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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' OPPOSTION TO TUSD SUPPLEMENTAL PETITION FOR UNITARY STATUS (DOC. 2406)

Hon. David C. Bury

Maria Mendoza, et al., Plaintiffs, United States of America, Plaintiff-Intervenor, v. Tucson United School District No. One, et al., Defendants.	Case No. CV 74-204 TUC DCB

INTRODUCTION

Mendoza Plaintiffs herewith submit their Opposition to TUSD's Supplemental Petition for Unitary Status ("Supp. Pet.") (Doc. 2406) which also incorporates their response to the District's Executive Summary of Equity Initiatives Under the Unitary Status Plan ("Exec. Summary") (Doc. 2384-1) pursuant to this Court's Order of October 2, 2019 (Doc. 2312)[1].

[1] The District filed the Exec. Summary on Sunday, December 1, 2019. On December 3, 2019, apparently unaware of that filing, this Court, having directed the District to further revise its FACE Plan and with issues relating to the Post-Unitary Status AASSD and MASSD Plans and the ELL Plan still outstanding, revised the schedule for filing the Exec. Summary (and, by extension, the District's supplemental petition for unitary status), stating that the Exec. Summary would be due within 30 days of its resolution of any objections to the forementioned plans. (Doc. 2386 at 8:12-14.) Rather than defer filing its Supp. Pet. until the proceedings relating to the outstanding plans had been concluded and its revised Exec. Summary had been filed, the District followed the deadlines set in this Court's October Order (Doc. 2312) and lodged its Supp. Pet. with the Court. Mendoza Plaintiffs therefore expressly reserve their right to file a supplemental opposition to the supplemental petition for unitary status and response to the Exec. Summary once the final, fully revised, Exec. Summary has been filed with the Court.

ARGUMENT

POINT I

TUSD OMITS ESSENTIAL FACTS AND CONTROLLING LAW FROM ITS STATEMENT OF THE "RELEVANT PROCEDURAL HISTORY" OF THIS CASE IN AN APPARENT EFFORT TO IMPROPERLY CIRCUMSCRIBE THE TEST TO BE APPLIED BY THIS COURT TO DETERMINE IF THE DISTRICT HAS ATTAINED UNITARY STATUS

The District's Statement of "Relevant Procedural History" is Notable for What it Omits

Judge Frey's Findings and the 1978 Settlement Agreement

The District's discussion of "Relevant Procedural History" (Supp. Pet. at 1:19-8:6) devotes a great deal of attention to Judge Frey's 1978 findings of fact and conclusions of law (*id*. at 2:8-5:18) but says virtually nothing about the 1978 Settlement Agreement against which the District's performance was measured for the next 30 years. In its Supp. Pet. TUSD says only: "Pursuant to the direction of the Court, the parties met and agreed on the terms of a remedial desegregation decree, entered in 1978, that specified targets for enrollment at the nine schools [at which Judge Frey had found effects of past intentional segregative acts by the District] *and contained some other provisions*." (*Id*. at 5:19-21; emphasis added.)

As this Court well knows, those unenumerated "other provisions" were of great significance and important both to its consideration of the District's 2005 petition for unitary status and the Ninth Circuit's review of its order on that petition. In addition to the fact that the Settlement Agreement (Doc. 393) did far more with respect to student assignment than merely set "targets for enrollment at … nine schools" (*id*.), the Settlement Agreement also addressed: faculty and staff employment and assignment; implementation

of the District's suspension and expulsion policy; testing and educational initiatives with specific attention to the testing and assessment of the District's African American students inclusive of programmatic recommendations to assist in the quality of education of African American students in the District; bilingual instruction; and the piloting of a literacy program. In addition, the Settlement Agreement required TUSD initially to file quarterly and thereafter annual reports concerning (1) the racial and ethnic student enrollment at all schools involved in the plans implemented pursuant to the Settlement Agreement[2]; (2) faculty and staff assignments and reassignments and the reasons for such decisions; and (3) all programmatic changes made pursuant to the Settlement Agreement and the effectiveness of such changes.

Further, the Settlement Agreement established an Independent Citizen's Committee to review and report concerning TUSD's compliance with the Settlement Agreement and required the District to (i) obtain court authorization for any new construction or permanent additions to schools and (ii) submit for court review any act or policy that substantially affected the racial or ethnic balance in any school.

Of particular significance given the District's most recent submissions to this Court, the Settlement Agreement also stated that once the Settlement Agreement became effective, the rights and obligations of the parties were to be determined solely by its terms and the terms of any subsequent stipulations or orders entered in the case pursuant to it and that in seeking enforcement of or relief in the courts from the terms of the Settlement Agreement, "no party may rely upon prior findings and conclusions in this case to interpret

[2] Over time, the District acknowledged that it was required to maintain prescribed "student ethnic/racial ratios" at 25 schools. (December 20, 2002 TUSD Memo re: Prescribed Student Ethnic/Racial Ratios (Doc. 1137-6 at Exhibit 9).)

the terms of [the Settlement Agreement] or to determine the rights and obligations of the parties."[3] (*See also*, August 31,1978 Order Approving Settlement (Doc. 436) at 5: "IT IS ORDERED: …That the Stipulation of Settlement…is approved, merged herein and shall be the controlling Order of the Court, notwithstanding any prior Orders or Findings entered herein, as provided in paragraph 23 of the said Stipulation of Settlement.") Further, as this Court observed in its Order of 8/21/07 (Doc. 1239): "After Judge Frey found that the constitutional violation warranted displacement of local authority by an injunctive decree

[3] This provision presumably was included because, as the Settlement Agreement itself recites at its outset, both sets of plaintiffs, supported by the Department of Justice, had filed motions to alter or amend the findings of fact and conclusions of law, which motions had been argued but not decided when the parties informed the court that they had reached a settlement and that it no longer was necessary for the court to decide the motions.

Based on arguments the District is asserting in the Ninth Circuit, Mendoza Plaintiffs anticipate that the District will attempt to argue in response that while Judge Frey's findings of fact and conclusions of law may not to be invoked to interpret the Settlement Agreement or determine the parties' rights and obligations under that Agreement, they should be relied on to determine the rights and obligations of the parties today. Not only does such an argument make no sense given, among other factors, the Ninth Circuit's subsequent 2011 opinion articulating the District's obligations under the Settlement Agreement and the existence of the USP which explicitly sets forth the District's current obligations, it also is based on a misreading of the key language in the Settlement Agreement. (Settlement Agreement, Doc. 393 at ¶ 23.) TUSD invokes the canon of *espressio unius est exclusio aterius* to attempt to argue that because the sentence in Paragraph 23 of the Settlement Agreement which states that in seeking enforcement of or relief from the terms of the Settlement Agreement no party may rely on prior findings and conclusions in the case does not expressly reference subsequent stipulations and orders while Paragraph 23 does refer to subsequent stipulations and orders in other sentences, such subsequent stipulations and orders are open to interpretation based on Judge Frey's findings and conclusions. But that argument ignores both the fact that the *espressio unius* canon creates only a rebuttabal presumption (*Boudette v. Barnette*, 923 F. 2d 754, 756-57 (9th Cir. 1991) and that a contract must be interpreted to carry out the intent of the parties. *See*, *e.g.*, *Goodman v. Newzona Inv. Co.*, 101 Ariz. 472, 472, 421 P.2d 318, 320 (1966)("The intent of the parties…must control the interpretation of the contract.") As this Court noted in its Order of 8/21/07 (Doc. 2139), when it addressed the District's then-pending motion for unitary status, the plaintiffs had filed motions to amend Judge Frey's findings of fact and conclusions of law that were never ruled on by Judge Frey because those motions "were resolved when the parties settled the remedial aspects of the case." (Doc. 1239 at 12, n.5.) Plainly, when they entered into the Settlement Agreement, the parties understood that Judge Frey's findings of fact and conclusions of law might have been amended had he ruled on the plainitffs' pending motions and intended that its terms should determine the District's obligations going forward. This is further reflected in the Court's Order which as noted above expressly stated that once approved, the Settlement Agreement "shall be the controlling Order of the Court, notwithstanding any prior Orders of Findings herein…." (Doc. 436 at 5.)

the parties entered into the Settlement Agreement, tailoring the remedies they agreed fit the nature and extent of the constitutional violations found by the Court." (Doc. 1239 at 12:11-14.)

This Court's 2008 Unitary Status Order

The District briefly discusses this Court's 2008 order on unitary status (Doc. 1270) in its Supp. Pet. (at 6:3-20). It quotes the Court's finding that to the extent practicable the student ratios established by the desegregation plans called for in the Settlement Agreement were met and maintained over a five-year period of time (Doc. 1270 at 5:19-20) but omits this Court's additional explicit statement that it "rejects the Defendant's position that once it implemented the desegregation plans required under the Settlement Agreement, it no longer had any obligation to remedy the racial imbalances caused by the demographic changes in the district" (*id*. at 8:1-3) and its holding that "[u]ntil unitary status is attained, the District is committed to desegregation of the district to the extent practicable, and 'at the very least' the District has a duty to not exacerbate racial imbalances caused by these demographic changes." (*Id*. at 8:3-6, citing cases and the report of TUSD expert David Armor ("explaining that until it attains unitary status, the district's duty under the Settlement Agreement is to maintain desegregated schools to the extent feasible" (*id*. at 8-9)).) Instead, the District suggests that for some supposedly unexplained reason, this Court simply "refused to find that the District had continued to comply in good faith with the remedial decree based on conduct after vestiges had been

eliminated and after the District had complied with the remedial decree for five years….." (Supp. Pet. at 6:14-16; emphasis in original.)[4]

The District concludes its cherry-picked discussion of the 2008 unitary status order with the statement that the Court ordered the District to comply with a post unitary status plan "in lieu of finding continued good faith after the first five years." Mendoza Plaintiffs are unsure precisely what the District intends to convey in its suggestion that this Court ordered a post unitary plan in lieu of making findings but what is clear – and omitted in the District presentation – is that this Court made express findings that the District had failed to act in good faith in its post-1983 implementation of the Settlement Agreement. (*See, e.g.*: "The Court finds that TUSD has failed to make a good faith effort to combat the demographic changes in the district to the extent practicable" (Doc. 1270 at 27:12-13); "While TUSD made a good faith effort to implement the program changes expressly required under the terms of the Settlement Agreement for the first few years, it failed to act in good faith in its ongoing operation of the District under the Settlement Agreement, specifically, by failing to monitor, track, review and analyze the effectiveness of its

[4] While the District acknowledges the Court's finding that the District had failed to monitor, track, review, and analyze the ongoing effectiveness of its programmatic changes to achieve desegregation (Supp. Pet. at 6:17-18), it omits the Court's finding, after having reviewed the evidence before it, that "the data reflects that the student assignment programs, practices, and procedures in place and used in TUSD have had no net effect on the demographic segregation in the district" (Doc. 1270 at 16:6-8) as well as its finding that "TUSD fails to present any evidence that over the past 27 years it monitored and reviewed the effectiveness of its race and ethnic sensitive school boundaries, magnet programs, and open enrollment to address demographic segregation. Without such review, TUSD has been incapable of making logical or meaningful changes to its student assignment policies, practices, or procedures related to desegregation….Under such circumstances, this Court cannot find that TUSD has acted affirmatively to address demographic re-segregation to the best of its abilities." (*Id*. at 19-21-20:3.) TUSD similarly omits all of the Court's findings with respect to the multiple provisions of the Settlement Agreement that related to areas of the District's operations other than student assignment. (*See, e.g.*, Doc.1270 at 27-55.)

programmatic changes. Consequently, millions of dollars were spent arbitrarily, without the ability to analyze the ongoing effectiveness of programmatic changes to address desegregation and quality of education issues to the extent practicable" (*id*. at 55:24-56:4); and "After full disclosure and briefing, the Court finds that the Defendant failed to act in good faith in its ongoing operation of the District under the Settlement Agreement" (*id*. at 3:1-2).)

The Ninth Circuit's 2011 Opinion on Unitary Status

In its extremely brief reference to the Ninth Circuit's opinion on appeal from the Court's 2008 order, the District says only that the Court of Appeals held "that the [District] Court's refusal to find good faith compliance precluded termination of supervision and determination of unitary status." (Supp. Pet. at 6:20-23.) However, the Ninth Circuit did more than address a "refusal to find good faith"; rather, it expressly noted that this Court had made affirmative findings of lack of good faith. For example, it stated: the "district court determined that the School District 'failed to act in good faith in its ongoing operation…under the Settlement Agreement.'" *Fisher v. Tucson Unified School District*, 652 F.3d 1131, 1142 (9 th Cir. 2011); *see also*: "the district court's extensive findings as to the School District's lack of good faith show that the time has not yet come … for Tucson [to be released from court supervision]" (*id*.).

Perhaps more importantly for purposes of the pending supplemental petition, the Ninth Circuit did not limit its consideration to only the good faith prong of the test to determine unitary status, as the District implies in its Supp. Pet. The Court of Appeals also made findings and issued directions to this Court concerning the further requirement that a school district demonstrate that it has eliminated the vestiges of its prior discrimination to

the extent practicable. The Court of Appeals first observed that "by reference to only certain of the *Green* factors, the [district] court stated concerns about whether the District had sufficiently eliminated the effects of past *de jure* segregation." (652 F. 3d at 1142.) It then ordered this Court to maintain jurisdiction until, *inter alia*, it is "convinced that the District has eliminated 'the vestiges of past discrimination …to the extent practicable' with regard to all of the *Green* factors." (*Id*. at 1143; citations omitted.)

The Unitary Status Plan ("USP")

Virtually the only thing the District says about the USP is that it "objected to the plan ultimately developed" (Supp. Pet. at 7:3) and that the "Court entered the Unitary Status Plan ("USP") as an order, over the District's objection…." (*Id*. at 7:7-8.) Not only does the District omit reference to its major role in the development of the USP; it also seeks to avoid the consequence of what is an uncontestable fact: the USP is a consent decree.

Notwithstanding its current effort to avoid the legal consequences of the USP being a consent decree[5], the District previously has acknowledged that very fact – and the Ninth Circuit has agreed. In its opening brief to the Ninth Circuit at the time of its 2014 appeal from a number of this Court's orders, TUSD unambiguously argued that "the USP is a consent decree" and quoted the USP recital that "this document is intended by the parties

[5] As the Ninth Circuit said in *Rouser v. White*, 825 F. 3d 1076,1082 (9th Cir. 2016): "'Without question courts treat consent decrees as contracts that have 'the additional element of judicial approbation.' Like terms in a contract, distinct provisions of consent decrees are independent obligations, each of which must be satisfied before there can be a finding of substantial compliance. Accordingly, courts don't release parties from a consent decree unless they have substantially complied with *every one* of its provisions." (Citations omitted; emphasis in original.) *See also*, this Court's Order dated 8/21/07 (Doc. 1239) at 10, n 4: Because the Settlement Agreement "is a binding consent decree, [it] creates mandatory obligations that are enforceable in every detail." (Citations omitted.)

as a consent order." (Relevant pages of Tucson Unified School District No. One's Opening Brief in Case No. 14-15204, attached as Exhibit A, at 2, quoting USP at 5, n.1; *see also* USP Section 1, A.) The Ninth Circuit in its order dismissing that appeal plainly stated: "The Unitary Status Plan can be characterized as a consent decree." *Fisher v. Tucson Unified Sch. Dist.*, 588 Fed.Appx. 608,609 (9th Cir. 2014).[6] More recently, when it dismissed the District's appeal from the Court's 9/6/18 Order (Doc. 2123) in Case No. 18-16926, the Ninth Circuit reaffirmed that statement when it explicitly relied on the Supreme Court case (*Carson v. American Brands, Inc*., 450 U.S. 79, 84-86 (1981)) that, it said, "set[] forth [the] test to determine whether [a] court has jurisdiction under § 1292(a)(1) over [an] appeal challenging [an] interlocutory order involving [a] consent decree." (A copy of the Court's opinion is attached as Exhibit B.) That the USP is a consent decree therefore is the law of this case. *United States v. Alexander*, 106 F.3d 874, 876 (9 th Cir. 1997) (citation omitted) ("a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case").

The Correct Test to Apply to Determine if the District has Attained Unitary Status

This Court must apply a three part test to determine whether the District has attained unitary status: (1) whether the District has eliminated the vestiges of past discrimination to the extent practicable with respect to all the *Green* factors; (2) whether it has demonstrated full and satisfactory compliance with all the provisions of the consent

[6] Because TUSD now seeks to derive an unfair advantage by taking the position that the USP is not a consent decree, a position "clearly inconsistent" with its prior position on which the Ninth Circuit relied and with respect to which it agreed in 2014, TUSD also is judicially estopped from arguing that the USP is not a consent decree. *Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782-83 (9th Cir. 2001) (internal citations omitted); *see also Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 270-71 (9th Cir. 2013).

decree for a reasonable period of time; and (3) whether it has demonstrated to the public and to the parents and students of the plaintiff classes its good faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance. *Freeman v. Pitts*, 503 U.S. 467 (1992). The District bears the burden of proof with respect to these showings. *Fisher*, 652 F.3d at 1135.

The Requirement to Eliminate the Vestiges of Past Discrimination to the Extent Practicable With Respect to All Green Factors Including Quality of Education

As noted above, TUSD premises its discussion of whether it has met the requirement that, as one step toward attaining unitary status, it has eliminated the vestiges of its past discrimination to the extent practicable by asserting that, as of 1983, there were no vestiges of past discrimination left for this Court to consider. (Supp. Pet. at 11:11-15; *see also*, TUSD Motion for Partial Unitary Status (Doc. 1993) ("Motion") at 7:7-9.) It therefore asserts that the Court's inquiry with respect to this prong of the test for attaining unitary status is essentially complete and that it "should not…look beyond the findings of Judge Frey to other areas of District operations." (Supp. Pet. at 11:19-22.) Mendoza Plaintiffs demonstrated above that the procedural history of this case and the Ninth Circuit's 2011 opinion preclude such an approach. Equally important, in its 2013 order approving the USP, this Court rejected the District's assertion – for at least the second time. It wrote:

> According to the District, the only findings of fact and conclusions of law establishing the constitutional violation at issue in this case were those dated June 4, 1978. The District argues that even the 1978 Stipulation

> was unsupported by findings of fact linking it to any constitutional violation. This is an old argument seen and rejected by this Court in 2006, when this Court issued the Order defining the scope of the unitary status proceeding it was then undertaking….

Order dated 2/6/13 (Doc. 1436) at 8:5-21; citations omitted. Indeed, this, too, is the law of this case. *Alexander*, 106 F.3d at 876.

In its order, this Court went on to expressly cite the directive of the Ninth Circuit that before it could find TUSD to be in unitary status it "must …be convinced that the District has eliminated 'the vestiges of past discrimination …to the extent practicable' with regard to all the *Green* factors" (*Fisher*, 652 F.3d at 1144), and observed that this includes "quality of education". (Doc. 1436 at 9:11.)

To the extent the District mentions quality of education at all in its discussion of this part of the test for unitary status, it suggests that it is not a *Green* factor and that the standard to which TUSD must be held in assessing its progress in providing quality education to its African American and Latino students therefore is different from that to be applied to other aspects of its obligations. (Supp. Pet. at 24:7- 25:22.) It is wrong. In *Freeman*, the Supreme Court observed that its earlier enumeration of what have come to be known as the "*Green* factors" was not intended to be "a rigid framework" and held that quality of education is a legitimate inquiry in determining compliance with a consent decree. (503 U.S. at 492-3.) Further, this Court has held as much and, therefore, yet again, it is the law of this case. (Doc. 1436 at 9:11.) Additionally, the District's assertion to the contrary (Supp. Pet. at 24:7-24) notwithstanding, the District bears the burden of demonstrating that it has removed the vestiges of discrimination to the extent practicable with respect to this and all other elements of the school system referred to as "*Green*

factors." (Doc. 1436 at 9:12-18, citing *Freeman*, 503 U. S. at 494.) *(See also, Little Rock School District v. Arkansas*, 664 F. 3d 738, 750-51, 755-56 (8th Cir. 2011), applying the same standards to the District's performance of its obligations relating to advanced placement enrollment and student achievement as to all other areas of the school district's operations.)

The Requirement to Demonstrate Full and Satisfactory Compliance With Every Provision of the USP

Not only did the Ninth Circuit reiterate that the Court must retain jurisdiction over TUSD until there has been full and satisfactory compliance with each portion of the USP as to which jurisdiction is to be withdrawn (*Fisher*, 652 F. 3d at 1144), it also has clearly held that "[a] consent decree may not be terminated without well-supported findings that all of its terms have been faithfully complied with for a substantial time." *Rouser*, 825 F.3d at 1082.[7]

The Requirement to Demonstrate a Good-Faith Commitment to the Whole of the USP as Well as to the Law and the Constitution

The issue is not, as the District states at some points in the Supp. Pet. whether the "District…could return to a system of *de jure* segregation" (*see, e.g.*, Supp. Pet. at 3:17-18) but, rather, whether there is a "*history* of good-faith compliance" with the USP, whether

[7] Even if quality of education were not to be considered a *Green* factor, it would remain an essential factor to be considered in determining compliance with the USP and attainment of unitary status given its centrality to the USP. For example, Section V of the USP explicitly addresses Quality of Education and begins with the statement: "The purpose of this section shall be to improve the academic achievement of African American and Latino students in the District…." (USP, Section V, A, 1.) And, the subsection on Student Engagement and Support says: The objective of this Section is to improve the academic achievement and educational outcomes of the District's African American and Latino students, including ELL students, using strategies to seek to close the achievement gap and eliminate the racial and ethnic disparities for these students in academic achievement…." (USP Section V, E, 1, a.)

TUSD's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations, and whether the District has demonstrated to the public and to the parents and students of the plaintiff classes its good faith commitment to the whole of the USP and to the provisions of law and the Constitution that were the predicate for judicial intervention in the first instance. *Fisher*, 652 F.3d at 1135, 1142, 1144-45 (emphasis in original).

POINT II

THE DISTRICT HAS NOT YET ELIMINATED THE VESTIGES OF ITS PAST DISCRIMINATION TO THE EXTENT PRACTICABLE

Student Assignment

In its Order of September 6, 2018 ("9/6/18 Order") (Doc. 2123), the Court first observed that the "USP does not call for integrated magnet schools; it requires district-wide integration." (9/6/18 Order at 31:11-13.) It then ordered the District to "identify viable non-magnet strategies like the Sabino High School Express Bus that promote integration" (*id*. at 31. 23-24) and further directed that the "District shall…[o]n a school-by-school basis…identify the non-magnet strategies, if any, that would improve integration at that school and adopt school specific integration plans." (*Id*. at 24-26.)

In response, the District filed its 3-Year Plus Integration Plan and Outreach and Recruitment Addendum. (Doc. 2270.) In that document TUSD identified eight schools that it said it had concluded have a high potential to be integrated. (Doc. 2270-3 at ECF p. 108.) While the Mendoza Plaintiffs critiqued the techniques the District planned to implement to further the integration of these eight schools (Doc. 2275 at 8:17-9:17), the fact remains that the District has concluded that over ten percent of its nonmagnet schools

(8 out of 69) have high potential to be integrated and that it can put plans in place to further their integration. It therefore is apparent that to date it has not yet integrated its schools to the extent practicable. Accordingly, it has not yet attained unitary status with respect to school assignment.

That this is so is further demonstrated by the fact that even as it points to the number of schools in the District that meet the USP definition of integration, the number of racially concentrated schools in the District still exceeds the number of integrated schools. (*See* TUSD Enrollment 40th Day 2019-20, attached as Exhibit C, showing 28 racially concentrated schools and 27 integrated schools exclusive of "alternative schools"; if those schools are included, the numbers are 29 racially concentrated and 28 integrated.) The students in these schools account for more that one-third of the District's total enrollment.

In this regard, the enrollment numbers for the six transition schools are of particular concern. All were racially concentrated in the 2016-17 school year when the Court ordered that their magnet status be withdrawn. (Order dated 12/17/16, Doc. 1983.) At that time, the Court stated that the "failure of the subject schools to achieve the integration criteria set forth in the USP should not relieve them (or the District) of on-going efforts to increase integration at those schools." (Doc. 1983 at 4:21-23; internal quotation and citation omitted.) Yet, as of the 2019-20 school year, four of the six schools are more racially concentrated than they were in 2016-17, one has the same high degree of racial concentration (85% African American and Latino) and only one has a slight reduction in such concentration (89% down from 91%). (*Compare* Exhibit C *and* 2016-17 TUSD Annual Report, Appendix II-64, TUSD Enrollment by School, Ethnicity and Integration Status, Final 40th Day, attached as Exhibt D.)

As of this writing, the Court has not ruled on the Mendoza Plaintiffs' objections to the District's magnet school plan and plan implementation contained in their Response to TUSD Notice of Filing of 3-Year+ PIP Integration Plan and Outreach & Recruitment Addendum (Doc. 2275). Rather than repeat those objections here, the Mendoza Plaintiffs respectfully invite the Court to consider Doc. 2275 together with this submission because it further details why TUSD has not yet attained unitary status with respect to student assignment.

Administrative and Certificated Staff

In the Supp. Pet., the District tellingly avoids any discussion of its own data concerning the USP's core administrative and certificated staff assignment requirement that it avoid placing beginning teachers at racially concentrated or underperforming schools (USP, Section IV, E, 5) or of its progress in implementing the Teacher Diversity Plan[8] developed pursuant to the USP Section IV, E, 3 to diversify in-school staff at a specifically identified set of target schools.

Instead, the District focuses heavily on (1) describing decreases in teacher vacancies since the USP's adoption (Supp. Pet. at 18:16-19:3) notwithstanding that, while not unimportant in a school system but perhaps not surprising in a district experiencing enrollment declines, there is no USP requirement expressly calling for such decrease, and

[8] The District has renamed a revised version of this plan as the "Teacher and Administrator Diversity Plan" following recent incorporation of measures to diversify administrative staff under this Court's 9/6/18 Order. (Supp. Pet. at 42:5-10.) The District erroneously attempts to describe these administrative staff measures as resulting from this Court's direction to revise the Teacher Diversity Plan "in a number of new and additional ways." There is nothing new about this obligation – USP Section IV, E, 4 expressly requires administrator diversification. Mendoza Plaintiffs suggest that the fact that the District only now is focusing on diversification of administrative staff is yet another reason why the District is not ready to be awarded unitary status.

(2) describing its processes for attaining teacher/administrator diversity, GYOP recruitment, and beginning teacher placement (*id.* at 19:4-20; 42:1-10; 43:12-45:15) developed only recently after multiple orders from this Court finding that that the District had not complied with the 9/6/18 Order and subsequent order directives concerning such processes (*see e.g.*, Order dated 9/10/19 (Doc. 2273) at 5:15-18 (referencing order to the District to show good cause why it failed to comply with beginning teacher certification study previously ordered), 13:13-19 ("the District has entirely ignored the remainder of the directives issued by the Court in its last Order" concerning processes for staff diversification, including GYOP recruitment)).[9]

Rather than repeat outstanding objections in this area, Mendoza Plaintiffs respectfully invite this Court to review their objections to TUSD's Second Supplemental Notices of Compliance re Certification and Support for Beginning Teachers (Doc. 2340) and Diversity Plan for Teachers and Administrators (Doc. 2341), with respect to which this Court has not yet ruled, together with this opposition because they detail why TUSD has not yet attained unitary status with respect to the USP's provisions concerning certificated and administrative staff. Mendoza Plaintiffs do, however, make a few points related to information they learned subsequent to these submissions.

[9] Mendoza Plaintiffs further respectfully submit that in light of the District's failure to implement the USP as to administrative and certificated staff as discussed in this section, and the District's related demonstrated lack of good faith (*see infra* pp. 36-37), it is not enough for purposes of awarding unitary status that the District finally has developed plans and procedures to remedy such failures. (*Fisher*, 652 F.3d at 1142 ("There is no authority for the proposition that a failure to demonstrate past good faith can be cured, and federal jurisdiction can be terminated, if a plan that merely promises future improvements is adopted. To the contrary, it is only "[a] *history* of good-faith compliance" that "enables the district court to accept [a school district's] representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.") (citation omitted).)

First, the recently-filed District Response to Questions Posed by the Special Master in his Report and Recommendation Regarding Certification and Support for Beginning Teachers (Doc. 2423) included an "updated inventory" as of November 5, 2019 concerning the placement of first year teachers which confirms that the District has been and remains significantly out of compliance with the USP's provisions addressing beginning teacher placement at racially concentrated or underperforming schools. In the 2019-20 school year, the District placed approximately **75%** of its first year teachers at racially concentrated or underperforming schools (*see* Doc. 2423 at 3 (101 out of 135 first-year teacher placements)) which notably comprise only 58.8% of all TUSD schools (*see* 2327-2). That percentage fits squarely in the range of between "over 70%" and 80.3% of such placements that has occurred every year since the adoption of the USP.[10] (*See* Mendoza Plantiffs' Objections to the Special Master's 2016-17 Annual Report (Doc. 2101) at 19 (Chart detailing first-teacher placements based on TUSD data).) While Mendoza Plaintiffs appreciate that the District is now, under Court order, beginning to couple mitigation strategies with first-year teacher placements at racially concentratred and/or underperforming schools, such recent mitigation does not relieve the District of its obligations or absolve it from its long-standing noncompliance in this area. (*See* 9/10/19 Order (Doc. 2273) at 7:11-14 (expressly rejecting TUSD argument that the large number of first-year teacher placements is "'not a major issue' and 'besides little can be done

[10] As detailed more fully in Mendoza Plaintiffs objections to TUSD's notice of compliance concerning certification and support for beginning teachers (Doc. 2340 at 5, n.4), the District inconsistently reported first-year teacher placements for the 2018-19 school year and subsequently reported "data entry errors" that may have affected reports of teacher placement in 2018-19 (*see* Doc. 2327 at 3:1-6; Doc. 2327-3). As a result, Mendoza Plaintiffs remain unclear about how many first-year teachers were placed at racially concentrated or underperforming schools in the 2018-19 school year.

because in all instances of these placements there were no other more experienced teacher applicants.'")

Separately, in the Special Master's report and recommendation relating to the Teacher Diversity Plan, retention, and grow your own programs, the Special Master noted that in the 2019-20 school year, the number of target schools successfully diversified under the Teacher Diversity Plan was 10 out of 26.[11] (Doc. 2392 at 3:25-4:1.) As reflected in the chart below, the District has reversed all progress made in diversifying target schools since the Teacher Diversity Plan was first approved by this Court (and maintained such reversal) with the result that in 2019-20, the District falls short of the teacher diversity plan's express "*initial* objective[] to reduce the number of schools with significant racial disparities from 26 to 13 by the beginning of SY 2016-17." (Doc. 2329-1, at ECF 33; emphasis added.)

Teacher Diversity Plan Progress

	Beginning of 2016-17	**End of 2016-17**	**End of 2017-18**	**End of 2018-19**	**2019-20**
TDP Progress	10 of 26 (38.5%)	14 of 26 (53.8%)	13 of 26 (50%)	10 of 26 (38.5%)	10 of 26 (38.5%)
Source	Doc. 2166-1, Exhibit 5	Doc. 2159-1, Exhibit 2	Doc. 2159-1, Exhibit 2	Doc. 2301-1, Appendix IV-10	Doc. 2392 at 3:25-4:1 (Special Master's R&R)

[11] Mendoza Plaintiffs do not agree that a new standard for measuring success under the Teacher Diversity Plan is appropriate for recommendation as proposed in the Special Master's report and recommendation (*see* Doc. 2392 at 6:2-7), with respect to which they do not have an opportunity to respond without leave of this Court, particularly given that Mendoza Plaintiffs remain open to expanding such measure to include all schools with truly diverse teaching staffs. They do, however, note that even under the Special Master's proposed measure, "diverse" target schools in 2019-20 total less than half of the target schools, 12 out of 26 (*id.* at 4:4-6).

In light of the District's either total lack of progress or actual reversal of progress with respect to beginning teacher placements and teacher diversity under the Teacher Diversity Plan (as well as the objections raised in Mendoza Plaintiffs' pending related objections), the Mendoza Plaintiffs respectfully suggest that the District should not be awarded unitary status in the area of certificated and administrative staff.

Quality of Education

ALEs

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

> The Court has held that "increases" for the purpose of assessing the effectiveness will be actual percentage increases made district-wide and at individual schools, and it will consider comparable data for White students to address concerns that ALE increases are merely an "all boats rising" phenomena. The Court adopted a "not less than" 15% Rule to be applied district-wide as a rule-of-thumb indicator of possible discrimination in an ALE program. The Court expressly held that neither actual increases nor the 15% Rule will be determinative of unitary status. To be clear, in combination they may also be insufficient.

Doc. 2123 at 50:18-25; citations omitted. (*See also*: "In assessing the District's behavior and process related to the ALE provisions in the USP, §V, the Court will consider three factors: the 15% Rule as limited herein, the strategy assessment matrix, and actual increases or decreases in ALE enrollment, participation, or completion. Accordingly, … IT IS …ORDERED adopting the 'Not less than' 15% Rule as a rule-of-thumb-red-flag for

when discrimination may exist in a particular ALE program district-wide." (Order dated 10/24/17, Doc. 2084, at 18:4-8, 19:1-3.)

Given these statements, it is surprising that the Supp. Pet. neither addresses the current status of ALE enrollment under the 15% Rule nor the relative participation of white students in the ALE programs. Nor are these topics addressed in the Exec. Summary. The only reference to these matters in the District's Annual Report for the 2018-19 Academic Year (Doc. 2298-1) is the apparently inaccurate statement that the District "met and exceeded the 15% Rule in fifteen of 28 goals." (Doc. 2298-1 at V-57, citing Appendix V-3, V.G.1.c ALE Supplementary Goals Summary, a copy of which is attached as Exhibit E).[12] Regardless of whether the numbers are 15 of 28 or 13 of 32 what is telling is the District's omission of any discussion of its failure to have overcome the indicator of possible discrimination measure in 13 (or 19) of the reported ALE categories. Similarly, while it cites some data on white enrollment in ALEs in the Supp. Pet., it fails to address the "all boats rising" phenomena. Indeed, with specific reference to Latino students, the data the District does present indicates that the phenomena remains of concern.

The chart on page 48 of the Supp. Pet. provides absolute but not relative numbers for participation in GATE broken down by race/ethnicity. A comparison of the numbers provided with District enrollment numbers reveals that the percentage of white students participating in GATE increased from 14.4% in 2016-17 (1372 of 9550) to 19.7% in

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

2018-19 (1760 of 8923[13]) or an increase of 5.3% By contrast, the percentage of Latino students participating in GATE only increased 4%, from 8% in 2016-17 (2278 of 28,822) to 12% (3249 of 27,148).[14]

Issues also exist with respect to AP enrollment and successful completion. Review of the District's report on enrollment based on the 15% Rule reveals that neither Latino nor African American enrollment in TUSD AP classes has attained levels that meet the 15% Rule target. (Exhibit E.)[15] What is perhaps more troubling, however, is that while the total number of AP exams taken by African American students increased slightly from 2015 to 2019 (an increase from 138 to 144), the number of African American students who received at least one qualifying AP score of 3 or higher actually fell (from 42 to 37). (2018-19 DAR (Doc. 2302-1), Appendix V-10.)[16]

[13] Copies of the TUSD 40th day enrollment reports for 2016-17 and 2018-19 from which the total enrollment figures used above are taken are attached as Exhibits D and C, respectively.

[14] While still well under the 19.7% enrollment of White students at 12.6%, the enrollment of African American students did increase between 2016-17 (301 of 4289 or 7%) and 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 that 15% Rule threshold. (*See* Annual Report, Appendix V-3, Exhibit E.)

[15] By contrast, White enrollment greatly exceeds 15% of total White enrollment at the high school level. (Exhibit E.)

[16] Mendoza Plaintiffs cite this statistic and others like it elsewhere in this Opposition not because they contend that the District must fully eliminate achievement gaps in order to attain unitary status (although the USP certainly identifies improving the academic achievement of African American and Latino students and *reducing* the achievement gap as among its goals (*see, e.g.*, USP, Section V, A, l and V, E, 1, a)); nor do they contend that "parity" is the test for unitary status. However, they do contend that the tests this Court has articulated must be met. Further, as this Court has observed, "student achievement [is] at least one measure of program effectiveness." (9/6/18 Order at 11-12, n. 4.) As such, it also is a measure of the District's implementation of the USP.

Mendoza Plaintiffs respectfully submit that the data set forth above, particularly when considered against the District's failure even to address the issues this Court plainly stated were of paramount importance to it in assessing TUSD's performance of the quality of education provisions of the USP relating to ALEs, demonstrate that the District has not yet attained unitary status in this area.

As of this writing, the Court has not ruled on the Mendoza Plaintiffs' Response to TUSD Notice of Filing of ALE Policy Manual (Doc. 2283). Rather than repeat their responses and objections here, they respectfully invite the Court to consider Doc. 2283, and particularly pages 9-13 thereof, with this submission because it further demonstrates that TUSD has not yet attained unitary status with respect to ALEs.

UHS

The District strains to demonstrate that it has satisfactorily integrated UHS[17] by comparing the enrollment numbers of its African American and Latino students at UHS with total African American and Latino residential population in the District notwithstanding that that has never been the test in this case or under the USP. (*See* Supp. Pet. at 50:5- 51:5.) Thus, it suggests that it has achieved a satisfactory result in enrolling African Americn students as four percent of the UHS student body because that "matches" demographic data indicating that four percent of the total residential population of TUSD is African American. (*Id*. at 50: 14-16.) Yet, in the Exec. Summary, when the District discusses the standards that it says should be applied to assess its current efforts at integration, diversity and equity, it notes that under the classifications applied at the time

[17] The District discusses this issue under the rubric of ALE access so the Mendoza Plaintiffs do as well but UHS enrollment plainly also implicates TUSD compliance to the extent practicable with its obligations relating to student assignment.

of trial in 1978, TUSD's African American enrollment would be 7% as of today, but that under the measures approved by this Court and used for the purposes of USP compliance assessment, the number of African Americans in the District increases by two to three percent. (Exec. Summary at 5, n. 1.) Indeed, for the purpose of assessing its progress toward integration, for school year 2019-20, the school year referenced in its UHS discussion, the District reported that African American students comprised 10% of the District's total enrollment and 9% of its total high school enrollment. (TUSD Enrollment 40th Day 2019-20, Exhibit C.)

The District does something similar in its discussion of the Latino enrollment at UHS, asserting that the school's 34 percent Latino enrollment is within six percent of the 40 percent Latino/Hispanic total residential population "within District boundaries" (Supp. Pet. at 51:1-2) rather than compare UHS Latino enrollment to total Latino high school enrollment of 59% in 2019-20 (or total Latino TUSD enrollment of 61%). (*Id.*) Tellingly, what the District also fails to address is the fact that the chart it has created shows that the percentage of Latino students at UHS actually declined from 2017-18 to 2019-20 (albeit by a single percentage point). (Supp. Pet. at 50.) Nor does it reference the data that would demonstrate that relative Latino enrollment has not changed materially since the USP was adopted. (*See* USP, Appendix C: Integration Criteria, reporting that in 2011-12, Latino students represented 31% of the UHS student body.)[18] This raises pipeline and recruitment

[18] Mendoza Plaintiffs do not want to unduly burden the Court but cannot help but comment on the fact that in its zeal to convince this Court to grant unitary status, TUSD invokes data that includes the UHS enrollment of Asian and Multi-Racial students (groups not before this Court) to support its assertion that it has met its burdens in this case because, *inter alia*, the data in the chart to which it refers "shows that, averaged over three school years, approximately 55 percent of UHS students are non-white." (Supp. Pet at 50, citing chart on that page.) It is impossible to get to 55% based only on the enrollment figures for African American and Latino/Hispanic students. TUSD's major argument is that UHS is more

issues that the Mendoza Plaintiffs addressed in their Response to TUSD Notice of Filing of ALE Policy Manual (Doc. 2283) at pages 8-9. Rather than repeat those arguments here, the Mendoza Plaintiffs respectfully invite the Court's attention to that submission.

Dual Language Programs

In the subsection of the Supp. Pet. relating to dual language programs, the District simply references its recent filings relating to this area of its educational mission. (*See* Supp. Pet. at 54-55.) Those filings are inadequate to support an award of unitary status.

In its 9/8/18 Order, the Court expressly ordered the District to "include plans and effective strategies, if any, for increasing dual language ALEs in the ALE Policy Manual, including how to offset the impact of dual language ALEs on access to ALEs for non-Spanish speaking African American and Latino students." (Doc. 2123 at 89:15-18.) In their Response to TUSD Notice of Filing of ALE Policy Manual (Doc. 2283), the Mendoza Plaintiffs demonstrated that the District failed to adequately address the first part of the Court's directive and that it had offered a response to the second part that failed to address the Court's concerns. Rather than repeat that argument here, Mendoza Plaintiffs respectfully invite the Court's attention to pages 6-8 of their Response, Doc. 2123.

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diverse than the other exam schools it has elected to compare itself to based, as noted above, not on school district enrollment numbers, but, rather, overall population. That aside, such data does not establish that TUSD has met its obligations under the USP. *See*, *Little Rock School Dist.* 664 F.3d at 751,stating that "mere comparisons" with other school districts were "insufficient to satisfy *Freeman*" when determining whether the school district had satisfactorily met its obligations in the area of advanced placement under the governing consent decree. Moreover, as the press has reported at great length, many of the schools TUSD has elected to compare to UHS, particularly those in New York City, are under intense pressure to better integrate. *See, e.g,* "Opinion: It's Time to Integrate New York's Best Schools, www.nytimes.com/interactive/2018/06/24/opinion/editorials/new-york-specialized-school.html.

When it denied the District's NARA to make all of Roskruge a no boundary school, the Court identified a number of issues with the District's Dual Language Plan. It then ordered the District to engage its expert, Rosa Molina, to prepare a complete inventory of TUSD's current TWDL programs and address the questions and issues that the Court had raised. (Order dated 9/30/19, Doc. 2295.) After the Molina report was filed, the Mendoza Plaintiffs filed their response, inclusive of the findings and recommendations of expert Beatriz Arias. Among other concerns, Dr. Arias highlighted the District's failure to achieve classroom linguistic balance in 12 of the 14 TWDL kindergarten classes notwithstanding the recent increased focus on achieving such balance, that the new TWDL program at Bloom lacks classroom linguistic balance and has not been able to sustain two strands at each grade level (having been able to fill only one TWDL third grade classroom), and that given District reports of low test scores for TWDL students there is a need both to build stronger Spanish literacy skills in those students and to provide additional professional development to TWDL teachers. A fuller discussion of Dr. Arias' observations and conclusions is contained in the Mendoza Plaintiffs' Objection to TUSD's Notice and Report of Compliance: Two-Way Dual Language (Doc. 2413). So as not to burden the Court with a full repetition of that filing here, the Mendoza Plaintiffs respectfully invite the Court to consider Doc. 2413 in connection with this submission.

Discipline

Issues That Must be Resolved Before This Court Considers TUSD's Request for Unitary Status

As of this writing, the Court has not ruled on either the Mendoza Plaintiffs' objections to the District's notice and report of compliance: discipline progress report, and

combined discipline/inclusivity professional learning plan (Doc. 2280) or their response to TUSD's second supplemental notice and report of compliance: inclusive school environments and cultures of civility (Doc. 2343).[19] Rather than repeat those objections here, the Mendoza Plaintiffs respectfully invite the Court to consider Docs. 2280 and 2343 together with this submission because they detail why TUSD has not yet attained unitary status with respect to its USP obligations relating to discipline.

TUSD's request for a finding of unitary status is further premature because, assuming this Court adopts the Special Master's recommendation that it order the District to respond to several discipline issues with respect to which he and the Implementation Committee "require additional information or clarification" (with an opportunity for Plaintiff responses) (Doc. 2380 at 2:4-8, 4:3-7), further follow up by the Special Master following such a Court order plainly would be required.

TUSD's Incomplete and Unverifiable Data and Assertions

Beyond these issues, the District in part premises its request for a finding of unitary status on purported declines in the administration of discipline based on information that is incomplete and with respect to which it has not provided Mendoza Plaintiffs with responses to their RFIs that would allow them to understand the bases for such purported declines. In the Supp. Pet., the District asserts that it cut in half the difference in "discipline rates" for African American versus white students that existed in the 2013-14

[19] The District filed a combined inclusivity/civility and discipline learning plan because "in reality the discipline plan completely overlaps the inclusivity/civility plan… ." (Doc. 2328 at 5:11-12.) Thus, Mendoza Plaintiffs respectfully submit that resolution of Mendoza Plaintiffs' objections to the inclusive school environments and cultures of civility professional learning plan is required before this Court can consider TUSD's request for a finding of unitary status in this area.

school year. (Supp. Pet. at 69:1-5.) The District does not define what disciplinary consequences are included in the term "discipline" for purposes of this assertion. It thereby glosses over the fact that the exclusionary nature of different disciplinary consequences can vary significantly and that students of one racial/ethnic group may disproportionately be subject to "more exclusionary" consequences such that it is inappropriate to group multiple forms of "discipline" together for analytical purposes. Further, when it responded to the RFIs, TUSD failed to provide Mendoza Plaintiffs an understanding of how it arrived at these figures notwithstanding their express request for that information. (*See* Response to RFI #2572, 2573, attached as Exhibit F.[20])

Nor did the District provide Mendoza Plaintiffs with an understanding as to how TUSD calculated what it says (at Supp. Pet. at 69:6-11) is a "dramatically reduced" "likelihood ratio" relating to African American students' likelihood to be short- or long-term suspended relative to white students. (*See* Response to RFI #2574, Exhibit F.) As a result, Mendoza Plaintiffs are unable to independently verify the District's assertions or to provide an informed response to them.

Moreover, notwithstanding that in the 9/6/18 Order this Court ordered TUSD to report "discipline data both by number of each type of disciplinary consequence imposed and by number of students receiving each type of disciplinary consequence.. [to] avoid any miscount of the degree of discipline difficulties" (9/6/18 Order at 130:7-11), it has apparently failed to do so. Mendoza Plaintiffs respectfully suggest that the Court should require that the District provide the data it previously ordered be reported (and in the

[20] Exhibit F is comprised of Mendoza Plaintiffs' original RFIs as submitted to the District, followed by the District responses (which omits some contextual material included in the original RFIs).

format that it ordered), and that the question of unitary status requires a review of each of these two sets of data to ensure there is no "miscount of the degree of discipline difficulties," including disproportionality.

Reversal in Disciplinary Trends in 2018-19

Noticeably absent from the District's Supp. Pet. is any discussion or explanation concerning reversals in progress relating to discipline that suggest TUSD may not be ready to be released from court supervision. For example, notwithstanding past progress TUSD made in reducing out of school suspensions, in TUSD's own words, "[t]he number of students receiving an out of school suspension increased for all [racial/ethnic] groups in 2018-19." (Appendix VI-22 to TUSD 2018-19 Annual Report (Doc. 2305-3) at ECF page 50; *See also id.* at ECF 49 ("Discipline rates for SY2018-19 across all groups increased slightly"); Appendix VI-16 to TUSD 2018-19 Annual Report (Doc. 2305-2) at 5 (increase of 906 out of school suspensions in the 2018-19 school year from the previous year among schools with ISI programs – programs specifically designed to reduce out of school suspensions). Significantly, in the 2018-19 school year, Latinos experienced the highest out of school suspension rates they *ever* have experienced under the USP. (*See* Doc. 2305-3 at ECF page 50.)

Moreover, not only did the District experience an increase in suspensions in 2018-19, it experienced an increase in students who were repeatedly suspended. In this regard the District explained as follows:

> [I]n 2018-19, an increase in suspensions occurred reversing an overall downward trend in suspensions over the last three years. The average number of students with one or more suspensions increased over five years by 32 students, bringing the overall rate in 2018-19 back to the 2014-15 level. Additionally, the number of repeat offenders is also comparable to

> the 2014-15 rate with a difference of only 53 students… Multi-Racial, African American, and Native American students made up the ethnicities with the highest percent of repeat offenders at about 37%.

(Doc. 2305-2 at 18.)[21]

Mendoza Plaintiffs recognize that the District appeared to make progress in reducing exclusionary discipline and disproportionality in the years following the adoption of the USP. However, they do not believe an award of unitary status is appropriate in the area of discipline at a time when the District has seemingly reversed such progress in a number of respects.

Family and Community Engagement

In its 9/6/18 Order, this Court ruled that unitary status "hinges on *implementation and effectiveness*… [of site-level] practices to create learning-centric family engagement and support opportunities" and observed that under the District's own "FACE Action Plan, often student engagement at District schools is limited to parental involvement activities, not strategies to support learning." (9/6/18 Order at 136:10-16; emphasis added.) Accordingly, this Court ordered the District to "develop[] district-wide guidelines for fostering family engagement at the school level, including *strategies which enable*

[21] Mendoza Plaintiffs are aware that the District has asserted that increases in short term suspensions in 2018-19 relate to revisions to its Code of Conduct to mandate suspensions for drugs, alcohol and fighting. (*See* Doc. 2437 at 5:7-11.) While such assertion is helpful, Mendoza Plaintiffs believe that because it is TUSD's burden to demonstrate that it should be awarded unitary status, it must provide complete information that would allow the Plaintiffs and this Court to fully understand why the rise in suspensions does not reflect a reversal of discipline progress as the data seems to suggest. Thus, for example, the District should provide discipline data for 2018-19 concerning drug, fighting, and alcohol-related suspensions under the revised Code of Conduct, including a breakdown by race/ethnicicty of the suspended students and a detailing of the number of those suspensions that would still have occurred under the prior version of the Code of Conduct. They further note that the District's general assertion for the rise in suspensions does not adequately provide an understanding (supported by data) of how the rise in number of students with repeat suspensions relates to student Code of Conduct revisions.

teachers to learn from families how best to meet the needs of their students and strategies which enable parents to participate meaningfully in school plans and activities." (*Id.* at 136:10-16; emphasis added.)

The Supp. Pet fails to engage in any discussion of the "implementation and effectiveness" of site-level family engagement guidelines and strategies expressly called for by this Court. Instead, it simply refers to the guidelines themselves. (*See* Supp. Pet. at 77-78.)

Further, in its separately filed Annual Report for the 2018-19 school year, the District provided only bare assertions concerning implementation of the required strategies and reported family engagement events in a manner that ignores portions of, and obfuscates TUSD's compliance with, this Court's 9/6/18 Order. Notwithstanding this Court's above-cited observation concerning "parental involvement" activities, and its express order that "data reporting for family and community engagement *shall not include* family involvement; family engagement must facilitate student learning or be training of family leaders for schools" (9/6/18 Order at 134:7-12, n.54; emphasis added), the District apparently indiscriminately reported a tally of events (but no description of such events) that it categorized as "family engagement" under Epstein's six types of family involvement. (*See, e.g.,* Table 7.1 at District Annual Report for 2018-19 (Doc. 2298-1) at VII-161 (reported family engagement "[a]ctivities included *staff development meetings… promotion celebrations and freshman orientations*."; emphasis added)[22].)

[22] Mendoza Plaintiffs note that they see no plausible basis for including "staff development meetings" or "promotion celebrations" in family engagement data given that they do not seem to involve families at all, let alone the kind of two-way communication envisioned by this Court. Moreover, the District's statement that "[a]n activity or event may be

Moreover, notwithstanding the District's assertions that its data tracking system can track "parent involvement" events and that TUSD provides staff with related training, the District declined to provide Mendoza Plaintiffs site-level family engagement data that breaks out "parent involvement" events as they expressly requested. (*See* responses to RFI #2594, 2595, 2596, 2597, attached as Exhibit G.) Nor did the District provide Mendoza Plaintiffs with a sampling of descriptions of site-level family engagement events as it has in past years, which would have allowed them to gauge the extent to which the claimed family engagement events include "strategies which enable teachers to learn from families how best to meet the needs of their students and strategies which enable parents to participate meaningfully in school plans and activities." (*See id.* at response to RFI #2601; 9/6/18 Order at 136:10-16.)[23]

Thus, the District has left the Plaintiffs and this Court in the dark about, and unable to verify, "the implementation and effectiveness" of the specific type of family engagement events on which this Court expressly stated its unitary status analysis hinges. For this reason alone, this Court should deny the District its request for unitary status with respect to family and community engagement.

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counted more than once if it fits more than one type of family engagement involvement" further creates confusion about the true nature and number of family engagement events held at individual school sites and focused on teachers actually learning from parents and parents developing the skills they need to successfully engage with their childrens' schools. (*See id.*)

[23] Similarly, with respect to the Annual Report assertions that the District solicited from families feedback on its "two-way communication" systems through a survey "used by FACE to determine where additional support was needed", the District declined to identify what the referenced needed additional support was in response to Mendoza Plaintiffs' express request. (*See* District 2018-19 Annual Report (Doc. 2298-1) at VII-160; Appendix VII-10 to 2018-19 Annual Report (Doc. 2306-1); Exhibit G, response to RFIs # 2599, 2600.)

Separately, in the 9/6/18 Order, this Court identified as another "remaining question" on which an award of unitary status depended, "the implementation of… an *effective* data gathering and tracking program." (9/6/18 Order at 136:19-22; *see also* USP VII, C, 1, c.) However, the Supp. Pet. provides only a general assertion that schools use the District's tracking system to report on family engagement activities and that the FACE department monitors such activities. (Supp. Pet. 73:20-24.) TUSD's bare assertion is not enough especially given the issues discussed above relating to the District's apparent inability to separate out and monitor true family engagement activities as contrasted with, for example, "promotion celebrations" and that the District, with the exception of a few schools at which it piloted its much delayed tracking system, "continued to use paper sign-in sheets and Excel spreadsheets to track both FRC and site-level family engagement activities" "[i]n SY2018-19." (TUSD 2018-19 Annual Report (Doc. 2298-1) at VII-159.) The District must, but has failed to, demonstrate that it has fully implemented its family engagement data tracking system at sites and that it is making "effective" use of such data as required by this Court's 9/6/18 Order. (9/6/18 Order at 136:19-22; *see also id.* at 143 (rejecting TUSD argument that as to EBAS, nothing more than development and implementation is required, because "establish[ment of] effective strategies" is required).)

Finally, Mendoza Plaintiffs add that it is premature to grant the District unitary status in this area given that this Court has yet to resolve their objections to the District's supplemental report and compliance concerning the revised FACE Plan (Doc. 2397). Indeed, this Court having recognized that FACE is a "multi-provision, multi-departmental program" (4/10/19 Order (Doc. 2213) at 13:5-7 (citing 9/6/18 Order at 132)), stated that without interconnectivity revisions to each of the ELL Plan, AASSD and MASSD

Operating Plans and FACE Update, it "has no basis for assessing the efficacy of the USP… FACE services, which are spread across and between these and other USP program units… ." (4/10/19 Order at 15:3-6.)[24] This Court thus subsequently delayed consideration of the FACE Plan's interconnectivity components because "further consideration of these interconnected departments [FACE, Language Acquisition Department, AASSD and MASSD] cannot be made until the roles and responsibilities of the post-unitary AASSD and MASSD are clearly defined" (12/3/2019 Order at 3:10-14) and ordered the Special Master to develop the AASSD and MASSD plans. The Mendoza Plaintiffs' objections to the Special Master's report and recommendation under this Court's directive have not yet been resolved. It therefore is premature for the Court to consider the District's request for unitary status in this area until it has resolved open issues concerning the student support services departments and interconnectivity among the related departments.

POINT III

THE SAME EVIDENCE THAT ESTABLISHES TUSD HAS YET TO FULLY AND SATISFACTORILY COMPLY WITH THE USP ALSO DEMONSTRATES THAT IT HAS YET TO MANIFEST SUFFICIENT GOOD FAITH COMMITMENT TO THE USP TO WARRANT TERMINATION OF COURT OVERSIGHT

In 2017, the Court issued a number of orders setting out the procedure to be followed by the parties and the Special Master to permit it to determine whether and to what extent the District had attained unitary status. (*See, e.g.*, Docs. 2023, 2025, 2037,

[24] The Court further ordered that the "[e]ffective coordination of services shall be addressed in the context of any proposed changes from the District in the roles and responsibilities for the AASS and MASS… ." (*Id.* at 14:12-14.)

2050, 2090.) In brief, the District was to file an annex to its 2016-17 Annual Report setting forth the state of its compliance with the USP. Thereafter, the Special Master was to prepare a status report setting forth his assessment of the District's level of implementation of the USP, indicating any areas in which he believed implementation had been achieved and providing Completion Plans for those areas in which full implementation had not yet been achieved. All parties were accorded the right to object to proposed Completion Plans.

The Court undertook an extensive review and analysis of the parties' and Special Master's filings in its 9/6/18 Order. While the Court held, over the class plaintiffs' objections, that TUSD had attained unitary status in certain areas, it also held that more work was required to achieve full implementation of the USP and directed the District to undertake additional work in many areas. It also set a schedule pursuant to which TUSD was to file notices of its claimed compliance with the Court's directives and further developed completion plans. (9/6/18 Order at 149-152.)

Mendoza Plaintiffs demonstrated above (and in the responsive filings referenced above) the extent to which the District's filings since the Court entered its 9/6/18 Order establish that TUSD has yet to fully and satisfactorily implement the USP and remove the vestiges of its past discrimination to the extent practicable with respect to student assignment, administrator and certificated staff, quality of education (ALEs), dual language, discipline, and family and community engagement. Here they focus on a related but different conclusion to be drawn from Court's 9/6/18 Order and the District's subsequent filings: that TUSD has not yet demonstrated its good faith commitment to the whole of the USP and to the law and the Constitution that predicated judicial intervention.

In sum, the record since the Court issued its 9/6/18 Order reveals that the Court has had to "ride herd" on the District's development and implementation of the Completion Plans intended to bring it into full compliance with the USP to a degree that establishes that TUSD is not yet ready to be released from Court supervision.[25] In its Orders of April 10 and 22, 2019 (Docs. 2213 and 2217), the Court reviewed the filings that the District had submitted pursuant to its 9/6/18 Order and found many of them to be unsatisfactory. It therefore directed revisions to many of the Completion Plans. In its Order of September 10, 2019 (Doc. 2273), the Court found that many of the revised Completion Plans remained unsatisfactory and concluded with the following direction: "The District shall immediately comply with the directives issued by the Court September 6, 2018, the April 2019 [] Orders issued subsequent to the December 1, 2018 Benchmark Notices of Compliance, and the directives contained herein, and the District shall file Second Supplemental Notices of Compliance Re: December 1, 2018 Benchmark Notices of Compliance." (*Id.* at 20:12-16.)

Prior to arriving at its conclusion that more effort was required from the District, the Court made the following findings and observations:

With respect to the USP provisions seeking to limit the placement of beginning teachers at underperforming and/or racially concentrated schools:

[25] To be clear, in focusing on the period since the Court issued its 9/6/18 Order because they know that period is of particular interest to the Court in assessing the District's readiness to be declared unitary, Mendoza Plaintiffs do not mean to suggest that the Court's on-going need to "ride herd" on the District before (and even in) in the 9/6/18 Order is not relevant to its overall assessment of the pending petition. Indeed, they believe that findings by the Court in the 9/6/18 Order itself demonstrate that the District is not yet ready to be relieved of Court supervision. *See, e.g.*, 9/6/18 Order at 80:7-9: "The District is not free to ignore an Order of the Court, and must show good cause and seek leave for non-compliance. The District has presented no such requests, but also has presented no evidence of compliance. The Court reaffirms it prior directives."

- "[T]he Mendoza Plaintiffs complain about inconsistency…The Court cannot ignore the inconsistency because accurate identification and tracking of beginning teachers is essential to an effective beginning support program and to the District's 910G Budget for beginning teacher mentors." (*Id*. at 4:12-18.)

- "In April 2019, the Court ordered the District to show cause why it had not conducted the planned study to establish criteria for making individualized case-by-case certifications for placing beginning teachers." (*Id*. at 5:15-17.)

- "The Court criticized the District for essentially offering support strategies to beginning teachers teaching in hard-to-teach underperforming schools that are nothing more than support strategies offered to all beginning teachers." (*Id*. at 5:26-28)

- "In April 2019, the Court rejected the District's assertion that placing beginning teachers at underperforming and racially concentrated schools 'was not a major issue….'" (*Id*. at 7:11-12.)

- "With…one exception, there continues to be absolutely no recognition by the District that extra support is necessary for beginning teachers being placed in hard-to-teach environments." (*Id*. at 8:19-21.)

- "The Court…finds that at a minimum the District's pre-start of the school year induction program should include a training unique to teaching in underperforming and racially concentrated schools. The District's teacher-support strategies are devoid of sheltering strategies, the second strategy for supporting beginning teachers. The District's one-on-one mentoring strategy is a teacher-development strategy. As noted above, on April 22, 2019, this Court ordered the District to include both." (*Id*. at 8:22-28; citations omitted; emphasis in original.)

- "The Court, likewise finds merit to the Mendoza Plaintiff's criticism of the Beginning Teacher Support strategies for not including follow-up second-year support strategies for teacher who are underperforming at the end of the first year….Consequently, the Court orders that the District track the End-of-the Year (EOY) proficiency scores for beginning teachers to ensure beginning teachers attain at least a 'Basic' proficiency score by then and, if not, support will continue." (*Id*. at 9:17-23.)

- "The District undermines the benefits that flow from the centralized hiring process by impermissibly allowing certification of a beginning teacher, without identifying the site-based administrative supports, sheltering strategies, that need to be in place to mitigate the negative impact of a beginning teacher, especially for students attending underperforming schools. This makes the Certification Form inconsistent with [the] USP…." (*Id*. at 10:2-6.)

The Court then ordered that the District "immediately comply" with its prior directives and explicitly listed what that was to entail. (*Id*. at 12:3-13:10.)

With respect to teacher diversity, GYOPs, and attrition:

- "[T]he District has entirely ignored the remainder of the directives issued by the Court in its last [April 22, 2019] Order." (*Id.* at 13:17-19.)

- "The Court cannot begin to fathom why the District has limited… [the diversity plan] to teachers and… [GYOPs] to administrators because this Court has expressly required both programs to apply to both teachers and administrators." (*Id.* at 13:27-13:1)

- "[T]he District ignored [in its supplemental notice of compliance] teacher GYOPs that it previously reported were being explored…" (*Id.* at 14:17-18.)

- "The District has also failed to comply with the Court's directive that it 'must identify how its GYOS's [*sic*] are TOCs or AOCs,' and if not, the District 'must refashion them and/or implement others to serve the purposes of the USP.'" (*Id.* at 14:27-15:1; citation omitted.)

With respect to promoting inclusive school environments and cultures of civility:

- "The District shall immediately comply with this Court's directive issued on September 6, 2018, to work in collaboration with the Special Master in assessing the effectiveness of existing strategies and identifying possible additional strategies." (*Id*. at 17:22-24.)

- "The District shall immediately comply with the Court's prior directives, as follows: (1) It shall NOT USE strategies that are not research based…; (2) It shall undertake a study of the effects of the pilot intervention program using restorative processes as instruction…; these studies shall inform future strategy choices by the District for creating inclusive school environments and cultures of civility; (3) It shall collaborate with the Special Master to identify strategies to be used in the future at schools that need improvement; (4) It shall collaborate with the Special Master to develop a professional learning plan for preparing District staff to implement the District's program to create and maintain school environments of inclusiveness and civility. (*Id*. at 18:2-12; emphasis in the original.)

With respect to professional learning for technology:

- "On April 22, 2019, the Court found the District had failed to comply with directives issued by the Court on September 6, 2018…." (*Id*. at 18:16-17.)

- "The Court has reviewed the Supplemental Notice of Compliance and the Special Master's objection that it continues to lack sufficient focus on the use of technology to facilitate student learning. The Special Master shall work with the District to expand the Courses Addressing Use of Technology in the Classroom to include content pedagogy, meaning 'courses about how to use technology in the subject matter that particular teachers teach (such as American government or biology, etc.)'" (*Id.* at 19:4-9; citation omitted.)

- "From the minimal information provided by the District in the Supplemental Notice of Compliance, it appears….The Court assumes….The Court might, likewise, assume….The Court is not, however, inclined to make assumptions in the context of finding unitary status. The District shall revise the Professional Learning Plan: Instructional Technology Plan as previously directed and make it clear how the District will evaluate the effectiveness of [Teacher Technology Liaisons] and how administrators will attain the requisite training to evaluate teachers with respect to their use of technology to facilitate student learning." (*Id.* at 19:17-20:10.)

Mendoza Plaintiffs could cite other examples but they respectfully suggest that the foregoing, with this Court's repeated references to the District's failure to comply with orders intended to achieve full implementation of the USP, establishes that the District has not yet demonstrated the good faith commitment to the USP that would warrant relieving it from court oversight.

CONCLUSION

For the reasons set forth above and its earlier filings referenced herein, Mendoza Plaintiffs respectfully request the Court to hold that the District has failed to comply with its 9/6/18 Order (and its subsequent Orders directing compliance with that Order), eliminate vestiges of past discrimination to the extent practicable, demonstrate full and satisfactory compliance with all the provisions of the USP for a reasonable period of time,

and demonstrate good faith commitment to the whole of the USP. Accordingly, this Court should deny the District's request that it be granted unitary status.

Dated: February 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2020, I electronically submitted the foregoing Mendoza Plaintiffs' Opposition to TUSD Supplemental Petition for Unitary Status 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: February 28,2020