

1 P. Bruce Converse (#005868)
2 Timothy W. Overton (#025669)
3 **DICKINSON WRIGHT PLLC**
4 1850 N. Central Avenue, Suite 1400
5 Phoenix, Arizona 85004-4568
6 bconverse@dickinsonwright.com
toverton@dickinsonwright.com
courtdocs@dickinsonwright.com
7 Phone: (602) 285-5000
8 Fax: (844) 670-6009

9 Robert S. Ross (#023430)
10 Samuel E. Brown (#027474)
11 **TUCSON UNIFIED SCHOOL DISTRICT**
12 **LEGAL DEPARTMENT**
13 1010 East Tenth Street
14 Tucson, Arizona 85719
15 Robert.Ross@tusd1.org
16 Samuel.Brown@tusd1.org
17 Phone: (520) 225-6040
18 *Attorneys for defendant*
19 *Tucson Unified School District No. 1*

20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 Roy and Josie Fisher, et al.,
23 Plaintiffs,
24 v.
25 Tucson Unified School District No. 1, et al.,
26 Defendants.
27 Maria Mendoza, et al.,
28 Plaintiffs,
29 v.
30 Tucson Unified School District No. 1, et al.,
31 Defendants.

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

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

32 **RESPONSE IN OPPOSITION TO**
33 **MENDOZA PLAINTIFFS' MOTION TO STRIKE (ECF 2431)**
34 **THE DISTRICT'S NOTICE OF RESPONSE TO ISSUES RAISED IN SPECIAL**
35 **MASTER'S R&R RE DISCIPLINE (ECF 2427)**
36

Introduction and Summary

1
2 The Mendoza Plaintiffs' motion to strike should be summarily denied. The motion
3 is based on a mischaracterization of the nature of the District's filing, and in any event is
4 not an appropriate remedy. The Mendoza Plaintiffs' real issue is merely that they wanted
5 an opportunity to respond substantively to the District's filing. If so, the proper approach
6 would have been to seek leave to respond, not to move to strike. Indeed, *had they even*
7 *asked* the District if there was any objection to filing a response, the District would have
8 accommodated. But they did not, preferring instead to move for the draconian, and
9 completely improper, relief of striking a pleading from the record.

10 On November 25, 2019, the Special Master filed his Report and Recommendation
11 ("R&R") related to discipline, describing that filing as "preliminary because there [we]re
12 some important questions that require[d] additional information or clarification from the
13 District that [would] require several days for the District to put the needed information
14 together." [ECF 2380, p. 2.] He further explained that he had reviewed objections by
15 the plaintiffs and evidence from the District and identified what he described as "the need
16 for some additional information before [the] Special Master [could] recommend that the
17 District be declared unitary with respect to discipline concerns." [Id.]

18 The specific issues that the Special Master asked the District to further address
19 were: (1) the increase in the number of disciplinary actions in 2018-19; (2) the increase
20 in the fourth quarter of 2018-19 and the first quarter of 2019-20 in aggression incidents;
21 (3) the processes the District uses to assess the completeness and accuracy of discipline
22 data; (4) how the District deals with supportive action plans; (5) the decrease in disorderly
23 conduct violations over a three-year period; and (6) how the District reports DAEP data.

1 Rather than waiting for the Court to order the District to provide that information,
2 and in an effort to move the process along, the District complied with the Special Master’s
3 recommendations and requests, providing the requested information to the Special
4 Master. The District then reported to the Court that it had complied with the request in
5 its January 31, 2020 filing, including the requested information. [ECF 2427.] Instead of
6 acknowledging the District’s good faith efforts to provide the requested information, the
7 Mendoza Plaintiffs attack the District’s filing as inappropriate, and ask this Court to strike
8 the District’s filing. Striking the District’s filing of information requested by the Special
9 Master would serve no purpose helpful to the Court, the record, the parties, or the process
10 of pursuing unitary status.

11 **I. The Motion to Strike should be summarily denied.**

12 “Motions to strike are generally disfavored and rarely granted.” *Lowe v. Maxwell*
13 & *Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017) (denying motion to strike); *accord*,
14 *e.g.*, *Hanna v. ComTrans Inc.*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2 (D.
15 Ariz. Oct. 28, 2016) (similar, noting that such a motion “is a drastic remedy”). Plaintiffs
16 argue that ECF 2427 is “further briefing” on the District’s original notice of compliance
17 that was barred by the Court’s Order (ECF 2312) and thus may be stricken under LRCiv
18 7.2(m). To the contrary, the District’s filing merely addressed questions and issues raised
19 by the Special Master in the R&R. Regardless, “even a properly made motion to strike
20 is a drastic remedy which is disfavored by the courts and infrequently granted.” *Yount v.*
21 *Regent Univ., Inc.*, CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14,
22 2009) (emphasis added) (quoting *Int’l Longshoreman’s Assoc. v. Va. Int’l Terminals,*
23 *Inc.*, 904 F. Supp. 500, 504 (E.D. Va. 1995)). For the reasons discussed below, the Court
24 should decline to apply that drastic remedy here.

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1 Courts should deny motions to strike where the submission at issue was reasonably
2 prompted by other filings/orders. For example, District of Arizona courts have denied
3 motions to strike improper “sur-replies” where they responded to new issues raised on
4 reply, *see, e.g., Sebert v. Arizona Dep’t of Corr.*, CV1600354PHXROSESW, 2016 WL
5 3456909, at *1-2 (D. Ariz. June 17, 2016), and has denied a motion to strike a
6 “memorandum of explanation” filed by a law firm after the court granted sanctions
7 against it. *See Larson v. White Mountain Group LLC*, CV 11-01111-PHX-FJM, 2011 WL
8 6759555, at *1 (D. Ariz. Dec. 23, 2011). Similarly, here, the filing at issue (ECF 2427)
9 was reasonably prompted by the Special Master’s R&R. The Special Master raised
10 various issues that he wanted the District to address; the District accordingly did so. The
11 Court should deny the motion to strike on this basis.

12 Courts also commonly deny motions to strike where the information in the
13 challenged filing would provide a more fully developed record, enabling the court to
14 better make decisions on the merits. *See, e.g., Hanna v. ComTrans Inc.*, CV-16-01282-
15 PHX-DLR, 2016 WL 6393601, at *2 (D. Ariz. Oct. 28, 2016) (denying motion to strike
16 because “[t]he Court prefers resolving fully briefed motions when possible” and no
17 prejudice would result); *accord, e.g., Wilson*, 15 C 9364, 2016 WL 8504990, at *3 (new
18 evidence filed with movant’s reply addressed evidentiary shortcomings raised in response
19 and permitted court to find that movant had met its burden of proof); *Greenbelt Ventures,*
20 *LLC v. Washington Metro. Area Transit Auth.*, 08:10-CV-157-AW, 2011 WL 2175209,
21 at *9 (D. Md. June 2, 2011), *aff’d*, 481 Fed. Appx. 833 (4th Cir. 2012); *Johnson v. County*
22 *of Wayne*, 08-CV-10209, 2008 WL 4279359, at *8 (E.D. Mich. Sept. 16, 2008).

23 Here, denying the motion to strike will unquestionably provide a more fully
24 developed record and aid the Court in rendering informed decisions as to this area of
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1 district operations. The issues raised by the Special Master in the R&R made clear that
2 there were additional areas he wished the District to address; the Court may have the same
3 questions/concerns. The District addressed those matters, and the information it provided
4 should remain in the record. As the Court attempts to make fully informed decisions as
5 to various areas of District operations — an effort all parties should support — having
6 the additional information requested by the Special Master can only help its process. The
7 Court should deny the motion to strike on this basis, as well.

8 Finally, motions to strike are commonly denied where permitting the challenged
9 filing to remain in the record would not unduly prejudice a party, *see, e.g., Sebert*,
10 CV1600354PHXROSESW, 2016 WL 3456909, at *2; *Hanna*, CV-16-01282-PHX-DLR,
11 2016 WL 6393601, at *2, or, conversely, where striking the filing would unduly prejudice
12 a party. *See, e.g., R. Prasad Indus. v. Flat Irons Env'tl. Sols. Corp.*, CV-12-08261-PCT-
13 JAT, 2015 WL 13388176, at *3 (D. Ariz. Jan. 22, 2015).

14 Here, plaintiffs cannot argue that they would be prejudiced at all by the Court's
15 permitting the District's filing to remain in the record: they substantively responded to
16 the filing. [*See* ECF 2431.] On the other hand, striking ECF 2427 would prejudice the
17 District. The District is seeking to provide information specifically identified by the
18 Special Master as needed for the Special Master to make his report and recommendation.
19 This is the District's only opportunity to be heard regarding the issues raised in the Special
20 Master's report, as required by Fed R. Civ. P. 53(f)(1), which provides:

21 "In acting on a master's order, report, or recommendations, the court **must** give
22 the parties notice and an opportunity to be heard[.]" [Emphasis added.]

23 For this reason, too, the motion to strike should be denied.¹

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25 ¹ If the Court believes the District must specifically request that its filing be permitted,
the District hereby does so. *See Kunzi v. Arizona Bd. of Regents*, CV-12-02327-PHX-

1 **II. The Mendoza Plaintiffs substantive arguments are meritless.**

2 The Mendoza Plaintiffs raise three complaints. As shown below, none of these
3 arguments are new, and none are specifically related to the District's response to the
4 Special Master's specific issues and questions. Each of them is addressed below.

5 **A. The District provided the information requested by the Special Master, and
6 it did not obscure any data.**

7 The Special Master's R&R asked the District to address why the number of
8 disciplinary actions for all students increased in 2018-19. In its response, (ECF 2427-1,
9 pp 2-3), the District explained that the increase was due in large part to a change in the
10 Code of Conduct with respect to drugs, alcohol and fighting, and to the increase in dug
11 and tobacco-related vaping offenses, which increases were seen not only in the District
12 but across the country. As explained in the District's filing, the Code of Conduct
13 eliminated some long-term and automatic suspensions and replaced them with short-term
14 suspensions and the option to receive interventions. [ECF 2427-1, pp. 2-3.]

15 The Mendoza Plaintiffs complain, however, that the District's filing seeks to
16 obscure increases in disciplinary incidents in SY 2018-19 because the District also
17 included a chart that compared the number of in-school disciplinary actions and short-
18 term out-of-school suspensions over a two-year period. The Mendoza Plaintiffs do not
19 argue, nor could they, that the District did not report disciplinary data from SY 2017-18
20 or SY 2018-19; instead, they raise an issue with a single chart used by the District as a
21 part of the information provided for the Special Master. The Mendoza Plaintiffs' position
22 appears to be that if the District had not provided the specific chart at all, the remaining
23 information would have been sufficient and would not have been objectionable. But
24 because the District showed in chart form a two-year trend, it purportedly was attempting

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JAT, 2013 WL 3895012, at *1 n.1 (D. Ariz. July 29, 2013) (granting motion for leave to
extend page limits, mooted motion to strike for failure to comply with the limitation).

1 to obscure increases in discipline in the 2018-19 school year.

2 All relevant data has been provided, and nothing is obscured. To the extent the
3 Mendoza Plaintiffs want to compare the data over a separate period, they are free to do
4 so. Indeed, that is exactly what they did in their response to the District’s filing. Even
5 so, the Mendoza Plaintiffs’ chart does not add to or take away from the District’s
6 explanation that the increase in disciplinary incidents in 2018-19 was in large part the
7 result of an increase in the number of vaping-related offenses and changes to the Code of
8 Conduct that sought to reduce mandatory long-term suspensions for fighting or substance-
9 related offenses and replace them with short-term suspensions and in-school interventions
10 that treat the root of the problem. [ECF 2427-1, pp. 2-3.]

11 In fact, the Mendoza Plaintiffs’ motion to strike acknowledges that “explanations
12 provided by the District with respect to the increases in short-term suspensions between
13 the 2016-17 and 2018-19 school years also apply to some extent with respect to the
14 increases observed in 2018-19 from the prior school year.” [ECF 2431, p. 5.] The
15 Mendoza Plaintiffs also acknowledge that the District has explained that with respect to
16 the increase in short-term suspensions in the 2018-19 school year, twenty-five percent
17 were related to mediation or drug/alcohol counseling dispositions. [Id., n.4.] The
18 Mendoza Plaintiffs further “recognize that what appears to have been a large decrease in
19 in-school interventions in 2018-19 may related to increases in short-term suspensions.”
20 [Id. at p.3, n.2.] Nevertheless, they argue they need more information. They don’t need
21 any additional information. The District has provided (a) all of the required data on
22 discipline (in its annual reports and other filings), and (b) the explanation of trends
23 requested by the Special Master.

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1 **B. The District has clearly explained its discipline review process without**
2 **conflicting statements.**

3 The Mendoza Plaintiffs' second argument appears to be based on their confusion
4 between: (1) District-level (Student Relations Department) discipline reviews, which
5 assess the completeness and accuracy of school-level discipline reporting; and (2) site-
6 level (school discipline teams) reviews in which school discipline teams review all
7 discipline data, including data on whether teachers disproportionately refer students for
8 exclusionary discipline and which supports can be provided to address the
9 disproportionate number of referrals.

10 Thus, when the Special Master asked in RFI 2581 (ECF 2431-1, p.3) how many
11 teachers were identified for additional teacher support as a result of discipline referrals
12 and at which schools those teachers work, the District explained that District-level
13 reviews include reviews of site-level reports, but the District-level reports do not ask for
14 specific teacher names or counts. Although school discipline teams collect this data, such
15 data is not collected at the District level. Instead, the District-level review ensures that
16 school discipline teams are collecting the data, reviewing the data, and providing support
17 when that data indicates a disproportionate number of referrals.

18 The District explains over five single-spaced pages in its annual report its system
19 for Discipline Data Monitoring at the District and site levels, including which specific
20 data is reviewed by site teams and which specific data is reviewed by the District's
21 Student Relations Department. [ECF 2298-1, pp. 153-158.]

22 For example, the District's annual report explains:

23 The District continued to provide training and support to site
24 leaders to ensure the accuracy of discipline data. The Student
25 Relations department, including the SR director, the SR
 coordinator (RPPC), and the CL, worked throughout the year
 with staff from sites and relevant departments to improve the
 usefulness and accuracy of data documentation. The District

1 improved site-level capacity for data entry to ensure accurate
2 and reliable reporting in SY2018-19, particularly through
3 training on data entry into the EBAS, including Synergy and
4 Clarify information systems.

5 ECF 2298-1, p. 153.

6 Although the District's Student Relations department conducts site visits and
7 works with schools on their data collection and review, reviewing its own set of criteria
8 to determine implementation fidelity, it is the school discipline teams that review which
9 teachers frequently refer students, and whether those teachers could benefit from
10 additional training or support. The District has not made contradicting statements
11 regarding its discipline review process. The Mendoza Plaintiffs' relevant objection
12 should be rejected.

13 **C. The District has thoroughly and repeatedly disclosed all discipline**
14 **data.**

15 The final issue raised in the Mendoza Plaintiffs' motion to strike is a renewed-
16 allegation that the District has not provided discipline data consistently. This issue has
17 been briefed *ad nauseam*, and the Mendoza Plaintiffs are well aware of the location and
18 detail of the District's regular reports and summaries of those reports from prior briefing.
19 Indeed, the Mendoza Plaintiffs' own motion simply refers the Court to their prior
20 arguments.

21 The District has consistently reported the discipline data required by the USP,
22 originally defined as Appendix I and now referred to as VI.G.1.b Discipline data.
23 Discipline categories – in-school discipline, in-school suspensions, short-term
24 suspensions and long-term suspensions – have been consistently reported over time.
25 Following research-based best practices, the District created and expanded positive
alternatives to suspension, In-School-Interventions (ISI) and District Alternative
Education Program (DAEP). The District added new categories (ISI and DAEP) into the

1 report starting in 2016-17. *See* 2019-20 DAR, Appendix VI-29, ECF 2305-4 at 32-38.

2 With the implementation of ISI and DAEP, the students who receive these
3 alternative forms of discipline are tracked separately for the purpose of best serving these
4 students, though the numbers are still reported to the Court and the parties each year in
5 the annual report. To the extent anyone wants to combine these numbers, the data is
6 provided *in a single location* to do so. In fact, for the charts provided with the District's
7 last two annual reports, these numbers are provided both ways--separately and combined.
8 [ECF 2133-3, pp. 8-9; ECF 2305-4, pp. 36-38.]

9 It is impossible that the Mendoza Plaintiffs are ignorant of where and how the
10 District reports discipline data. The Mendoza Plaintiffs fully understand that the District
11 does not simply report information in different appendices and tell the Special Master and
12 Plaintiffs to "figure it out." [ECF 2431, p.8.] Indeed, the District re-explains the process
13 for recording the data and the location of the data in the very document the Mendoza
14 Plaintiffs now seek to have stricken from the record. They need look no further than ECF
15 2427-1, which includes (again) specific tables, charts, and descriptions of locations of
16 various data points. Apparently, that is exactly what they did when they created their own
17 chart in their motion to strike. Their motion to strike should be denied.

18 Conclusion

19 For these reasons, the Motion to Strike should be denied. The Mendoza Plaintiffs
20 have now already made their arguments in response to the information the District
21 provided, and the Court should not strike any of that information from the record.

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Dated this 26th day of February, 2020.

Respectfully submitted,

/s/ P. Bruce Converse _____

P. Bruce Converse

Timothy W. Overton

DICKINSON WRIGHT, PLLC

1850 N. Central Avenue, Suite 1400

Phoenix, Arizona 85004-4568

Attorneys for Tucson Unified School

District No. 1

CERTIFICATE OF SERVICE

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I hereby certify that on the 26th day of February, 2020, I electronically transmitted the attached 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