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

Robert S. Ross (#023430)
Samuel E. Brown (#027474)
TUCSON UNIFIED SCHOOL DISTRICT
LEGAL DEPARTMENT
1010 East Tenth Street
Tucson, Arizona 85719
Robert.Ross@tusd1.org
Samuel.Brown@tusd1.org
Phone: (520) 225-6040
Attorneys for defendant
Tucson Unified School District No. 1

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)

REPLY IN SUPPORT OF
SUPPLEMENTAL PETITION FOR UNITARY STATUS

Table of Contents

Table of Authorities

Cases

Other Authorities

Introduction

The Mendoza Plaintiffs' opposition to the Supplemental Petition for Unitary Status is a paradigm example of a willful refusal to look at the forest, and instead focusing on what amounts to a few trees here and there in the forest, which the Mendoza Plaintiffs do not believe have been properly pruned. This deliberate, myopic viewpoint cannot obscure the incredible, sustained, multiyear effort that the District has mounted across all departments to implement the thousands and thousands of individual requirements and mandates of the USP and its many action plans. It is that overall effort to tend the forest that leaves no doubt that this school district, in this town, and in this era, has "accepted the principle of racial equality" and that there is no chance that it will suddenly revert to the pre-1951 dual elementary school system upon termination of Court supervision.

This Reply first addresses the Mendoza Plaintiffs' effort to prevent reference to the Court's 1978 findings of fact and conclusions of law, which carefully examined the evidence in the only trial in this case and expressly determined what vestiges of that pre-1951 dual elementary school system remained by 1977, when the trial took place. There simply is no good reason not to consider those findings in the inquiry as to whether the Constitutional basis for continued federal court intrusion into locally-elected officials' authority has ended.

The District then addresses the Mendoza Plaintiffs' implausible and mistaken argument that vestiges of that dual elementary school system remain today, nearly 70 years after the system was voluntarily dismantled by the District in 1951, after a historic campaign, led by the District, to change the state law mandating segregation. Finally, the District responds to the arguments raised by the Mendoza Plaintiffs regarding good-faith compliance with the Unitary Status Plan. None of those arguments has merit.

Accordingly, the District respectfully again requests that the Court dissolve the USP, terminate court supervision, and close the case.

I. JUDGE FREY'S 1978 FINDINGS MUST GUIDE THE DETERMINATION OF THE LIMITS OF FEDERAL COURT CONTROL OF THE SCHOOL DISTRICT.

Judge Frey's findings of fact and conclusions of law [ECF 345] comprehensively examined the evidence after a month-long bench trial in the case and determined what vestiges of the prior dual school system remained in 1978. This trial is the only evidentiary hearing which has ever occurred in this case. It is a necessary source today in assessing whether disparities observed currently can be causally traced to the prior *de jure* dual elementary school system. The Mendoza Plaintiffs, recognizing the importance of those findings, desperately argue that for one reason or another they should be ignored.

A. The 1978 remedial order, by its terms, does not preclude looking to those findings.

First, the Mendoza Plaintiffs point to language in the 1978 remedial order [ECF 436] to argue that the Court may not now rely on the 1978 findings to determine the scope of the Constitutional inquiry. [Response, ECF 2439, pp. 3:19-5:3]. But the Mendoza Plaintiffs carefully omit key language of that 1978 order; the complete clause at issue makes clear that this is not the case. To the contrary, the District properly cited — and the Court must rely on — Judge Frey's 1978 findings to determine the limits of the Court's authority to operate the District in place of its elected Governing Board.[1]

Plaintiffs misleadingly cite only a fragment of a provision from the 1978 remedial order to assert that "no party may rely upon prior findings and conclusions in this case to

[1] No party is arguing that Judge Frey's findings were substantively erroneous. The Mendoza Plaintiffs only attempt to preclude their use by waving a 1978 agreement that is no longer operative, conflating its provisions, and omitting key language that makes clear that, even if the agreement were relevant, it would not apply here.

interpret the terms of [the 1978 remedial order] or to determine the rights and obligations of the parties." [ECF 2439, pp. 3:26-4:2]. Following is the complete provision, with the critical language — *omitted by Plaintiffs* — underlined:

> [I]n seeking enforcement of or relief in any federal court from the terms of this stipulation, no party may rely upon prior findings and conclusions in this case to interpret the terms of this stipulation or to determine the rights and obligations of the parties thereunder.

[ECF 436, pp. 3477 (9):32-10:4].

The District is not seeking relief from the 1978 remedial order. It is not seeking to interpret the terms of the 1978 remedial order. It is not seeking to determine the rights and obligations of the parties under the 1978 remedial order. Accordingly, the provision on which the Mendoza Plaintiffs mistakenly rely has nothing to do with the present Petition whatsoever, and it does not in any way bar reliance on the 1978 factual findings.

B. The 1978 remedial order is further inapplicable because it was dissolved by the Court in its order terminating supervision in 2009 and later superseded by a different order with no such language.

Moreover, the 1978 remedial order does not bar the District or the Court from considering Judge Frey's findings because it was dissolved when the Court ended judicial supervision and closed the case in 2009. It was not revived by the remand, and it has been superseded first by the post-unitary status plan and now by the Unitary Status Plan.[2] It is thus irrelevant to the Court's current determination of unitary status. In considering the District's good-faith compliance for purposes of unitary status, the Court will look to compliance with the USP, not the 1978 remedial order.

[2] The Stipulated Remedial Order was terminated by this Court in its Order [ECF 1299] and Judgment [ECF 1300], declaring "this case is closed and all federal judicial oversight of the operation of [the District] is ended" and approving the Post-Unitary Status Plan (PUSP). On remand, it was the PUSP, not the Stipulated Remedial Order, that remained in place, until the USP was developed to replace the PUSP. [ECF 1320, p. 3:17-19].

The USP, the operative Court order, does not, by its terms, preclude consideration of Judge Frey's findings. Thus, the Mendoza Plaintiffs advocate looking to the dissolved 1978 remedial order for one single purpose: to preclude consideration of Judge Frey's findings. But the 1978 remedial order, by its terms, **does not** limit the use of Judge Frey's findings when subsequent court orders are at issue. Again, the operative provision is:

> [I]n seeking enforcement of or relief in any federal court from the terms of this stipulation, no party may rely upon prior findings and conclusions in this case to interpret the terms of this stipulation or to determine the rights and obligations of the parties thereunder.

[ECF 436, pp. 3477 (9):32-10:4 (emphasis added)].

The provision expressly only applies to the specific 1978 remedial order. This is particularly clear when it is read with the preceding sentence in that same order. That sentence recognizes that the parties "shall retain all rights and remedies . . . in seeking enforcement or relief from this and any subsequent stipulations and orders." [*Id.*, p. 9:26-31 (emphasis added)]. Under the canon of *espressio unius est exclusio alterius*, *see Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005); *Hardware Mut. Ins. Co. v. Dunwoody*, 194 F.2d 666, 668 (9th Cir. 1952) (applying canon to contracts), the omission of "and any subsequent stipulations and orders" from the provision about using judicial findings must be interpreted as intentional. "The force of the [*expression unius*] maxim is strengthened where a thing is provided in one part . . . and omitted in another." *Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1474 (9th Cir. 1995).[3]

[3] The Mendoza Plaintiffs argue that *expressio unius* only creates a rebuttal presumption and that contracts must be interpreted in accordance with the parties' intent. [ECF 2439, p. 4 n.3.] But they have not rebutted the presumption or shown evidence of contrary intent. "The intent of the parties, **as ascertained by the language used**, must control the interpretation of a contract." *Goodman v. Newzona Inv. Co.*, 421 P.2d 318, 320 (Ariz. 1966) (emphasized portion omitted by Mendoza Plaintiffs). Plaintiffs have provided no evidence — from "the language used" in the remedial order, which must be the starting point for interpretation of the contract, or from any other source — that the parties intended an interpretation other than the one that results from applying *expressio unius*.

Because this provision simply does not apply to the current petition for unitary status or to the determination of when termination of supervision is appropriate under the Constitution, the Court can and must rely on the **only** factual findings in the case to determine the scope of vestiges remaining in 1978, and thus the Constitutional limits on the Court's remedial authority today.

C. Continuing jurisdiction may not be based on a theory that the USP was entered by "consent."

The Mendoza Plaintiffs argue that the USP is a "consent decree" that governs when Court supervision may be terminated, even if the basis for federal court jurisdiction no longer exists. Not so. First, the District could not, through the USP, consent to Court supervision beyond that legally required to remedy the specific Constitutional violations found by Judge Frey. Second, the USP inherently is not a consent decree — the District objected before, during, and after its preparation and entry, and the fact that the District participated in negotiating specific language in the document cannot transform those objections into consent. Third, it is not "law of the case" or otherwise judicially preclusive that the USP is a consent decree.

1. The District could not consent to court supervision beyond that required under the Constitution.

The District could not, through the USP, "consent" to court supervision beyond that legally required to remedy the specific constitutional violations found by Judge Frey in 1978, because then-members of the District's Governing Board could not, by agreeing to a "consent decree," bind their successors in future restraint of the power of their offices.

They argue only that, at the time of the remedial order, motions to amend Judge Frey's findings were pending. This is not evidence of contractual intent and does not rebut the presumptive interpretation.

A school board member "may not agree to restrict his freedom of action in the exercise of his powers, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable." *Sch. Dist. No. 69 v. Altherr*, 458 P.2d 537, 542 (Ariz. Ct. App. 1969) (citations omitted), *disapproved in part on other grounds by Bd. of Trustees v. Wildermuth*, 492 P.2d 420 (Ariz. Ct. App. 1972). In Arizona, "the school board is considered a noncontinuous body, organized each year. In other words, [a school district has] a 'new' school board each year." *Id.* at 542-43. An agreement that purports to bind a future school board in the exercise of its powers is, likewise, against public policy and unenforceable. *Id.*

Along similar lines, Arizona courts have noted that school boards cannot, absent specific legislative authority, delegate to another their "power to manage and control the affairs of the district." *Godbey v. Roosevelt Sch. Dist. No. 66*, 638 P.2d 235, 241 (Ariz. Ct. App. 1981); *see also Bd. of Educ. v. Scottsdale Educ. Ass'n*, 498 P.2d 578, 585 (Ariz. Ct. App. 1972) ("[W]here, as in Arizona, the power to manage and control the affairs of the school district lies exclusively with the board of trustees, except where that power has been by specific legislation granted to someone else, the Board may not delegate that authority without specific legislative authorization."), *vacated on other grounds,* 509 P.2d 612 (Ariz. 1973).

The U.S. Supreme Court has admonished that "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation. If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law,' it may 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*,

557 U.S. 433, 450 (2009) (internal citation omitted). Under *Horne*, parties cannot, via a consent decree, agree to extend a district court's jurisdiction beyond its authority to oversee the remedy of the specific constitutional violations at issue. *See United States v. Bd. of Educ.*, 663 F. Supp. 2d 649, 656-57 (N.D. Ill. 2009) (applying *Horne*).

The USP unquestionably cedes the power to manage and control the affairs of the District to this Court. Because the Governing Board could not, under Arizona law, agree to such court supervision beyond that mandated by law, the USP is unenforceable as a consent decree and as a "contractual" basis for requiring the District to remain under court supervision. Any "consent" and "contractual" force of the USP only extends as far as supervision is required under desegregation case law, and no further. The USP could not, by "consent," extend judicial supervision over the District to "remedy" issues not tied to the specific, limited constitutional violations Judge Frey found.

2. The District did not consent but rather objected to the USP.

Regardless, the circumstances under which the USP was entered make clear that it is not a consent order. The Ninth Circuit has identified three nonexclusive circumstances under which a party can continue to contest an alleged "consent order": "(1) where there was no actual consent; (2) where the district court lacked subject matter jurisdiction to enter the judgment; and (3) where a party intended to preserve its right of appeal or specifically preserves its right to appeal." *Hoa Hong Van v. Barnhart*, 483 F.3d 600, 610 n.5 (9th Cir. 2007) (citations, quotation marks omitted). The first and the third circumstances apply here and independently mandate that the USP not be given the effect of a consent order.

It is beyond dispute that the District "intended to preserve its right of appeal or specifically preserve[d] its right to appeal." *Id.* The Court must look to the record to

determine whether a party preserved, or intended to preserve, its right to appeal an alleged consent order. *See, e.g.*, *U.A. Local 342 Apprenticeship & Training Tr. v. Babcock & Wilcox Constr. Co.*, 396 F.3d 1056, 1058 (9th Cir. 2005) (finding appellate jurisdiction "because it is clear that Babcock 'intended to preserve its right of appeal'"). The record here makes clear that such preservation, or least intent of preservation, occurred.

The District explicitly objected to, and reserved its right to continue to object to, the substantive basis for the USP, the appropriateness of its being entered at all, and other specific portions of the plan. These objections and reservations were timely made on the record, contemporaneous with the parties' joint submission of the stipulated language that became the USP. [ECF 1406, pp. 2:26-3:3 ("The Parties, by filing the Draft USP and accompanying legal memoranda today, are not waiving any objections they may have to the Draft USP or to further changes and proposals that may be made, and reserve the right to raise any such objections in future briefing.").]

The District concurrently filed a Legal Memorandum of Objections in which it stated that, although it participated in negotiating the language in the draft, the District "does not acknowledge or admit that vestiges of the segregated system remain" and "does not acknowledge or agree that the obligations it is undertaking pursuant to the Draft USP are necessary or required to achieve unitary status." [ECF 1407, p. 2:12-17.] The District also set forth detailed objections to various obligations set forth in the draft USP [ECF 1407], and it filed additional objections to the USP. [ECF 1412.] These objections all predated the Court's entry of the USP, were never withdrawn, and remained operative and on the record as of the entry of that order and through today.

It is independently improper to apply the USP as a consent order because there was not — and could be no — actual consent. Actual consent is lacking where the

circumstances indicated that the party now objecting did not intend to consent substantively to entry of the order. *See, e.g.*, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 n.2 (9th Cir. 2009) ("[I]t is readily apparent that Plaintiffs did not give their 'actual consent' to the entry of judgment on the merits against them; rather, they executed the stipulation so that they would have a final judgment to appeal.").

As in *Wal-Mart Stores*, it is clear from the record here that the District did not consent substantively to entry of the USP. The District — ordered by the Court to work with the Special Master to create a negotiated plan — stipulated to some (but not all) of the language in the USP (i.e., the form of the plan). But, as described above, the District explicitly objected to, and reserved its right to continue to object to, the substantive basis for the USP, the appropriateness of its being entered, and other specific portions of the plan. These facts show that the District did not give "actual consent" — and, as addressed above, it could not give actual consent.

3. Neither the "law of the case" nor judicial estoppel prevent the recognition of the simple truth that the District did not consent to the USP.

The Mendoza Plaintiffs argue that it is "law of the case" that the USP is a consent decree and that the District is judicially estopped from arguing otherwise. Neither is true.

a. The Court is not bound by law of the case on this issue.

Contrary to the Mendoza Plaintiffs' argument, it is not law of the case that the USP is a consent order: there has been no decision on the merits on that issue. Law of the case only applies to issues that were actually decided. *See, e.g.*, *Cont'l Ins. Co. v. Fed. Express Corp.*, 454 F.3d 951, 954-55 (9th Cir. 2006) (issue of which treaty applied was not law of the case based on denial of summary judgment motion where "[d]enying summary judgment rendered no decision on what law governed; no actual ruling on the issue of

applicable law was made. The record bears this out: nowhere is it evident that the court actually analyzed the treaties in force"); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766-67 (9th Cir. 2001) (law of the case did not apply because "the *Lucas I* court did not reach the merits of market definition; rather it adopted the district court's assumption in order to develop its analysis of Coker Tire's market power"); *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988) (law of the case "has no application here, since no appellate decision had issued on the merits"); 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. Juris. § 4478 (2d ed.) ("Actual decision of an issue is required to establish the law of the case.").

The Mendoza Plaintiffs seize on the Ninth Circuit's offhand statement that the USP "can be characterized as a consent decree" and its ensuing analysis under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), of whether it had jurisdiction under U.S.C. § 1292(a)(1) over an appeal of an interlocutory order "modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." *Fisher v. Tucson Unified Sch. Dist.*, 588 Fed. Appx. 608, 609 (9th Cir. 2014). But the Ninth Circuit did not actually decide that the USP was a consent order. Rather, the Ninth Circuit was faced with one party (the District) arguing that the USP was an injunction, so that its modification was appealable under § 1292(a)(1), and another (the Mendoza Plaintiffs) arguing that the USP should be analyzed under *Carson* because the USP did not "by [its] express terms . . . fall neatly within the ambit of §1292."[4] The parties did not, for purposes of that appeal, contest whether the USP was a consent order. *See* 18B Charles A. Wright, Arthur R. Miller &

[4] As the Mendoza Plaintiffs pointed out in their Answering Brief in that appeal, *Carson* set out "'special rules' . . . to be applied when a party seeks to appeal orders that are claimed to modify consent orders . . . or other orders that fail by their express terms to fall neatly within the ambit of §1292(a)(1)." [Mendoza Answering Br., excerpt attached as Exhibit A hereto, pp. 4-5 (emphasis added)].

Edward H. Cooper, Fed. Prac. & Proc. Juris. § 4478 ("A position that has been assumed without decision for purposes of resolving another issue is not the law of the case, a rule that may extend to an issue that was assumed because it was not contested."). The Ninth Circuit analyzed its ability to hear the appeal under U.S.C. § 1292(a)(1) as expanded by *Carson*, but it did not analyze at all whether the USP was a consent order.[5] Under these circumstances, as in *Continental Insurance Company*, there has been no "law of the case" determination that the USP is a consent order.

Even if the Ninth Circuit's offhand comment could be considered law of the case, it would not be a decision the Court need, or should, follow. As noted in *United States v. Alexander*, cited by the Mendoza Plaintiffs, courts have discretion to deviate from the law of the case if, inter alia, "the first decision was clearly erroneous" or "a manifest injustice would otherwise result." 106 F.3d 874, 876 (9th Cir. 1997); *see also, e.g.*, *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) ("[L]aw of the case is an equitable doctrine that should not be applied if it would be unfair to [a party] to bar it from relitigating the disputed issue."). As addressed above, the USP is not, and could not be, a consent decree. Any actual decision that it is a consent decree would be clearly erroneous and would result in manifest injustice (the ceding of the Governing Board's power to manage and control the affairs of the District beyond the point required by the Constitution and desegregation law). Thus, even if this issue is law of the case, the Court is not bound to — and should not — apply it.

Finally, the particular circumstances of a desegregation case under supervision for several decades are yet another reason that any law of the case should not be strictly applied here. As Wright & Miller noted, "[i]nstitutional reform litigation may provide

[5] Nor is there any analysis of whether the USP is a consent order in the Ninth Circuit's July 2019 decision dismissing another appeal under § 1292(a)(1) and *Carson*.

good reason to dilute the 'manifest injustice' standard. Continuing administration of a complex decree may . . . demonstrate that earlier legal rulings should be revised. Law-of-the-case doctrine should not stand in the way of optimal enforcement." 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. Juris. § 4478. For example, the Eighth Circuit has held that law of the case does not bar a district court from changing its mind about the required standard of compliance with a desegregation decree:

> To extrapolate and superimpose wholesale law of the case doctrine onto the district court's authority to oversee and enforce a complex, highly detailed Stipulated Remedial Order that attempts to remediate more than a century of segregated educational facilities 'would weaken to an intolerable extent' the district court's ability to exercise its equitable powers to accomplish the duty with which it was charged to ensure that that remedial plan is being complied with. In light of the district court's ongoing supervision of the case, we believe that none of the parties to this litigation could have had the same settled expectations regarding the manner and detail in which the district court was to monitor and enforce the orders it had entered that parties in typical private litigation may well have had.

Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 561 F.3d 746, 751 (8th Cir. 2009) (citation omitted). That reasoning should apply here. The "law of the case" cannot change the plain and clear words in the record to falsely manufacture consent where none was given.

b. Judicial estoppel does not apply.

In a footnote, the Mendoza Plaintiffs argue that the District is judicially estopped from arguing that the USP is not a consent decree because, in 2014, the District stated that the USP, as a consent order, was an injunction that fell within § 1292(a)(1)'s provisions allowing appeals of interlocutory orders. The discretionary, equitable doctrine of judicial estoppel does not apply here. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* at 749. Courts considering applying judicial estoppel should look at whether: (a) the later position is "clearly inconsistent" with the earlier position; (b) the party "achieved success" in the prior proceeding; and (c), if not estopped, the party would derive an unfair advantage from the inconsistent statement or impose an unfair detriment on another party. *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir. 2007) (citing *New Hampshire,* 532 U.S. at 750).

Courts in this Circuit also look at "whether the party to be estopped acted inadvertently or with any degree of intent." *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2011). Incompatible positions advanced based on chicanery or fraud on the court are more likely to prompt application of judicial estoppel; positions advanced based on inadvertence or mistake are not. *See id.*; *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995 (9th Cir. 2012); *see also New Hampshire*, 532 U.S. at 753. The importance of the representations to the litigation may also be considered. *See Milton H. Green Archives, Inc.*, 692 F.3d at 995 (noting that, in *Johnson v. State, Oregon Dept. of Human Res., Rehab. Div.*, 141 F.3d 1361 (9th Cir. 1998), "a minor inconsistent statement in an ancillary matter was insufficient to justify application of judicial estoppel"); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133-34 (9th Cir. 2012) (applying judicial estoppel where plaintiff's incompatible "statements in the earlier cases were not peripheral or immaterial; they were central to her claims").

Judicial estoppel cannot be applied to preclude the District from arguing that the USP is not a consent order. First, the District did not achieve any success or advantage from its prior statement. It merely indicated that the USP operates as an injunction —

which is true — and, thus, orders affecting it fall within § 1292(a)(1). That statute would apply regardless. It is unclear whether the Ninth Circuit relied on the District's statement — it analyzed its jurisdiction under § 1292(a)(1) and under *Carson*, as advocated by the Mendoza Plaintiffs — but the District certainly gained no advantage, as the Ninth Circuit concluded that it did not have jurisdiction (an outcome not dependent on whether the USP was a consent order). Second, the District will obtain no "unfair advantage." Plaintiffs have not relied on the District's prior statement, and it would not be "unfair" to permit the District to argue that the USP cannot be applied against it beyond the point appropriate under the Constitution. Finally, as in *Johnson*, the District's prior statement was minor and immaterial. These circumstances do not justify application of judicial estoppel.

In sum, Judge Frey's findings in 1978 as to the extent of the vestiges then existing inform and limit the scope of the Court's constitutional authority to continue substituting its own judgment for that of the locally-elected school district officials and the trained educators whom they have employed.

II. THERE ARE NO VESTIGES OF THE PRIOR DUAL SCHOOL SYSTEM REMAINING.

"[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (quotation marks omitted). Here, the Constitutional violation giving rise to the application of the *Green* test was the former elementary school system, *de jure* segregated with respect to African American students, which ended voluntarily seven decades ago. Judge Frey's findings as to the scope of the violation and its vestiges remaining to be remedied in 1978 must shape the Court's consideration of unitary status.

But the Mendoza Plaintiffs instead argue that the District must now eliminate all current disparities in order to terminate Court control of the District — regardless of

whether those disparities are caused by the prior dual school system that ended voluntarily 70 years ago (and, apparently, regardless of whether these same disparities plague most school districts, including those with no history of dual, segregated operation). The Mendoza Plaintiffs cite no legal authority for these arguments, and they fail to controvert the case law set forth by the District in the Supplemental Petition.

The only disparities that may be considered are those that are causally linked to the specific, original constitutional violation. *See, e.g.*, *Freeman*, 503 U.S. at 496 ("The vestiges of segregation [to be eliminated] . . . must be so real that they have a causal link to the *de jure* violation being remedied."); *Jenkins*, 515 U.S. at 89-90 (order aimed at desegregation "interdistrict goal" was not a proper remedy in case involving only intradistrict Constitutional violations); *Tasby v. Moses*, 265 F. Supp. 2d 757, 764 (N.D. Tex. 2003). The Mendoza Plaintiffs cite no contrary case law.

The fact that racial disparity may currently exist does not authorize continued court supervision unless there is a causal link between the current disparity and the original violation. *See, e.g.*, *N.A.A.C.P., Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960, 974 (11th Cir. 2001) ("[The district] is not responsible for the segregative effects of external forces over which it has no control."); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 413 F. Supp. 2d 1051, 1067 (N.D. Cal. 2005) ("Unless the current segregation is a 'vestige' of past discrimination, a desegregation decree cannot be extended."); *Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1281-82 (D. Colo. 1995) ("The constitutional authority of the federal courts is limited to compelling the elimination of negative effects of *de jure* discrimination . . . . [The proposal] that this court retain jurisdiction and require further affirmative action in the District's

employment practices . . . would go beyond remediation of past discriminatory conduct."). The Mendoza Plaintiffs cite no contrary case law.

Moreover, by instructing courts to look at whether the vestiges of past discrimination have "been eliminated to the extent practicable," *Dowell*, 498 U.S. at 250, the Supreme Court has rejected the notion that school districts must do everything possible to eliminate those vestiges. *See, e.g.*, *Jenkins*, 515 U.S. at 101. The Supreme Court has made it clear that school districts are not required to eliminate all problems that may stem from racial prejudice in society, nor are they required to create a school system where each school perfectly reflects the racial composition of the community. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971); *Monteilh v. St. Landry Parish Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988). The Mendoza Plaintiffs cite no contrary case law.

The Supreme Court has expressly held that a school district is "under no duty" to battle reoccurrence of racial disparities that result from residential demographic patterns rather than from the original violation. *Freeman*, 503 U.S. at 494; *see also Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-37 (1976) ("[H]aving once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."). The Mendoza Plaintiffs cite no contrary case law.

Contrary to the Mendoza Plaintiffs' assertion, there **is** a difference between *Green* factors and non-*Green* factors in the vestiges analysis. The Supreme Court has expressly directed district courts to look at the *Green* factors to determine whether vestiges of segregation remain. *Dowell*, 498 U.S. at 250. But as to non-*Green* factors, the Supreme

Court has merely said that courts may, in their discretion, "inquire whether other elements ought to be identified." *Freeman*, 503 U.S. at 492.

But most importantly, for non-*Green* factors, courts hold that there is no presumption that any racial disparities were caused by the prior *de jure* system — effectively putting the burden on the party advocating for continued court supervision (here, the Mendoza Plaintiffs) to show that current disparities in non-*Green* areas were causally linked to the Constitutional violation. *See, e.g.*, *Coal. to Save Our Children v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 776-77 (3d Cir. 1996) ("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."); *United States v. City of Yonkers*, 197 F.3d 41, 52 (2d Cir. 1999); *Sch. Bd. of the City of Richmond, Va. v. Baliles*, 829 F.2d 1308, 1312-13 (4th Cir. 1987). Nowhere is this more than true than in the area of student achievement. *See, e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 330 (4th Cir. 2001) ("Most courts of appeals confronting [the] issue . . . have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination.") (collecting cases from the Second, Third, Fourth, and Seventh Circuits).

The Mendoza Plaintiffs provide no evidence of a causal link between the District's former dual school system and current disparity in any of the areas they have raised, and they cite no case law requiring the District to disprove vestiges in those areas. The Court should follow the lead of the majority of circuits in holding that non-*Green* factors require

plaintiffs to prove that the current disparities are the proximate result of the former *de jure* system — which they have not done and cannot do.

A. The Court's prior orders, in 1978 and 2008, have already determined that all causally-linked vestiges were eliminated.

Judge Frey's 1978 findings, issued after a full evidentiary trial, came 10 years after the Supreme Court's decision in *Green*, and Judge Frey relied on that case in systematically and carefully analyzing what few vestiges remained in 1977 as a result of the *de jure* violations he found — some of which were already then more than 25 years in the past.

Judge Frey made it clear that most effects of the *de jure* violations had attenuated by the time of trial (now 40 years ago), and that the then-current racial and ethnic makeup of most schools in the District was not the result of those *de jure* violations. While expressly acknowledging and relying on *Green*, Judge Frey found no vestiges of the prior in the *Green* factor areas of faculty and staff assignment, transportation, facilities, or extracurricular activities. He found that the only vestige remaining at the time was in student enrollment at nine schools. [ECF 345, p. 223.]

In 2008, the Court found that this vestige — student enrollment at nine schools — had been eliminated to the extent practicable in the five years following entry of the remedial injunction. [ECF 1270, p. 7.] This is the end of legitimate inquiry into any alleged vestiges: Judge Frey's decision makes it clear that any disparities present today cannot be causally traced to the original *de jure* violation and are thus not vestiges of that discrimination.

No Court ruling has ever contradicted this finding. Indeed, the Ninth Circuit's 2011 ruling did not address it. And the Court's finding that vestiges in student enrollment

were eliminated by 1983 is law of the case: it was actually decided, on the merits, and has never been shown to be in error.

Since the only causally-linked vestiges found by Judge Frey to exist 40 years ago in 1977 were eliminated by 1983, there can be no vestiges existing today that are causally linked to the *de jure* segregation that is the only basis for Court supervision. The District pointed this out in the Supplemental Petition; the Mendoza Plaintiffs did not rebut it.

B. There is substantial evidence that any disparities today are not causally related to the District's conduct 70 years ago.

The Mendoza Plaintiffs urge that vestiges of the prior dual elementary school system that ended 70 years ago remain in the areas of: (a) student assignment, (b) administrative and certificated staff, (c) certain aspects of quality of education, (d) discipline, and (e) family and community engagement. Whatever disparities may exist today in these areas are simply not causally connected to the District's pre-1951 dual elementary school system, and they are the result of other causes outside the scope of a desegregation case. For each area (discussed below), the Mendoza Plaintiffs: (a) cite no evidence in support of, and do not even mention, the requirement that a disparity must be causally connected to the prior dual school system to be a "vestige" of that prior segregation; and (b) demonstrate that they clearly do not understand the applicable law.

1. Student Assignment.

First and foremost, this Court found in 2008 that the only vestiges of prior discrimination in student assignment were eliminated by 1983. [ECF 1270, p. 7.] Thus any disparity today is a result of causes and factors other than the prior dual school system, and it is outside the proper scope of a desegregation case. A school district does not have a constitutional duty to address and remedy residential-based or other resegregation after the constitutional discrimination has been remedied. *Freeman*, 503 U.S. at 494; *see also*

Spangler, 427 U.S. at 436-37. Where, as here, as in *Freeman*, and as in *Spangler*, the racial imbalance has been at least temporarily corrected after the abandonment of *de jure* segregation, it can be asserted with a degree of confidence that the past discrimination is no longer playing a proximate role. *Freeman*, 503 U.S. at 503 (Scalia, J., concurring).

Second, the passage of 60 to 70 years since the discrimination at issue ended, without more, is substantial evidence that effects or vestiges of that conduct have attenuated and disappeared over time — enough, at the very least, to shift the burden of going forward with evidence of causation to the plaintiffs. As Justice Scalia observed 27 years ago in his concurrence in *Freeman*,

> the rational basis for the extraordinary presumption of causation simply must dissipate as the *de jure* system and the school boards who produced it recede further into the past. Since a multitude of private factors has shaped school systems in the years after abandonment of *de jure* segregation — normal migration, population growth (as in this case), "white flight" from the inner cities, increases in the costs of new facilities — the percentage of the current makeup of school systems attributable to the prior, government enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor.

Id. at 506.[6]

The Mendoza Plaintiffs point to the District's own finding that eight schools still have the potential to become "integrated" under the USP as evidence that the District has not yet done "all that is practicable." But this **completely** misses the point: in a

[6] The District also takes the position that no presumption of causation ought to be applied, either to *Green* factor disparities or others, when 50 years has passed since the dual school system ended, particularly where, as here and unlike *Green*, the dual school system was voluntarily dismantled by the school district before *Brown v. Board of Education*. In 1992, 25 years after Lyndon Johnson was president, Justice Scalia observed in his concurrence in *Freeman*, "[a]t some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time." 503 U.S. at 506. Now, now more than *50* years since Lyndon Johnson was president, we are well past that time.

desegregation case, the dispositive question is **not** whether enrollment disparities can be reduced — all districts have disparities, and, hopefully, all districts constantly strive to reduce them. as a matter of good educational policy. The dispositive question is whether those disparities can be causally traced to the prior dual school system. Here, they cannot, and that is the end of the constitutional inquiry as to whether student assignment issues justify continued court intrusion into locally-elected officials' authority.

Additionally: (a) for over 50 years (since 1969) the District has had a policy of open enrollment to improve diversity, supported by free transportation for attendance outside the neighborhood school zone; (b) the state has mandated full open enrollment within and across District lines for more than 25 years and funds tuition-free charter schools within the District boundaries; and (c) the District has had a formal Governing Board policy of nondiscrimination in school assignment for over 40 years. These are all strong evidence that any disparity in enrollment at individual schools that may be observed today simply has nothing to do with the pre-1951 dual elementary school system. It is instead the product of individual choice, residential patterns, other available school options not under the District's control, and other factors for which the District is not responsible. Because of the educational benefits of integration and diversity, and because it is the right thing to do, the District remains committed to promoting diversity and integration, and reducing racial concentration, but that commitment is not mandated by the Constitution and should not be the province of further Court supervision.

2. Administrative and certificated staff.

The Mendoza Plaintiffs next argue that a vestige of the prior dual elementary school system remains with regard to the District's teaching and administrative staffs. Again, the argument completely misses the mark: (a) there is no disparity that is unique

to this District or to former *de jure* segregated school districts generally, (b) Judge Frey examined the issue and found no vestige of the prior dual elementary school system remaining in this area after a month-long trial 42 years ago, and (c) there is strong evidence that nothing about the District's conduct more than half a century ago is today still evident in the District's hiring and placement of administrative staff. For these reasons, there simply is no disparity today in the District's teaching and administrative staff that can be causally related to the pre-1951 dual elementary school system.

First, and as noted in the District's Supplemental Petition, the District hires teachers and administrators of color at rates higher than state, local, and national averages, including many hundreds, if not thousands, of districts that have no history of dual school systems. This totally eliminates the possibility that anything about employment of teachers and administrators today is causally related to the pre-1951 dual elementary school system.

Second, Judge Frey found no vestige of the prior dual school system after a month-long bench trial 40 years ago, far closer in time to the dual elementary school system than we are today. [ECF 345.]

Finally, there simply is nobody still employed or involved with the hiring of teachers at the District today, and no member of the Governing Board today, who was involved in any way with the hiring and placement of teachers 70 years ago in 1950, the last year the District had a dual elementary school system.

The Mendoza Plaintiffs do not, and cannot, point to any evidence that anything about the District's hiring and employment of teachers is causally related to the prior dual elementary school system.[7] There simply is no vestige of that system — which ended

[7] As with student assignment and the other *Green* factors, the District's position is that where, as here, the District voluntarily ended the prior dual school system more than 50

voluntarily 70 years ago — relating to teachers and administrators. Any disparity observed today is necessarily a result of other factors, and it is no longer properly the province of any continued federal court intervention based, like here, on that prior dual elementary school system.

3. Quality of Education.

The Mendoza Plaintiffs also urge that a vestige of the pre-1951 school system exists in the area of quality of education, pointing to ALE participation, UHS enrollment, and the District's Dual Language program. This argument is completely misplaced, and it actually has nothing to do with a vestiges analysis.

First and foremost, quality of education is not a *Green* factor, and thus the burden is on plaintiffs to establish that any current disparity is causally related to the pre-1951 dual elementary school system.[8] The plaintiffs have utterly failed even to address this threshold issue. This alone requires a finding that there is no vestige of the prior dual school systems in the area of quality of education.

But more fundamentally, quality of education measures utilized by school districts, and those set out in the USP, are all measures designed to improve academic achievement for minority students, reducing the gap in average levels of academic achievement among groups of different races and ethnicities. Judge Frey specifically reviewed the evidence on differential academic achievement in 1978, and he concluded that the gap was not the

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years ago, no presumption of causality should be applied to any current observed disparity in teaching and administrative staff, and the burden of showing any causal link should rest with the plaintiffs.

[8] The Mendoza Plaintiffs argue that this Court has held that student achievement is a *Green* factor, and, thus, it is law of the case. [ECF 2439, p. 11:23-24]. Even if the law of the case doctrine applied here for this Court (and it does not), it will not apply to the Ninth Circuit or the Supreme Court, so this Court might as well get it right now. Quality of education and student achievement are not *Green* factors entitled to any presumption of causality.

result of discriminatory conduct by the District: in other words, the observed disparity was not causally related to the prior dual school system and was not a vestige of that system. [ECF 345, pp. 167-68.] This is consistent with other courts that have addressed the issue. *See, e.g.*, *Belk*, 269 F.3d at 330 ("Most courts of appeals confronting [the] issue . . . have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination.") (collecting cases from the Second, Third, Fourth, and Seventh Circuits).

4. Discipline.

Similarly, the Mendoza Plaintiffs also completely miss the dispositive issue regarding discipline. Again, discipline is not a *Green* factor, and thus the burden rests with plaintiffs to establish that any disparity in discipline today is caused by the specific conduct of the District in connection with its pre-1951 dual elementary school system and is not merely a reflection of general social ills that manifest across society. This they have not done and cannot do.

They cannot do this because the issue **is in fact** one of general societal nature, and it is not tied in any way to specific conduct by the District 70 years ago. Most districts across the nation, including hundreds and hundreds with no history of dual school systems, experience disparities in rates of discipline. In fact, in the District, there is no disparity in discipline between Hispanic and White students, and the disparity in discipline between African American students and White (and Hispanic) students is significantly less than the national average. In short, because the District's existing discipline disparity is far less than the national average, the District is doing better than most school districts across the country, and there can thus be no causal link to the prior dual school system voluntarily dismantled 70 years ago.

There is no question that the District's policies are facially neutral and that the District has, and has had for years, formal policies prohibiting discrimination in discipline on the basis of race. For all of these reasons, discipline at the District today does not provide any Constitutional basis for continued supervision by the Courts.

5. Family and Community Engagement.

Finally, the suggestion by the Mendoza Plaintiffs that there is a "vestige" of the pre-1951 dual school system in the District's family engagement efforts is perhaps the best illustration of their fundamental lack of understanding of the concept of a "vestige." A "vestige" of a prior dual school system is: (a) a current disparity that (b) is causally connected to the prior dual school system.

Here, neither element is even arguably met. First, there is no evidence that there is any "disparity" in the District's family and community engagement programs. If there is no disparity, there can be no vestige of prior discrimination.

Second, there is no evidence that anything about the District's family engagement effort is causally connected to the pre-1951 dual elementary system in the District. Indeed, a formal family and community engagement program was not even a concept in public education 70 years ago, let alone connected in some continuous causal chain to today's programs.

More fundamentally, the presence or absence of family and community engagement programs, or tracking systems for measuring them, is not a *Green* factor, which means that plaintiffs bear the burden of proof as to the existence of a disparity in treatment based on race or ethnicity and as to any causal connection to the pre-1951 dual elementary school system. The Mendoza Plaintiffs have utterly failed to address this issue. Simply put, their complaint regarding the "effectiveness" of the District's tracking

system for measuring family engagement has nothing to do with either the existence of a disparity or the causal link to the old dual elementary school system. Even if plaintiffs were to argue that "they can't tell" if there is a disparity, that would not advance their position, because it is utterly implausible that something about today's family engagement programs is caused by the pre-1951dual elementary school system.

In sum, there are simply no vestiges of the pre-1951 dual elementary school system present in the District today, 70 years after the District voluntarily dismantled that system, years before the Supreme Court's decision in *Brown v. Board of Education*.

III. THE DISTRICT MEETS THE GOOD FAITH COMPLIANCE TEST.

A. The Meaning of the Good Faith Test.

1. The purpose of the good faith test is to ensure that a school district will not revert to a dual school system upon termination of Court supervision.

The Mendoza Plaintiffs argue that the issue underlying the "good faith" prong of the unitary status analysis is not whether the District "could return to a system of *de jure* segregation." [ECF 2439, pp. 12:19-20.] Actually, that is exactly the issue.

As the District pointed out in the Supplemental Petition, there are multiple ways that a district may show that it meets the "good faith" requirement. This is because "the purpose of the good-faith finding is to ensure that a school board has accepted racial equality and will abstain from *intentional* discrimination in the future." *Manning ex rel. Manning v. Sch. Bd. of Hillsborough County, Fla.*, 244 F.3d 927, 946 n.33 (11th Cir. 2001) (emphasis added). "A finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitution ritual." *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987). The relevance of "good faith underscores the

notion that unitariness is less a quantifiable 'moment' in the history of a remedial plan than it is the general state of successful desegregation." *Id.* at 331.

Thus, a school district can demonstrate its good faith compliance by showing its "commitment to a constitutional course of action [in which] its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." *Freeman*, 503 U.S. at 491. It can similarly show "[a] well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular to indicate that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention." *Morgan*, 831 F.2d at 331. *Accord, e.g.*, *Lockett v. Bd. of Educ. of Muscogee County Sch. Dist., Georgia*, 111 F.3d 839, 843 (11th Cir. 1997) ("A good faith commitment . . . enables the district court to accept the school board's representation that [the school board] has accepted the principle of racial equality and will not suffer intentional discrimination in the future." (quotation marks omitted)); *Jenkins v. Sch. Dist. of Kansas City, Missouri*, 77-0420-CV-W-DW, 2003 WL 27385936, at *11 (W.D. Mo. Aug. 13, 2003) (quoting *Manning*, *Freeman*, and *Morgan* and holding that "[t]he essence of the above-cited authority is that whether a school district has evidenced good faith depends on whether the school district's record throughout the litigation demonstrates that the school district has accepted the principle of racial equality").

Indeed, in considering "good faith," "[t]he focus is on the school board's pattern of conduct, and not isolated events." *Manning*, 244 F.3d at 946 n.33. "Focusing on isolated aberrations blurs a court's long-term vision." *Id.*

In fact, some courts have granted unitary status (or partial unitary status) based on findings that vestiges have been eliminated and that the district is not likely to return to

discriminatory practices, without formally considering good faith. *See, e.g.*, *Liddell v. Special Sch. Dist.*, 149 F.3d 862, 868-69 (8th Cir. 1998).

In determining good faith, courts consider, as a substantial part of the analysis, whether a return to discrimination is likely. *See, e.g.*, *Jenkins*, 2003 WL 27385936, at *11 ("There has never been resistance to remedy implementation by the [district] or its officials. . . . [T]he Court finds that the [district] has demonstrated a good faith commitment to its African-American students that it will endeavor to provide a quality education to students of all races."); *Berry v. Sch. Dist. of City of Benton Harbor*, 195 F. Supp. 2d 971, 991 (W.D. Mich. 2002) ("The testimony uniformly supports the conclusion that all students in the [district] are receiving the same education, regardless of race. As a result, the failure to continue to implement [a program] after 1992 does not suggest a likelihood that the district will return to its past segregative conduct.").

The Mendoza Plaintiffs rebut none of this case law. They argue that the District must show a history of good faith [ECF 2439, p. 12:21];[9] indeed, the District has shown a history of good faith, both through its specific efforts and because it has been making clear for years that a return to *de jure* segregation will not occur — the purpose of the good faith analysis. The Mendoza Plaintiffs do not rebut that history of good faith at all.

[9] The Mendoza Plaintiffs also argue that a consent decree cannot be terminated without findings of compliance with all of its terms. [ECF 2439, p. 13:11-15.] First, the case they cite, *Rouser v. White*, 825 F.3d 1076 9th Cir. 2016), involved termination of a consent decree (related to prison religious accommodation) on the grounds of "substantial compliance" as interpreted under California law, not consideration of unitary status under federal school desegregation law and the specific framework established by the Supreme Court. Second, as addressed above, the USP is not a consent decree. Third, as addressed below, the District has complied in good faith.

2. Achieving numerical targets is not and cannot be a requirement for unitary status, particularly where meeting those targets involves many factors beyond the control of a school board.

"The good faith requirement concerns the manner of the school district's compliance more so than it does technical compliance with every detail of a remedial order." *Jenkins,* 2003 WL 27385936, at *10 ("Plaintiffs complain that details of the Court-ordered educational plans are yet to be implemented or have not been implemented to the maximum possible extent. Plaintiffs do not argue with the notion, nor could they, that the KCMSD has whole-heartedly adopted the concept of systemic reform that was the thrust of the educational plans. Nor do Plaintiffs question the KCMSD's commitment to the delivery of quality education to all students regardless of race."). "Perfect compliance with the court's remedial orders is not required for a constitutional violator to be released from judicial oversight." *See Berry*, 195 F. Supp. 2d at 991.

3. Occasional disagreements on the sufficiency of or approach to compliance cannot negate or obscure the massive compliance effort over the past seven years, demonstrating beyond genuine dispute the District's commitment to the goals underlying the USP.

In arguing that the Court has at times identified deficiencies in the District's notices of compliance or other filings [ECF 2439, p. 36], the Mendoza Plaintiffs ignore: (a) the fact that the District has complied with literally thousands of specific tasks required by the Court and that the occasional deficiencies have generally been in the information presented to the Court, not the substantive compliance; and (b) the fact that the good faith requirement looks at whether the District's "policies form a consistent pattern of lawful conduct directed to eliminating earlier violations," *Freeman*, 503 U.S. at 491, rather than on "technical compliance with every detail of a remedial order." *Jenkins*, 2003 WL 27385936, at *10.

First, this Court has repeatedly recognized the substantial progress the District has made, both in complying with specific Court orders and in generally improving the school system for minority students. The Court has done so even in the specific orders cited by plaintiffs. For example, in the September 6, 2018 Order, the Court denied unitary status in some areas but concluded with two pages detailing the District's "innovative strategies" and "dramatic" progress, noting, inter alia, that: there were "absolutely more students in TUSD attending more racially diverse schools than existed at the inception of this case," District magnet schools were receiving national recognition, the district was operating "innovative ALE programs" and "exceptional college preparatory programs" with increasing minority enrollment, the District was "a vanguard in offering culturally relevant curriculum," and its drop-out and graduation rates (particularly for minority students) were "to be envied in and out of Arizona." [ECF 2123, pp. 147:5-149:4.] The April 10, 2019 Order noted that the District "continued to comply with the Court's directives" [ECF 2213, p. 2:21-24], and, although the Court ordered that some compliance reports be enhanced to cross-reference USP-wide compliance [*e.g.*, *id.*, pp. 14-17], it specifically noted that it did not "fault the District for the limited presentation of the record," based on the "nature" of the proceeding. [*Id.*, p. 17:9-19.] In the April 22, 2019 Order, the Court noted, e.g.: there were no objections to the AASSD/MASSD operating plans [ECF 2217, p. 2:6-8]; the District had met the Special Master's recommendations for FACE data tracking [*id.*, p. 2:10-28]; ELL graduation rates had met targets for three years and were higher than state averages [*id.*, p. 5:9-12]; the District had shown that "no further action is needed from this Court" in certain areas [*id.*, p. 6:1-6]; and Hispanic and Black teacher attrition rates in the District were "substantially lower than the national average for minority teachers." [*Id.*, p. 14:5-7.] Although the Court required additional

action in some areas, such orders did not reflect noncompliance. [*E.g.*, *id.*, p. 12:9 ("The Special Master has generated an updated target list.").] And, in its September 10, 2019 Order, the Court's criticisms were mostly focused on a need for further documentation of certain programs and forms of compliance; few were concerns that the District was not operating the substantive programs required of it. [*See generally* ECF 2273.]

Second, the isolated Court statements identified by the Mendoza Plaintiffs are not inconsistent with a finding of good faith. Again, "[p]erfect compliance with the court's remedial orders is not required for a constitutional violator to be released from judicial oversight." *Berry*, 195 F. Supp. 2d at 991. The impact of the case law cited by the District — and not controverted by plaintiffs — is that this Court must look to whether the District has shown a general commitment to educate students regardless of race and to follow the Court's orders, regardless of whether it has perfectly complied with each of the hundreds of individual tasks. *See, e.g.*, *id.*; *Freeman*, 503 U.S. at 491; *Jenkins*, 2003 WL 27385936, at *10. As the Eleventh Circuit held, the Court should focus "on the school board's pattern of conduct, and not isolated events," because "[f]ocusing on isolated aberrations blurs a court's long-term vision." *Manning*, 244 F.3d at 946 n.33. The District has done so.

B. The District has complied in good faith with the USP.

The District has consistently evidenced its commitment to a constitutional course of action directed to eliminating racial disparities, not only throughout litigation but also before the District even had an obligation to desegregate. The District has spent decades implementing policies and programs designed to remedy any inequities that may have resulted from *de jure* segregation. The good-faith efforts of the District are demonstrated in its achievement of averages higher than those of the nation and state in countless measures of racial equality. In many instances, the District's efforts extend far beyond

those required under *Green*. Most telling, the shortcomings of which the plaintiffs accuse the District often stem from factors outside of its control. The District's compliance with court orders cannot be labeled as a "temporary constitutional ritual." There is no risk that the District will return to an intentionally discriminating system that it voluntarily abandoned decades ago.

1. Student Assignment.

In its order dated September 6, 2018 [ECF 2123], the Court granted partial unitary status in the area of student assignment, excepting only the District's magnet program. The Court directed the District to file a revised Comprehensive Magnet Plan, containing criteria and processes for creating, evaluating, and eliminating magnets, and also to create a three-year integration plan for every school in the District, designed to assess the potential for further integration and to improve integration. The Court also directed the District to file a combined Outreach and Recruitment Addendum for magnet and ALE programs. [ECF 2123, at 149.]

The District filed the requested plans on schedule, including the addendum, on August 30, 2019. [ECF 2270.] For magnet schools, the integration plans were included in the individual magnet plans. For other schools, the integration plans were developed after detailed (and extraordinarily time-consuming) analysis of the demographics of the numbers of school-age children residing within a practical attendance range of each school in the District, using external data combined with current student data. The Comprehensive Magnet Plan was developed after a major cross-departmental effort to study and revise the earlier, court-approved Comprehensive Magnet Plans.[10]

[10] The Mendoza Plaintiffs objected to the plans and the addendum (as they have to every single plan and notice of compliance filed by the District) [ECF 2275 and 2282], and they effectively incorporated by reference those objections into their response to the

The Mendoza Plaintiffs' response argues that the District is not sufficiently integrated simply by counting the current number of schools that are "integrated" and "racially concentrated" using the definitions in the USP. But the USP, and the law of desegregation, do not require a particular outcome as a condition for termination of federal court supervision. Rather, the question is whether the District has devoted sufficient effort to complying with the USP in the area of student assignment that it is clear that the "further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention." *Morgan*, 831 F.2d at 331. There can be little doubt that the District has devoted a huge effort to compliance, and that, for this and other reasons set out in the Supplemental Petition, there simply is no chance that this District, in this community, in this era, is suddenly going to revert to a dual elementary system (which is now prohibited by Arizona state law as well as federal law).

But even the outcome of the District's efforts in this area is far better than the Mendoza Plaintiffs acknowledge. The Mendoza Plaintiffs have focused on only one, relatively arbitrary measure: the number of schools that are "integrated" or "racially concentrated" under the USP. This focus ignores the amazing progress the District has made over the past several years. The percentage of students in the District who are enrolled in an integrated school has dramatically increased, **doubling** from 19% in 2014-15 to 38% in 2019-20. The percentage of students in the District who are enrolled in racially concentrated schools has dropped, from 48% in 2014-15 to 36% in 2019-20. Even the number of schools shows significant progress: the number of integrated schools has

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Supplemental Petition. [ECF 2439, p. 15]. The District filed responses to those objections [ECF 2323 and 2326], which are hereby likewise incorporated by reference in this Reply.

increased by 50%, from 18 to 27, over that same period. The number of racially concentrated schools has dropped by 20%, from 35 to 28.

This progress is particularly commendable given that: (a) the current enrollment pattern is not, as discussed above, in any way the result of prior unconstitutional conduct by the District; and (b) there are external headwinds that make any progress extraordinarily difficult, including segregated residential patterns spread over a wide geographic area, difficult cross-town traffic patterns, cross-district open enrollment mandated by state law, and state funding for free charter schools within the District's boundaries. It is precisely such factors beyond a school district's control that lead courts to reject outcomes as a condition for termination of supervision. *See, e.g.*, *Jenkins*, 515 U.S. at 101.

The Mendoza Plaintiffs further argue that racial concentration has increased at the six transition schools, whose magnet status was withdrawn over the District's objection. All of those transition schools were moving toward integration before withdrawal of magnet status, so it is hard to see how this allegation (even if true) in any way reflects on the District's efforts. Moreover, the Mendoza Plaintiffs have manipulated their data, combining African American and Hispanic enrollment in an effort to overstate racial concentration, when in fact, under the USP, racial concentration is based on only a single racial or ethnic group.

Properly measured, three transition schools had reduced racial concentration between 2016-17 and 2019-20: (Pueblo HS (89% to 87%); Utterback MS (80% to 77%); and Safford K8 (77% to 76%)); and three had increased racial concentration: (Cholla HS (79% to 82%); Ochoa ES and Robison ES increased by 5% and 6%, respectively). [*See* Mendoza Exhibits C and D, ECF 2439-1, pp. 8-15.]

There are often specific explanations for these increases at each school. For example, Ochoa is a small school with declining enrollment. The increase in racial concentration was entirely because Native American enrollment declined more than other groups, demonstrating how clumsy and misleading mere reference to the percentage of one race can be in assessing overall diversity. In SY2016-17, Ochoa had 177 students: 3 white, 9 African American, 16 Native American, and 149 Hispanic. In SY2019-20, Ochoa had 162 students: 5 white, 7 African American, 7 Native American students and 143 Hispanic students. No negative inference can be drawn from the increase in percentage of Hispanic enrollment at Ochoa. The numbers are simply too small to draw any statistically significant conclusions, and the cause appears to be a change in a population not at issue in this case. Moreover, during the same period, Ochoa made significant strides academically: moving from an "F" school in SY2016-17 to a "B" school by SY2018-19.

Again, merely providing a count of schools that are either integrated or racially concentrated, particularly when the count is not accurate and provides no context for the purported increases or reductions, cannot serve as a bar to unitary status.

2. Administrators and Certificated Staff.

In 2018, the Court granted partial unitary status in the area of certificated and administrative staff, excepting only (a) the filing of a revised Teacher Diversity Plan and GYO Program plan, and (b) a notice of compliance with the Court's directives in the area of centralized hiring and support for new teachers. [ECF 2123 at 149-150.]

The District filed the requested diversity plans on schedule. [ECF 2159.] The Court ordered modifications to the plans [ECF 2217], and the District filed those on schedule. [ECF 2221.] The Court again requested modifications [ECF 2273], including a

comprehensive restatement of all elements of the teacher and administrator diversity plans, and the District filed those on schedule. [ECF 2329.][11]

First, any assessment of the District's efforts to promote diversity among its teaching staff must begin with the recognition, as noted in its moving papers, that the District already employs Hispanic teachers at a rate nearly **four times** the national average, **double** the Arizona average, and roughly **equivalent** to the percentage Hispanic population in the Tucson area. The District employs African American teachers at a rate approximately equal to the state average and the percentage African American population. [ECF 2406, p. 21.] The District is also better than state averages for administrators: this year, African American administrators comprise 11.6 percent of the District total, while the average for the state is only 5.9 percent, and African Americans make up only about 4 percent of the Tucson area general population; Hispanic administrators comprise 38.7 percent of the District total, while the average for the state is only 31.4 percent. [ECF 2329-1, p. 91.]

Second, the District cannot simply assign teachers from one school to another. Teachers apply to teach at a particular school, and if the District were to attempt to assign a teacher to a school at which the teacher did not wish to teach, other surrounding districts would be happy to take the teacher. The District can only incentivize or persuade teachers to transfer to a school at which the teacher will improve the diversity of the teaching staff.

Given the national shortage of teachers, the realities of the market, and the many other factors outside the District's control, though the District aspires to meet the 15%

[11] The Mendoza Plaintiffs objected to the plans and the addendum [ECF 2340 and 2341], and they effectively incorporated by reference those objections into their response to the Supplemental Petition. [ECF 2439, p. 16]. The District filed responses to those objections [ECF 2353 and 2326], which are hereby also incorporated by reference in this Reply.

rule,[12] neither the USP nor the Diversity Plans contain a required result for termination of court intervention; indeed, as discussed above, it would be contrary to desegregation law to require any particular outcome as a condition for termination of court supervision.

Finally, the District does not and cannot "assign" or "place" first-year teachers at one or another particular school. When filling vacancies at a racially concentrated or underperforming school, the District is entirely dependent on who applies for the vacant position. When a first-year teacher is hired at a racially concentrated or underperforming school, it is only because there were no other qualified applicants with more experience: either the District accepts the first-year teacher, or the position remains vacant. Thus, the District is not "out of compliance" because some particular percentage of its first-year teachers are at racially concentrated or underperforming schools. Again, neither the USP nor the first -ear teacher plans contain any required percentage, nor could there properly be any.

The District's efforts to persuade and incent teachers to transfer to different schools to improve diversity is not some recent creation. The District has had a formal incentive plan since 2016, and since then the District has been able to persuade more than 100 teachers to transfer schools and improve diversity.

The District had focused on "within-school" diversity for teachers because the ability to affect "within-school" diversity for administrators is quite limited. Of the District's 85 schools, 55 have only one administrator, so "within-school" diversity of administrative staff is not possible. Of the 30 schools with more than one administrator in SY2019-20, only seven had teams that were not diverse. All of those schools were

[12] The 15% rule, somewhat simplified, is that each school's minority teaching staff departs no more than 15 percentage points from the average percentage of all teachers in each race or ethnic group at any given school level in the District.

within one administrator of complying with the 15% rule. Thus, only a few schools within the District are affected by an administrator incentive plan.

Finally, there simply is no constitutional dimension requiring continued federal court intervention in this area: there is no independent constitutional requirement to balance diversity of teaching and administrative staffs across the District, and there is no independent constitutional requirement prohibiting first-year teachers at any particular school. There is no vestige of the pre-1951 dual elementary school system that these measures are designed to ameliorate. For these reasons, the arguments advanced by the Mendoza Plaintiffs are insufficient as a matter of law to stand in the way of ending federal court intervention and returning the District to its locally-elected officials.

3. Quality of Education.

The Mendoza Plaintiffs list three reasons why they think the District should not be declared unitary regarding quality of education issues. First, they argue the District cannot be declared unitary because African American and Latino students do not participate in some ALEs in percentages that are within 15% of their relative enrollment in the District (the "15% Rule"). [ECF 2439, pp. 20-23.] Second, they argue the District has not sufficiently increased African American and Latino enrollment at University High School ("UHS"). [ECF 2439, pp. 23-25.] Finally, they argue the District's dual language ("DL") program cannot be declared unitary because there have been low scores for some students and because the two-way dual language ("TWDL") classrooms do not have a perfect balance of students who speak English, Spanish, or are bilingual. [ECF 2439, pp. 25-26.] Neither the USP nor the Constitution require parity or any similar numeric goal for the District to be declared unitary. As demonstrated below, none of these arguments provide

legal, constitutional justification for retaining Court supervision over the District's operations.

a. Participation in Advanced Learning Experiences.

The Mendoza Plaintiffs argue the District should not be declared unitary because African American and Latino students do not satisfy the 15% Rule for all ALEs. Although the Court has previously stated that it would "consider" the 15% Rule [ECF 2084, pp. 18-19], the Court never said that the 15% benchmark was determinative of unitary status. In fact, it has stated precisely the opposite — that it would only serve as an "indicator" of "possible discrimination." And even through the microscope under which this District has been operating for several years, there has not been any indication of actual discrimination. If the participation disparity indicates the need for a further look, that further look has revealed no discrimination by the District or even an allegation thereof. Thus, the remaining disparity is attributable to factors other than discrimination by the District, and it cannot serve as a bar to unitary status. Moreover, the 15% standard cannot be determinative of unitary status when there is no evidence that there is a single school district in the country that satisfies the 15% Rule in every possible ALE. The District is aware of none.

Indeed, a school District's inability to create racial balance despite significant efforts and no evidence of discrimination is not indicative of a lack of good faith, but instead evidences outside forces that cannot properly be attributed to the school district's prior discriminatory acts. *See Everett v. Pitt Cty. Bd. Of Ed.*, 788 F.3d 132, 147 (4th Cir. 2015) ("While the Board was under no duty to implement intensive desegregation efforts given that many of the remaining racially identifiable schools were a consequence of demographic shifts within Greenville, ***its failed efforts at bringing greater racial balance***

to Greenville City schools illustrate that any remaining segregation in the school district is a consequence of outside forces that cannot properly be attributed to the Board's prior discriminatory acts." (emphasis added)); *cf. Jenkins,* 515 U.S. at 102 (to require a remedy, inferior student achievement must be proven to have resulted from *de jure* segregation); *see also Keyes*, 902 F. Supp. at 1282 ("The Court's opinion in . . . *Jenkins* . . . defeats the plaintiffs' call for compelling additional action to investigate and redress racial disparities in student achievement . . . [when the] court has never made any findings that such differences are the result of discrimination by the District.").

To be sure, as found by Judge Frey, differences in academic achievement between different ethnicities are "a common finding in school districts throughout the United States," are "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." [ECF 345, pp. 166-67.] As the Supreme Court has declared, 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).[13]

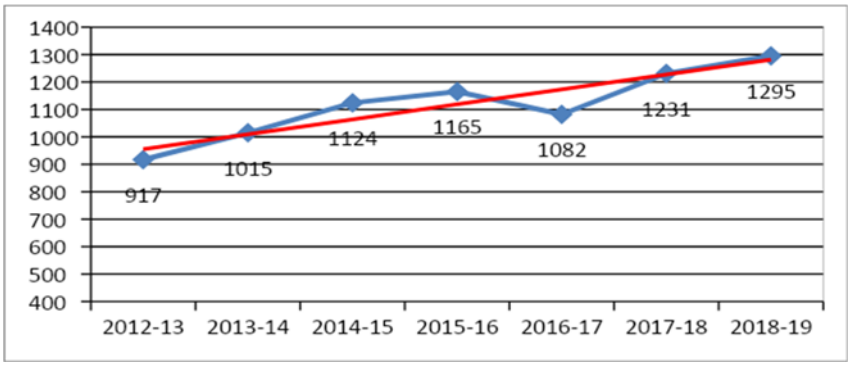
In any event, the Special Master's R&R recognized the ***success*** the District has achieved in increasing access to and participation in ALE programs: "It seems worth noting that between 2012-13 and 2018-19, the numbers of African American students participating in ALE has increased 41% and the number of Latino students has increased

[13] Stated differently, the good-faith standard tests the District's actions — not the results of the District's actions. There have been no allegations, let alone proof, of actual, specific discriminatory actions by the District.

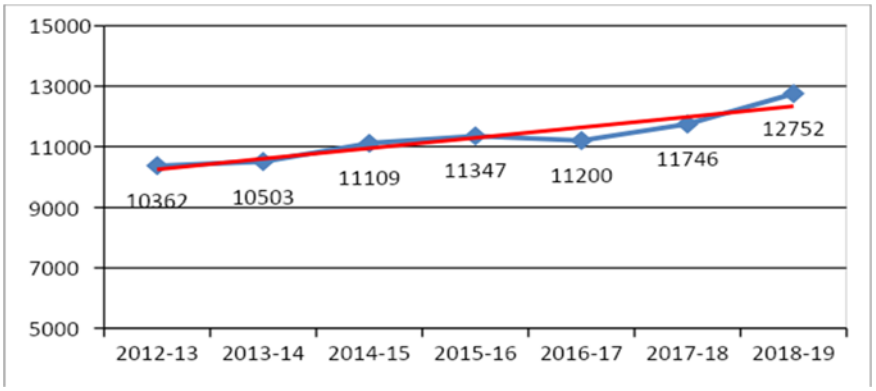
23%. For both racial groups, the sharpest rise in participation occurred over the last two years after a drop in enrollment . . . .” [ECF 2376, p. 2.]

Indeed, the District’s African American and Latino 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, as shown below:

Number of African American Students Participating in ALEs with Trend Line



Number of Hispanic Students Participating in ALEs with Trend Line



In addition to these overall increases in ALE participation by African American

and Hispanic students, the District has shown significant improvements in the number and/or percentages of African American and Hispanic student in nearly every ALE offered. [ECF 2267-2, p. 5.] The District provided detailed reports on these improvements throughout its Progress Report on Advanced Learning Experiences. [ECF 2267-2.]

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[s] of the USP dealing with ALE" once the District initiated implementation of five specific policies. [ECF 2376, p. 8.]

The Special Master recommended that the District initiate programs to: (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, even if it means they appear in more than one type of document.

As reported in detail in the District's Notice of Compliance [ECF 2424], the District has complied with all five recommendations.[14] Indeed, the Mendoza Plaintiffs have not lodged any complaints as to the District's initiation of implementing these five policies as recommended by the Special Master.

Moreover, neither the Mendoza Plaintiffs nor anyone else have come forth with

[14] The District: (1) has made dual language classes available at all District high schools, and those classes continue to increase [ECF 2424, p. 3]; (2) has increased AP offerings at Santa Rita high school in both 2017-18 and 2018-19, and it continues to work with the ALE Department to increase its offerings and provide AP opportunities [ECF 2424, p. 4]; (3) has planned to pilot an opt-out self-contained GATE program at two schools in SY 2020-21 [ECF 2424, p. 4]; (4) has not restricted its policies and practices for limiting ALE attrition to African American students, but rather has made such policies applicable for all students [ECF 2424, p. 4]; and (5) has included all ALE policies in the ALE Policy Manual. [ECF 2424, pp. 4-5].

evidence that the District is discouraging African American students from enrolling in ALEs, or that the District is offering ALEs only at predominantly white schools (of which the District has none). Indeed, the District has been on the cutting edge of creating and offering ALE classes and programs that create significantly more opportunities for African American and Hispanic students to participate in ALEs. For example, as the Mendoza Plaintiffs admit, TUSD's cluster GATE classes have drastically increased GATE participation among African American and Hispanic students. GATE participation among African American students went from 5% to 13% from 2014-15 to 2019-20, and participation among Hispanic students increased from 7% to 13% in that same time frame. Additionally, the increased number of ALEs available in an ever-increasing number of schools demonstrates not only that the District is not discriminating, but that it is in the vanguard of districts that utilize innovative strategies to improve the academic achievement of its African American and Hispanic Students. [*See* ECF 2406, pp. 50-52.] As shown in the District's Supplemental Petition, these efforts have resulted in the District's achievement gap being among the lowest in the state, when compared with comparable districts. [ECF 2406, p. 53.] The District is entitled to a declaration of unitary status in relation to its ALE program.

b. University High School.

The Mendoza Plaintiffs' second objection to unitary status for the District's quality of education programs is that the District has not "satisfactorily" integrated UHS. [ECF 2439, p. 23.] Not only do the Mendoza Plaintiffs fail to articulate what level of integration would be "satisfactory" to them, they fail to acknowledge the District's significant and innovative efforts to integrate UHS and the substantial success the District has achieved based on those efforts. In addition to being ranked as a top college prep school by the

U.S. News and World Report, UHS is one of the most diverse exam schools in the nation.

Demographic student data from seven of the highest-rated exam schools in the country, as compared to UHS, shows the strong diversity of the UHS population when compared to other similar schools:

Student Demographic Data: SY 2019-20						
School[15]	**White**	**African Am.**	**Hisp.**	**Asian**	**Multi-Racial**	**Other**
Thomas Jefferson	21%	2%	2%	70%		
Talented and Gifted	37%	8%	38%	13%	3%	
Brooklyn Latin	13%	12%	12%	54%		8%
Brooklyn Tech	22%	7%	7%	61%	2%	1%
Stuyvesant	19%	1%	3%	74%	4%	
Boston Latin	47%	8%	12%	30%	3%	
Bergen Academies	38%	3%	8%	51%		1%

UHS Student Demographic Data: 2017 - 2020					
School Year	**White**	**African Am.**	**Hispanic**	**Asian**	**Multi-Racial**
2017-18	46%	3%	35%	11%	5%
2018-19	44%	3%	35%	7%	4%
2019-20	45%	4%	34%	12%	5%

Indeed, UHS qualifies for the designation of highly diverse because two groups of students, Hispanic and White, are each more than 25%. Of the seven comparable schools shown above, only one other enrolls at least 25% Hispanic students, and the next highest enrolls only 12%. The District falls toward the middle of the pack in percentages of African American students at UHS, which itself is impressive because the percentage of African American people in Tucson is far below the percentages in Dallas, Brooklyn,

[15] Thomas Jefferson High School for Science and Technology, Fairfax County Public Schools, Fairfax, VA; School for the Talented and Gifted, Dallas School District, Dallas, TX; The Brooklyn Latin School, NYC Geographic District #14 School District, Brooklyn NY; Brooklyn Technical High School, NYC Geographic District #13 School District, Brooklyn, NY; Stuyvesant High School, NYC Geographic District #2 School District, NYC; Boston Latin School, Boston Public School, Boston, MA; Bergen County Academies, Bergen County Vocational Technical School District, Hackensack, NJ.

Boston, and Fairfax. [ECF 2406, p. 55.]

The Mendoza Plaintiffs complain because the District includes numbers of Asian and Multi-Racial students to show its success in increasing integration at UHS, but they do not articulate how including these numbers takes away from the significant participation of African American and Hispanic students at UHS.[16] Nor, importantly, do they complain that the District is actually discriminating against African American or Hispanic students in UHS admissions. Indeed, there is not a single allegation of actual discrimination anywhere in the Mendoza Plaintiffs' Response, including in regards to quality of education or UHS. Although the District will continue its extensive efforts to increase integration at UHS, including specifically for African American and Hispanic students, the efforts and results over the last several years, combined with no specific proof or even allegations of discrimination, indicate that the District is unitary in its administration of UHS.

c. Dual Language.

The Mendoza Plaintiffs' third and final quality of education complaint is that the District's dual language (DL) program should not be declared unitary because (1) the District has not achieved a perfect linguistic balance in its DL classrooms and (2) there are "reports of low test scores for TWDL students." [ECF 2439, p. 26.]

i. <u>Linguistic Balance.</u>

As the Mendoza Plaintiffs are well aware, and as has been explained previously, [*e.g.*, ECF 2417, pp. 3-5], Arizona laws requiring four hours of English instruction for

[16] USP §V.A.5, subsection (a) requires the District to revise UHS admission processes and procedures so that "***all students*** have an equitable opportunity to enroll at University High School"; it is not limited to African American and Latino students. Likewise, subsection (b) requires the District to administer "the appropriate UHS admission test(s) for ***all 7th grade students.***"

ELs (and related guidelines from the Arizona Department of Education) have been the primary obstacle to achieving linguistically-balanced classrooms and to improving Spanish achievement, because both rely on the ability to place native Spanish-speaking ELs in Two-Way Dual Language ("TWDL") classes in grades K-1.

In Arizona, TUSD is a recognized leader in the area of dual-language education and its accomplishments despite state law obstacles have been well-documented. [*See, e.g.,* ECF 2401.] As reported by renowned expert Ms. Rosa Molina, Arizona law ***"severely restric[ted] the development of viable TWDL programs by not allowing Native Spanish speakers access to the TWDL classrooms."*** [ECF 2401-1 at 19]. She noted the District's efforts in 2017-18 to propose "an alternate model for the TWDL program to linguistically balance their TWDL classrooms" to the State Board of Education [ECF 2401-3, p. 3], followed by efforts in 2018-19 to work with the Arizona Department of Education (ADE) "regarding the use of an alternative assessment to qualify kindergarteners for a Bilingual Waiver Type 1." [*Id.*] The resulting collaboration with ADE led to relaxed regulations allowing "TUSD to include more Spanish-speaking students to enter the TWDL program at the primary level" for SY2019-20 [*id.*] — close to 100 students.

Throughout SY2018-19 and into the current school year, TUSD staff served on the ADE subcommittee charged with developing procedures to operationalize SB1014, a proposal passed in 2018 that would allow more native Spanish-speaking ELs to participate in dual-language programs. TUSD staff is also playing an instrumental role in advocating for a proposal to repeal the mandated four-hour block (Proposition 203) and allow Arizona school districts to offer dual language immersion programs for ELs. If passed, ELs could participate fully in TWDL programs in TUSD and statewide without

having to first qualify for a waiver. TUSD's Language Acquisition staff members are at the forefront of this effort and were specifically requested to provide expert testimony to state legislators in January 2020, in the House Education Committee. [ECF 2417, p. 5.]

All of the above-cited efforts were designed and implemented toward creating the conditions necessary for linguistically-balanced classrooms to thrive, and for TWDL students to achieve at high levels in both languages. None of these efforts are discussed in the Mendoza Plaintiffs' response. The District has faithfully executed its USP and Court-ordered obligations to build and expand its dual language program to the greatest extent practicable, given prior and existing state law obstacles, and should be awarded unitary status in this area.

Just as the District led the way in Arizona by working with the Arizona Legislature to allow school desegregation and by thereafter desegregating, the District has been working to persuade the Arizona Legislature to modify state requirements that hamper DL efforts in Arizona schools and to create a program that leads the way in educating District students. Ironically, the Mendoza Plaintiffs want to penalize the District for actions that are not only beyond the District's control (similar to pre-1951 segregation requirements) but against which the District has fought so that it can provide a better education to its students, and especially its Hispanic students.

The Mendoza Plaintiffs and their expert Dr. Beatrice Arias are well aware of these Arizona-specific challenges to reaching the ideal linguistic balance. Dr. Arias published a paper in 2015 that recognized that Arizona's state law restricted the ability of Arizona school districts to reach the desired linguistic balance.[17] Despite Dr. Arias's publications

[17] Available at https://www.amacad.org/sites/default/fils/academy/multimedia/pdfs/CAL-AAASWhitePaper-LanguagePotentialAmericans.pdf. This paper follows from an entire book devoted to this topic written by Dr. Arias. *See* 5 Arias, M. Beatriz, and

about the statutory limitations prohibiting linguistically-balanced classrooms in Arizona, her report is virtually silent on such limitations as applied to the District's efforts to linguistically balance its classrooms with native Spanish-speaking ELs.

The District's plans and efforts to increase linguistic balance are working. The District has advocated for changes in state laws and regulations, developed systems (through professional learning, a TWDL framework, school handbooks, curriculum in both languages, etc.) and has enacted policies (applications for ADE waivers and screeners) to facilitate the requisite linguistic balance in TWDL classrooms.

In SY2018-19, using the alternate assessment to enroll students for SY2019-20, TUSD qualified and enrolled an additional **92** native Spanish-speaking ELs into its TWDL programs. The TWDL Inventory identified **four K-1 TWDL classrooms** that had reached the 33% linguistic balance. [ECF 2401-2, pp. 13-16]. These four classrooms enrolled only a fraction of the total **92 students** enrolled through TUSD efforts in all 30 of its TWDL K-1 classrooms.

The District achieved a proportion of native Spanish-speaking ELs or bilingual students between 20% and 32% in an **additional 15 classrooms**. These 15 classrooms were all 1-3 students from meeting the 33% linguistic balance. Though they did not reach that ideal proportion, they did increase linguistic balance that serves to provide TWDL students with peer-to-peer learning, which increases English and Spanish proficiency and academic achievement for all TWDL students in a total of 30 TWDL K-1 classrooms.

In a single year, the District has significantly increased linguistic balance in almost two-thirds of its TWDL K-1 classrooms (19 of 30 classrooms). As described in its

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Christian Faltis, "Implementing Educational Language Policy in Arizona: Legal, Historical and Current Practices in SEI" (Bristol: Multilingual Matters, 2012).

Supplemental Report, the District is currently implementing strategies to further increase such linguistic balance for SY2020-21. There is zero risk that after advocating for the past four years with ADE, the State Board of Education, and the State Legislature to enroll ELs in its TWDL programs in order to obtain the requisite linguistic balance, the District will suddenly change course and fail to continue to implement its plans to obtain such balance in all of its TWDL classrooms now that state obstacles have been removed or mitigated. The District's DL program is not only unitary, it is exemplary.

ii. Efforts to improve Spanish proficiency and achievement.

As with linguistic balancing, Ms. Molina has long recognized that the primary obstacle to improving Spanish proficiency in the District's TWDL program has been state laws restricting access for native Spanish speakers, which negatively impacts Spanish language learning for both native Spanish and native English speakers:

> The end result of following this statute is that TWDL programs serve only English-speaking (ESS) students and the Native Speakers (NSS) of the target language are not able to access these programs during the early and critical stage of literacy development (K-2nd). These programs become closer to One-Way Immersion programs that are designed to serve English speakers exclusively and not Two-Way Dual Language programs that benefit both groups of students. It is important to note that the full implementation of Proposition 203 has been problematic throughout the state.

[TWDL Plan, ECF 2401-1, p. 19.]

TUSD has also implemented other efforts to improve Spanish language attainment and academic achievement in Spanish, as is evident in its Plan and in Ms. Molina's Supplemental Report. Beyond developing and implementing a TWDL Plan and Framework and school-level TWDL handbooks, the District has done the following:

- Enacted an annual cycle of professional learning for TWDL teachers [ECF 2401-3, p. 5];

- Implemented academic assessments in both English and Spanish [*Id.*, p. 7]; and
- Developed and implemented a new Spanish Language Arts (SLA) curriculum. [*Id.*, p. 9.]

The USP speaks only of a dual language program, and neither the USP nor the Constitution require the District to operate a TWDL program, let alone the perfect implementation of the ideal TWDL program. TWDL is just one avenue of achieving bilingual education. This is not, and cannot constitutionally be, a bar to unitary status. DL programs are programs in aid of Hispanic education. As indicated above, the achievement gap with respect to Hispanic students is smaller than gaps in other Districts, and smaller than state and national averages.

The Mendoza request to deny unitary status is without merit, given that the record reflects the District's exemplary efforts in support of its successful TWDL program. Now that the primary obstacle, linguistic balancing, has been mitigated, there is *zero risk* that the District will fail to continue to improve Spanish language proficiency and academic achievement for TWDL students. There are no factual or legal reasons to deny the District a declaration of unitary status in its DL programs.

4. Discipline.

The Mendoza Plaintiffs object to the District being declared unitary in the area of discipline for two reasons: (1) they allege the District's data is incomplete and unverifiable; and (2) they argue the District cannot be unitary because data in some discipline categories showed one single-year increase.[18] As discussed below, these same

[18] The Mendoza Plaintiffs also argue the District cannot be unitary in Discipline because the Court has not ruled on the District's notice of compliance and the Mendoza Plaintiffs' and Special Master's responses and recommendations thereto. The issues therein are fully briefed, the Special Master has addressed all objections, the District has responded to

rehashed arguments of "we need more information" and "you're not doing enough" are both incorrect and insufficient factually and legally to deny a declaration of unitary status.

a. The District's data is complete and verifiable.

The Mendoza Plaintiffs' argument that the District's discipline data is not complete or verifiable is utterly without merit, and it does not become meritorious simply because they keep repeating it. The Mendoza Plaintiffs are well aware of where the District's data is reported and what it means — the District has reported and explained its data numerous times. [*See, e.g.*, ECF 2427-1, pp. 6-12; ECF 2325, pp. 3-8.] They have not provided one shred of evidence (other than their own repeated allegations) that the discipline data is unreliable. They have not provided evidence of a single instance of disciplinary consequences not being reported. No one has come forward and said "X student was suspended and it was not input into the discipline system" or "Y student was suspended for 10 days and it was recorded as two" or "Z student was suspended for assault but it was recorded in the system as disorderly conduct." These unsupported allegations cannot justify retention of jurisdiction over the District, particularly in light of the District's repeated explanations and steady improvement.

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each of the Special Master's recommendations (adopting and implementing them) [ECF 2427 and ECF 2437], and the Mendoza Plaintiffs have responded [ECF 2431]. Nothing in that briefing counsels against unitary status; instead, it supports a declaration of unitary status. The District also incorporates herein its Notices of Compliance re: Discipline [ECF 2266] and Inclusivity [ECF 2328], as well as its responses to the Mendoza Plaintiffs' objections [ECF 2325, ECF 2354, 2354-1, and 2354-2]. In its October 31, 2019 reply to the Mendoza Plaintiffs' second round of objections [ECF 2280], the District addressed the issue of collaboration with Dr. Hawley with evidence of calendar invites and emails showing collaboration. [Reply to Mendoza Objections, ECF 2354; *see also* ECF 2354-1 and 2354-2]. The subsequent R&R from Dr. Hawley acknowledged that collaboration did in fact occur, even detailing specific advice he provided to the District. [SM R&R re Inclusivity and Civility, ECF 2377, 11/25/19.] Notably, the Special Master in his R&R ***"recommend[ed] that the District be given partial unitary status for its work on inclusivity and the development and enhancement of civil behaviors and culture."*** [*Id.*]

The District has consistently reported the discipline data required by the USP, originally defined as Appendix I and now referred to as VI.G.1.b Discipline data. Disciplinary consequences, defined by category — in-school discipline, in-school suspensions, short-term suspensions, and long-term suspensions — have been consistently reported over time. Following research-based best practices in pursuit of USP goals, the District created and expanded positive alternatives to suspension, In-School-Interventions (ISI), and District Alternative Education Program (DAEP). The District added these categories (ISI and DAEP) into the report starting in 2016-17. [2019-20 DAR, Appendix VI-29, ECF 2305-4, pp. 32-38.]

With the implementation of ISI and DAEP, the students who receive these alternative forms of discipline are tracked separately for the purpose of best serving them, though the numbers are still reported to the Court and the parties each year in the annual report. The data is provided in a single location to allow readers to combine and analyze these numbers as desired. In fact, for the charts provided with the District's last two annual reports, these numbers are provided both ways — separately and combined. [ECF 2133-3, pp. 8-9; ECF 2305-4, pp. 36-38.] Indeed, the Mendoza Plaintiffs have created their own charts in support of their arguments, based on the District's consistent and regular reporting.

Not only is this data regularly and accurately reported, the process for how the District monitors and produces this data has been regularly and accurately reported. [*See* ECF 2298-1, pp. 153-156.] The District even created a new Student Relations department to oversee the completeness and accuracy of reporting. Student Relations engages in multiple trainings with school leadership and staff to ensure sites are reporting data correctly and inputting information accurately. Student Relations also continues to meet

with the Department of Justice to review reporting on individual aggression incidents, to ensure quality control and complete, accurate reporting. Student Relations meets with all school discipline teams to ensure accuracy in data input, and it analyzes site data reports and compares them to Synergy and Clarity data. Student Relations then notes any discrepancies and communicates back to individual sites to make corrections.

Student Relations also uses the following processes to assess the completeness of discipline reporting and data:

- All schools submit a monthly discipline report.
- SR analyzes discipline reports, checking for accuracy to identify discrepancies.
- SR sends a discipline report twice a week to all schools.
- All schools are required to call SR prior to any exclusionary discipline.
- All aggression dispositions are reviewed and checked for accuracy. Schools that submit incorrect dispositions are notified, and additional training is provided to the site administration.
- SR meets with each school's Discipline Committee. School referrals are checked and discipline data reviewed.
- ISI/PIC data are reviewed to ensure students are being sent to ISI in an equitable fashion. Teachers who have disproportionate numbers of ISI referrals are noted, and the schools provide additional training and support as needed.
- The Compliance Liaison reviews discipline data bi-weekly. Discrepancies are returned to the sites for correction, and Assistant Regional Superintendents are notified when necessary.

These processes were reported in detail in the 2018-19 DAR in section VI(D) Discipline Data Monitoring. [ECF 2298-1, pp. 153-156.]

It is impossible that the Mendoza Plaintiffs are ignorant of where and how the District reports and reviews discipline data. The Mendoza Plaintiffs fully understand that the District does not simply report information in different appendices and tell the Special Master and Plaintiffs to "figure it out." [ECF 2431, p.8.] Plaintiffs need look no further than ECF 2427-1, which includes (again) specific tables, charts, and descriptions of locations of various data points. And, contrary to the Mendoza Plaintiffs' feigned unawareness regarding the District reporting discipline data broken down by number and disciplinary incidents, the District provided this information at ECF 2325, p.5.

Moreover, their arguments that the District did not respond to their RFIs are belied by their provision of the District's RFI responses. [ECF 2439-1, pp. 27-32.] A review of their own exhibit makes clear that the District responded to each of their questions. Just because the Mendoza Plaintiffs want to dispute the District's answer does not mean that the District did not answer.

Additionally, the argument that the District does not define which disciplinary consequences are included in the term "discipline" is also wrong, as the District explained (as is included in the Mendoza Plaintiffs' own exhibit) that "data used in VI-22 for discipline are unique student counts across all disposition types." [ECF 2439-1, p. 27.] As stated above, these include in-school discipline, in-school suspensions, and short- and long-term suspensions. And their argument that the District does not "provide Mendoza Plaintiffs with an understanding as to how TUSD calculated" the "dramatically reduced likelihood ratio" is likewise flat wrong. The District's RFI response points the Mendoza Plaintiffs to Exhibit VI-22 to the District's annual report [ECF 2305-3, pp. 49-52], which thoroughly explains the data and process for arriving at the likelihood ratio. [ECF 2439-

1, p. 28.][19] The Mendoza Plaintiffs have all discipline data, as well as an explanation of how it was produced. Their arguments to the contrary are without merit and are insufficient to deny the District a declaration of unitary status.

b. Fluctuations in discipline data do not justify retaining court supervision.

The Mendoza Plaintiffs argue the District cannot be declared unitary because there was an increase in discipline in some of the many categories reported by the District. This is not, and cannot be, the standard for being declared unitary. If it were, federal courts would spend all of their time running school districts because every school district in the country has fluctuations in its discipline data every year.

The District reports, and the Special Master acknowledges, that the overall discipline trends are positive. Indeed, as shown in the table below, the District also saw a decrease in the number of students: with at least one in-school discipline incident, with an in-school suspension, with an in-school intervention, or with a long-term suspension. The only exception to these trends occurred in the number of students with at least one short-term suspension. [2018-19 DAR Appendix VI-29, ECF 2305-4].

Discipline Disposition	**2016-17**	**2018-19**
In School Discipline	4151	3250
In School Suspension/Intervention	2453	1410
Long-term Suspension	149	126
Short-term Suspension	2,104	2,366[20]

[19] *See also* 2016-17 DAR, ECF 2057-1, p. 356 & n.106 (describing a "P-Index" and providing a citation to a textbook describing the "Students Suspended Index," which is the equivalent to the P-Index), p. 357 & n.109 (describing that the "likelihood ratio" compares the "p-index for both African American and white students" and explaining precisely how it is calculated: "The likelihood ratio is a measure of the relationship between two groups and is calculated by dividing the p-index of one group by another. A likelihood ratio of zero occurs when the p-index is one." This **same information** was again provided in the 2017-18 DAR, *see* ECF 2133-2, pp. 4-6.

[20] Excludes short term suspensions related to DAEP. [ECF 2305-4.]

The District acknowledges that the number of students receiving a short-term suspension increased between 2016-17 and 2018-19. In 2016-17, there were 2104 students with a short-term suspension. This increased to 2366 in 2018-19. Indeed, the District reported this increase and discussed reasons for it in its annual report. [ECF 2298-1, p. 157.] The Mendoza Plaintiffs cite that report for evidence that short-term suspensions increased, but they completely ignore the District's explanation, saying such an explanation is "noticeably missing," as if the District has not explained the increase.

Moreover, the District has explained that the SY 2018-2019 increases in short-term suspensions (and repeat offenses) were based on two key factors: (1) the District changed its Code of Conduct to reduce the number of days students are suspended from school by reducing the number of violations that result in automatic long-term suspensions; and (2) the number of drug- and tobacco-related vaping incidents significantly increased in Tucson (as well as in the rest of the country).

The increase in short-term suspensions was due in large part to a change in the Code of Conduct with respect to drugs and alcohol and fighting, eliminating some long-term suspensions and replacing them with short-term suspensions and the option to receive interventions to treat the root of the problem. The new approach provides formal discipline in the form of drug/alcohol workshops or fighting mediation to attempt to address the root cause of the behavior after a mandatory one-day suspension. Accordingly, more students received formal disciplinary action in 2018-19, as students received a one-day suspension if they agreed to participate in the workshops or mediations. More than 900 students received a one-day suspension and participated in workshops or mediations related to fighting and drug/ alcohol violations.

There are two primary ways to measure exclusionary discipline: (1) number of suspensions; and (2) number of days suspended from school. The more important of these is the number of days suspended from school, which tracks more closely the amount of time students spend outside of the regular academic environment. Thus, while at times the number of suspensions may increase temporarily, the number of days spent outside of the classroom is steadily decreasing. Moreover, these research-based best practices not only reduce the number of days students spend outside of the classroom, they also combine consequences with workshops and mediations that help the students make changes to enhance academic opportunities and reduce discipline — a goal of the USP.

Another reason for the increase in short-term suspensions was the significant increase in drug and tobacco violations involving vaping, which occurred in Tucson and across the nation. In 2016-17, there were 22 tobacco and 6 drug violations involving vaping, compared to 113 tobacco violations and 252 drug violations involving vaping in 2018-19. The District's Code of Conduct changes, discussed above, are designed to address this specific issue, eliminating suspensions of 10 days or more for some of these violations and replacing them with short-term suspensions and treatment options aimed to help students overcome the issues leading to the violations.

The District has provided all relevant data to the plaintiffs and the Special Master and has explained fluctuations in data. There are no factual or legal justifications for denying the District unitary status in the area of discipline.

5. Family and Community Engagement.

The Mendoza Plaintiffs raise three criticisms concerning the District's Family and Community Engagement ("FACE"), all of which disregard the District's good faith efforts to comply with the Court's directives and the previously filed pleadings detailing

such efforts. The District has addressed all of the Mendoza Plaintiffs' criticisms in multiple prior filings, as cited in the Supplemental Petition. Nevertheless, the District again addresses these criticisms, for the Court's ease of reference.

a. Site-Level Engagement Guidelines and Strategies.

First, the Mendoza Plaintiffs argue that the District fails to "engage in any discussion of the 'implementation and effectiveness' of site-level engagement guidelines and strategies," despite the District doing so in numerous filings. [*See, e.g.*, ECF 2391-1, pp. 3-7, Ex. 1.] The District's FACE efforts can be grouped into two broad categories: individual school-based activities, and activities undertaken by central District staff. Each category, and its emphasis on site-level engagement, is described below.

i. <u>School-Based Activities.</u>

The Guidelines for Family and Community Engagement at School Sites ("Guidelines") [ECF 2391-1, Ex. A] describe: (a) the specific activities expected at each site, (b) the roles and responsibilities of those involved, and (c) the reporting requirements to track implementation and enable analysis and accountability. The Guidelines were developed by the District's central Family and Community Engagement Department, in conjunction with Dr. Joyce Epstein[21] and the National Network of Partnership Schools.

Underlying the Guidelines and all school-based activities is the central concept of two-way communications, in which school staff learn from parents and parents learn from school staff. These two-way communication activities include opportunities for a school to share written information with families, families to share written information with the school, and meetings where the school and families engage in conversations so that

[21] Dr. Epstein is a Professor at Johns Hopkins University; Director, Center on School, Family, and Community Partnerships; Director, National Network of Partnership Schools (NNPS); and Co-Director/Directorship Team-CSOS.

families and school staff learn from each other. Additionally, the guidelines provide multiple opportunities for professional development to help school staff engage in best practices to facilitate two-way communication.

ii. Central District Activities.

Planning and Coordination. The FACE Department provides overall planning and coordination for the District's family and community engagement activities, together with an annual assessment of their effectiveness. [*See* ECF 2391-1, p. 7 for greater detail.]

Training and Instruction. FACE Department staff provide annual training and instruction to school site and other District staff on family engagement best practices and activities, again focusing on two-way communication and Dr. Epstein's Six Types of Involvement. [*See* ECF 2391-1, pp. 7-8 for greater detail.]

One such example is that all school site administrators and certified staff receive annual online training on effective two-way communication through conferencing. This training provides protocols for conferencing that facilitate two-way conversation, guidance in how to create an atmosphere where parents are comfortable to share ideas, planning for conversations that encourage parents to share, providing opportunities for parents to choose topics they would like to discuss, and offering information to parents to help them prepare to make good use of their conferencing opportunities.

Support and Monitoring for School-Based Activities. FACE Department staff are responsible for support and monitoring of family engagement activities at school sites, to ensure that school sites are implementing the Guidelines. Monitoring and support includes review of monthly reports, review of data input into the District's family engagement participation tracking system, reviewing school websites, remedial training and instruction where needed, and fostering collaboration across schools in family

engagement activities. FACE department staff regularly inform regional assistant superintendents about the compliance of each school within the region.

FACE staff, with the advisement of Dr. Epstein, will work with school site staff and other District departments to expand on the parent involvement and leadership training already taking place, and will develop training to help parents successfully participate in school life and decision-making, with a particular focus on the needs of various immigrant groups. [*See* ECF 2391-1, pp. 8-9 for greater detail.]

Family Resource Centers. FACE Department staff operate the District's four Family Resource Centers, which provide a broad range of family educational opportunities in support of students' learning. Many other departments host events and workshops at the Family Resource Centers. A representative calendar of events for these activities, showing the nature and breadth of these activities, was previously submitted at ECF 2391-1. The FACE department also operates the District's clothing bank at the Duffy Center, as well as the McKinney-Vento office, which provides administrative support and services for homeless students eligible under the McKinney-Vento Act. [*See* ECF 2391-1, pp. 10-12 for greater detail.]

iii. Staffing and Accountability.

School-Based Activities. Primary responsibility for implementing FACE activities at each school lies with the principal. Each school also has either a school community liaison (funded with Title I grant funds) or a designated family engagement contact (paid a stipend from the FACE Department). Principals are held accountable for implementing the Guidelines by the regional assistant superintendent for that school, as well as in annual evaluations of the principal. The regional assistant superintendent is

regularly informed of the status of reports and activities for each school by the FACE department staffer assigned to that school.

FACE Department. The FACE Department has primary responsibility for: (a) supporting, monitoring, and conducting training for school-based family engagement activities; (b) operation of family centers; (c) maintaining relationships with national family engagement organizations and staying abreast of family engagement research and best practices; and (c) supporting the family/community engagement activities of other departments, as needed and requested. [*See* ECF 2391-1, pp. 13-15 for greater detail.]

b. Family Engagement Activities and Efforts.

Second, the Mendoza Plaintiffs argue that the District has not provided a description of family engagement activities, which ignores the District's detailed account of such efforts in pleadings cited to in the Supplemental Petition. [ECF 2391-1, pp. 24-39.] The activities encompass all six areas of Dr. Epstein's Six Types of Family Involvement, as well as staff development designed to encourage family engagement and ensure that parents and other adult caregivers feel welcome and valued as partners in their children's education.

The Guidelines provide opportunities for families to provide written communication of ideas, concerns, and impressions to the schools by providing conferencing feedback surveys, suggestion boxes at the schools, and annual family engagement surveys. The District also provides an "online suggestion box" on all school webpages. Surveys and suggestion boxes are specifically designed to allow families to provide information anonymously, if they so choose, to encourage them to share information they might not be willing to share through other avenues.

The Guidelines provide opportunities for additional two-way communications through: (a) decision making activities such as site councils, family engagement teams, and the parent teacher organization, (b) focus groups, and (c) meetings between school and families (both individual family meetings regarding one student [e.g., parent-teacher conferences] and larger meetings more generally about curriculum and other topics).

School site councils and family engagement teams facilitate two-way communication by ensuring parents, students, administrators, certified staff, classified staff, and community members are represented in decision-making groups. All members of these decision-making bodies have an equal say in sharing ideas, planning, and making decisions for the school.

Focus groups provide opportunities for families to share information and ideas about matters specific to their children's school. Focus groups are facilitated by community members rather than school staff, to help participants feel comfortable in sharing their ideas or concerns. Each school site is required to conduct at least one curricular-focused event per semester. These events facilitate two-way communication by allowing the school to share information about the curriculum and provide strategies for families to support the learning at home, as well as opportunities to engage in direct, curriculum-related conversations with teachers.

There are several conditions that are important for effective two-way communication with families. For example, it is important that families have access to their child's academic and personal information; that families are able to provide teachers with information about their child's development; that information shared with families is culturally understandable and meaningful; and that information is used for positive actions that teachers, families, and school leadership can implement.

A valuable opportunity for two-way communication is the parent-teacher conference. The District's Guidelines state goals for participation in both Fall and Spring conferences, and they provide protocols for specific parent-teacher conferences, described in an online professional development module required for all school administrators and certified staff.

These protocols support two-way communication by describing specific actions teachers and school staff can take before, during, and after conferences to: encourage family participation; communicate to families the value of their participation in conferencing; present opportunities and encourage families to provide input about what they would like to discuss during conference; make the environment comfortable and welcoming to families attending conferences; prepare for discussion that encourages families to share information; present information such as data or student work examples in a manner that families can understand; reach those families who are unable to participate in conferences in a traditional way; and build upon the family-teacher partnership after conferencing. Information provided in this professional development module can be applied to all family-teacher interactions, to encourage two-way communication and develop positive working relationships between family and school which builds student success.

Other opportunities for communication include training on use of the District information systems available to families (e.g., (a) the ParentVUE portal to Synergy, the District's student information system, and (b) Family Computer Kiosks at each school to provide access to ParentVUE and the school's website). Though not explicitly required in the guidelines, schools and families communicate regularly through notes, letters,

email, text message, phone calls, and meetings, as a matter of course giving both school staff and families opportunities to share information with each other.

Training for teachers and school staff on best practices regarding two-way communication is provided each year. Trainings include: Dr. Joyce Epstein's Six Types of Family Involvement, which specifically addresses two-way communication; Culturally Relevant Pedagogy and Instruction, which addresses cultural awareness in communicating with students and families; Parent-Teacher Conferencing, which includes actions teachers can take to facilitate and encourage two-way communication during conferences and other face-to-face interactions; site-based and training about the Guidelines for Family and Community Engagement, which include a definition, rubric, required tasks, and promising practices to encourage and facilitate two-way communication; and training for other school personnel about outreach, parent leadership, focus groups, and promising practices to help schools learn from families.

c. The District's Data-Tracking System.

Third, the Mendoza Plaintiffs argue that the District has failed to demonstrate that it has fully implemented a data-tracking system or that it is making use of such data. School sites across the District engage in activities to facilitate family engagement. As explained previously, in SY2018-19, FACE continued to use paper sign-in sheets and Excel spreadsheets to track site-level family engagement activities. However, during the school year, FACE and Technology Services designed and piloted an electronic school-based tracking system to capture family engagement events and attendance. Site administrators were first introduced to the event-tracking system in March 2019. A major training effort was conducted over the summer.

The tracking system has been fully operational districtwide since the beginning of the current school year last August. The District is using the data to determine which schools need further training and coaching on parent engagement. Schools file monthly reports on FACE activities with the District's FACE Department and use the tracking system and Guidelines to identify and report on family participation in FACE events at each school, enabling assessment of the degree to which those activities are successful in engaging all of the school's constituent communities. At the end of SY2019-20, the District will analyze participation by school by race/ethnicity, to determine which school communities need targeted outreach for greater parent engagement.

As is evident from the above explanations, none of the Mendoza Plaintiffs' objections to FACE have merit. The Mendoza Plaintiffs' criticisms are unsupported in fact, and, beyond that, the Mendoza Plaintiffs seek to apply a standard beyond what is required of the District. The actual standard is good faith. The District has complied with Section VII of the USP in good faith and should be determined unitary in this area.

Conclusion

For the foregoing reasons, and those set out in its moving papers, the District respectfully submits that it is operating in unitary status and has complied in good faith with the Unitary Status Plan. The Court should dissolve the Unitary Status Plan and return control of the District to its lawfully elected local officials.

Dated this 13th day of March, 2020.

Respectfully submitted,
/s/ P. Bruce Converse
P. Bruce Converse
DICKINSON WRIGHT, PLLC
1850 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004-4568
Attorneys for Tucson Unified School District No. 1

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 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