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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0090-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, v. Tucson Unified School District No. 1, et al., Defendants.	4:74-cv-0204 TUC DCB (Consolidated Case)

RESPONSE TO MENDOZA PLAINTIFFS' MOTION TO STRIKE (2432) DISTRICT'S NOTICE OF RESPONSE TO ISSUES RAISED IN SPECIAL MASTER'S R&R RE ALE POLICY MANUAL (ECF 2424)

Introduction and Summary

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

On November 22, 2019, the Special Master filed his Report and Recommendation ("R&R") related to the District's ALE Policy Manual, describing five specific polices he believed the District should initiate. [ECF 2376.] Specifically, he recommended that the District: (1) make dual credit classes more available throughout the District's high schools, (2) increase the number of AP classes at Santa Rita; (3) pilot an opt-out self-contained GATE program at one or two schools; (4) not limit its policies and practices relating to attrition from ALE to African American students; and (5) include all ALE policies and practices in the ALE policy manual. [*Id.*]

Instead of waiting for the Court to order the District to follow these recommendations, and in an effort to move the process along, the District complied with the Special Master's recommendations and requests. [ECF 2424.] Rather than acknowledging the District's good faith efforts to provide the requested information, the Mendoza Plaintiffs attack the District's filing as inappropriate, and ask this Court to strike the District's filing. Striking the District's filing of information responsive to the Special Master's requests would serve no purpose helpful to the Court, the record, the parties, or

the process of pursuing unitary status.

Moreover, the substance of the Mendoza Plaintiffs' motion to strike shows their motive, as it is completely unrelated to the document which they ask the Court to strike. Specifically, the Special Master asked the District to initiate implementation of five policies aimed at addressing specific issues, and the District's notice of compliance explained how the District was and is initiating or continuing those policies. The Mendoza Plaintiffs' motion to strike does not mention a single one of those five issues. Instead, it rehashes the Mendoza Plaintiffs' continuous refrain about how the District is not doing enough to show increases in ALE successes for African American and Latino students.

As demonstrated by the Special Master's R&R, he is fully cognizant of the ALE participation rate in the District, and in fact he specifically recognized the impressive progress over the last seven years, with respective 23% and 41% participation increases of Latino and African American students, despite overall declining enrollment (*Id*., p. 2). He also recognized that "many factors that influence student and family choices and student outcomes [make it] highly unlikely that parity could be attained" (*Id.*, p. 8). Had the Special Master raised any issues concerning the 15% Rule, or any other concern regarding measuring ALE success, the District would have addressed such issues in its notice; however, the Special Master did not address any such topic in his R&R, and it is completely inappropriate for the Mendoza Plaintiffs to try to rehash their argument under the guise of a motion to strike information that is responsive to the Special Master's R&R.

I. The Motion to Strike should be denied.

"Motions to strike are generally disfavored and rarely granted." *Lowe v. Maxwell & Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017) (denying motion to strike); *accord,*

e.g., *Hanna v. ComTrans Inc.*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2 (D. Ariz. Oct. 28, 2016) (similar, noting that such a motion "is a drastic remedy"). Plaintiffs argue that ECF 2424 is "further briefing" on the District's original notice of compliance that was barred by the Court's Order (ECF 2312) and thus may be stricken under LRCiv 7.2(m). To the contrary, the District's filing merely addressed questions and issues raised by the Special Master in the R&R. Regardless, "even a properly made motion to strike is a drastic remedy which is disfavored by the courts and infrequently granted." *Yount v. Regent Univ., Inc.*, CV-08-8011-PCT-DGC, 2009 WL 995596, at *11 (D. Ariz. Apr. 14, 2009) (emphasis added) (quoting *Int'l Longshoreman's Assoc. v. Va. Int'l Terminals, Inc.,* 904 F. Supp. 500, 504 (E.D. Va. 1995)). For the reasons discussed below, the Court should decline to apply that drastic remedy here.

Courts should deny motions to strike where the submission at issue was reasonably prompted by other filings/orders. For example, District of Arizona courts have denied motions to strike improper "sur-replies" where they responded to new issues raised on reply, *see, e.g.*, *Sebert v. Ariz. Dep't of Corr.*, 2: 16-cv-00354-PHX-ROS, 2016 WL 3456909, at *1-2 (D. Ariz. June 17, 2016), and denied a motion to strike a "memorandum of explanation" filed by a law firm after the court granted sanctions against it. *See Larson v. White Mtn. Grp. LLC*, CV 11-01111-PHX-FJM, 2011 WL 6759555, at *1 (D. Ariz. Dec. 23, 2011). Similarly, here, the filing at issue (ECF 2427) was reasonably prompted by the Special Master's R&R. The Special Master raised various issues that he wanted the District to address; the District accordingly did so. The Court should deny the motion to strike on this basis.

Courts also commonly deny motions to strike where the information in the challenged filing would provide a more fully developed record, enabling the court to

better make decisions on the merits. *See, e.g.*, *Hanna*, 2016 WL 6393601, at *2 (denying motion to strike because "[t]he Court prefers resolving fully briefed motions when possible" and no prejudice would result); *accord, e.g.*, *Wilson*, 15 C 9364, 2016 WL 8504990, at *3 (new evidence filed with movant's reply addressed evidentiary shortcomings raised in response and permitted court to find that movant had met its burden of proof); *Greenbelt Ventures, LLC v. Washington Metro. Area Transit Auth.*, 08:10-CV-157-AW, 2011 WL 2175209, at *9 (D. Md. June 2, 2011), *aff'd*, 481 Fed. Appx. 833 (4th Cir. 2012); *Johnson v. County of Wayne*, 08-CV-10209, 2008 WL 4279359, at *8 (E.D. Mich. Sept. 16, 2008).

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

Finally, motions to strike are commonly denied where permitting the challenged filing to remain in the record would not unduly prejudice a party, *see, e.g.*, *Sebert*, 2:16-cv-00354-PHX-ROS, 2016 WL 3456909, at *2; *Hanna*, CV-16-01282-PHX-DLR, 2016 WL 6393601, at *2, or, conversely, where striking the filing would unduly prejudice a party. *See, e.g.*, *R. Prasad Indus. v. Flat Irons Envtl. Sols. Corp.*, CV-12-08261-PCT-JAT, 2015 WL 13388176, at *3 (D. Ariz. Jan. 22, 2015).

Here, plaintiffs cannot argue that they would be prejudiced at all by the Court's permitting the District's filing to remain in the record: they substantively responded to the filing. [*See* ECF 2432.] On the other hand, striking ECF 2424 would prejudice the District. The District is seeking to provide information specifically identified by the Special Master as needed for the Special Master to make his report and recommendation. This is the District's only opportunity to be heard regarding the issues raised in the Special Master's report, as required by Fed R. Civ. P. 53(f)(1), which provides:

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

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

I. The Mendoza Plaintiffs substantive objections are meritless.

The Special Master's R&R recommended only that the District initiate five additional ALE policies to receive unitary status. The Special Master's R&R did not ask for updated data on African American and Latino participation. [ECF 2376.] In its response, (ECF 2424), the District adopted all five of the Special Master's recommendations, explaining how it had already initiated or was in the process of initiating these suggestions. The Mendoza Plaintiffs do not even mention—let alone respond to—a single issue addressed in the District's notice of response to the Special Master's R&R.

Instead, the Mendoza Plaintiffs re-hash their criticisms of the District for not meeting the 15% benchmark in either 13 or 19 of the potential areas – something not required by the law or the Court nor recommended by the Special Master in his

[1] If the Court believes the District must specifically request that its filing be permitted, the District hereby does so. *See Kunzi v. Ariz. Bd. of Regents*, CV-12-02327-PHX-JAT, 2013 WL 3895012, at *1 n.1 (D. Ariz. July 29, 2013) (granting motion for leave to extend page limits, mooting motion to strike for failure to comply with the limitation).

R&R.[2] The Mendoza Plaintiffs' motion is not a "response" to the notice of compliance, but a renewed argument on an issue the parties have argued and re-argued numerous times previously, and which the Special Master has considered and has decided did not merit additional attention prior to the District being declared unitary regarding its ALE program. Nevertheless, to the extent this issue warrants any response, the District explains below why the Mendoza Plaintiffs' argument is without merit.

The Court has previously stated that it would "consider" the 15% Rule among others. [ECF 2084, pp. 18-19.] The Court never said that the 15% benchmark was determinative. In fact, it has stated precisely the opposite. This arbitrary standard cannot be determinative of unitary status when there is no evidence that there is a single school district in the country that satisfies this arbitrary benchmark in every possible ALE. The District is aware of none.

The standard established by the Supreme Court is to eliminate to the extent practicable any vestiges of the prior *de jure* segregated system. *See Bd. Of Educ. of Okla. City Pub. Sch. Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991); *see also Manning ex re. Manning v. Sch. Bd. Of Hillsborough Cty., Fla.*, 244 F.3d 927, 943 n.29 (11th Cir. 2001) ("The phrase 'to the extent practicable' is not meaningless surplusage. [It] . . . 'implies a reasonable time limit on the duration of [the] federal supervision' because 'extend[ing] federal court supervision indefinitely is neither practicable, desirable, nor proper.'" (quoting *Coal. To Save Our Children v. State Bd. Of Educ. of State of Del.*, 90 F.3d 752, 760 (3rd Cir. 1996)). It is not to maintain federal jurisdiction over school district operations until those districts reach perfection or an exhaustion of possibilities.

[2] The Mendoza Plaintiffs argue that it "is telling" that the District's notice of compliance does not discuss the 15% Rule. Indeed, it is telling of the District's good-faith efforts to comply with the Special Master's R&R rather than re-hash the same arguments already addressed by the Special Master and deemed by him not to need additional argument.

See Missouri v. Jenkins, 515 U.S. 70, 101 (1995) (district court's consideration of whether school district had reached its "maximum potential" was "clearly . . . not the appropriate test to be applied" in determining unitary status); *accord, e.g., N.A.A.C.P., Jacksonville Branch v. Duval Cty. Sch.*, 273 F.3d 960, 973 (11th Cir. 2001) (The Supreme Court has made quite clear, however, that the Constitution does not require a school board to eliminate the vestiges of past discrimination 'to the maximum extent practicable.'").

Moreover, as found by Judge Frey, differences in academic achievement between different ethnicities are "a common finding in school districts throughout the United States," "not peculiar in any way to Tucson School District No. 1," and "do not support a reasonable inference of unequal provision or delivery of educational services."[3] The Supreme Court has made it very clear: Although "numerous external factors beyond the control of the [school district] and the State affect minority student achievement," "[s]o long as these external factors are not the result of segregation, they do not figure in the remedial calculus. ***Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own.***" *Jenkins*, 515 U.S. at 102 (emphasis added).

In any event, the Special Master's R&R recognized the ***success*** achieved by the District through its commitment to equitable access to ALE programs: "It seems worth

[3] Because Academic Achievement is not a *Green* factor, the party advocating for continued court supervision has the burden of proving that any disparities were caused by the prior *de jure* system. *See, e.g., Coal. To Save Our Children*, 90 F.3d at 776-77 ("Because the performance disparities claimed by Appellant are not among (or even similar to) the *Green* factors or the vestiges identified in the 1978 Order, we will not simply presume—as Appellant urges us to do—that these are vestiges of *de jure* segregation. Appellant offers no persuasive authority for establishing a causal link between present achievement disparities and past *de jure* segregation."). Here, Judge Frey found that academic achievement imbalances were not a vestiges of a prior *de jure* dual system. ECF 345, pp. 166-67. Thus, it is impossible for the plaintiffs to show that disparities in academic performance are vestiges of the prior *de jure* dual system.

noting that between 2012-13 and 2018 19, the numbers of African American students participating in ALE has increased 41% and the number of Latino students has increased 23%. For both racial groups, the sharpest rise in participation occurred over the last two years after a drop in enrollment…." [ECF 2376, p. 2.]

Indeed, the District's African American and Hispanic students have achieved significant academic success when compared with state and national averages, and when compared to other districts in the state and around the nation. [ECF 2406, pp. 50-55.] The District's African American and Hispanic students have achieved an increase in graduation rates and a decrease in dropout rates, as well as increased access to, participation in, and completion of ALEs. [ECF 2267-2, pp. 5-22, 34-45, and 59-63.] In fact, more African American and Hispanic students are participating in ALEs in the District than ever before, despite declining enrollment.

Consequently, in identifying his last recommendations on ALE programs and policies, the Special Master recommended that the District "be awarded partial unitary status for those portion of the USP dealing with ALE" once the District initiated implementation of the five specific above-mentioned policies. [ECF 2376, p. 8.] The District has done just that, and the Mendoza Plaintiffs have not lodged any complaints as to the District's initiation of implementing any of those five policies.

II. Conclusion.

For these reasons, the Motion to Strike should be denied, and the Mendoza Plaintiffs' substantive arguments against the District's filing should be disregarded.

Dated this 28th day of February, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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