceeding those goals  
22 for African American and Latino students in only 13 instances, not 15.

23 <sup>4</sup> Copies of the TUSD 40<sup>th</sup> day enrollment reports for 2016-17 and 2018-19 from which the  
24 total enrollment figures used above are taken are attached as Exhibits C and D,  
25 respectively.

26 <sup>5</sup> While still well under the 19.7% enrollment of White students at 12.6%, the enrollment  
27 of African American students did increase between 2016-17 (301 of 4289 or 7%) and  
28 2018-19 (503 of 4159 or 12.6%). Significantly, however, over 80% of that increase is  
attributable to the expansion of "cluster" GATE targeted at schools serving substantial  
numbers of African American students, as recommended by the Special Master and  
ordered by this Court in 2017 (Doc. 2084 at 18:24-27), but African American enrollment  
in self-contained and pull-out GATE continues to fall below the 15% Rule threshold. (*See*  
Annual Report, Appendix V-3, Exhibit C.)

1 Issues also exist with respect to AP enrollment and successful completion. Review  
2 of the District's report on enrollment based on the 15% Rule reveals that neither Latino nor  
3 African American enrollment in TUSD AP classes has attained levels that meet the 15%  
4 Rule target. (Exhibit C.)<sup>6</sup> What is perhaps more troubling, however, is that while the total  
5 number of AP exams taken by African American students increased slightly from 2015 to  
6 2019 (an increase from 138 to 144), the number of African American students who  
7 received at least one qualifying AP score of 3 or higher actually fell (from 42 to 37).  
8 (2018-19 DAR (Doc. 2302-1), Appendix V-10.)  
9

10 The District's own data therefore demonstrates that it cannot meet the test for  
11 unitary status with respect to ALEs that has been articulated by the Court.  
12

### 13 CONCLUSION

14  
15 For the reasons set forth above, the Court should strike the ALE Filing. In the  
16 alternative, the Court should consider the Mendoza Plaintiffs' response thereto and deny  
17 TUSD's renewed request for unitary status with regard to USP, Section V, A of the USP.<sup>7</sup>  
18 In an excess of caution, Mendoza Plaintiffs respectfully invite the Court's attention to their  
19 earlier objections to such requests by the District and to their Motion to Stay (Doc. 2186),  
20 expressly incorporate herein the arguments set forth in those pleadings, and also note this  
21 Court's statement when it denied that Motion that it will not again reach the question of  
22  
23  
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25 \_\_\_\_\_  
26 <sup>6</sup> By contrast, White enrollment greatly exceeds 15% of total White enrollment at the high school level. (Exhibit A.)

27 <sup>7</sup> In expressly addressing the District's submission with respect to Section V,A of the USP,  
28 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.

1 unitary status until after the District's Executive Summary filing and the unitary status  
2 proceedings relating thereto.

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4  
5 Dated: February 14, 2020  
6

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10 /s/ Juan Rodriguez  
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16 Attorney for Mendoza Plaintiffs  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2020, I electronically submitted the foregoing **MENDOZA PLAINTIFFS' MOTION TO STRIKE TUSD NOTICE OF COMPLIANCE WITH SPECIAL MASTER'S REPORT AND RECOMMENDATION RE ALE POLICY MANUAL AND RENEWED REQUEST THAT IT BE GRANTED UNITARY STATUS WITH RESPECT TO SECTION V.A OF THE USP (DOC. 2424) OR, IN THE ALTERNATIVE, PERMIT THE WITHIN RESPONSE THERETO** 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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/s/ Leslie Rodriguez

Dated: February 14, 2020

Leslie Rodriguez