

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

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

12 **UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF ARIZONA**

14 Roy and Josie Fisher, et al.,  
15 **Plaintiffs,**  
16 v.  
17 Tucson Unified School District No. 1, et al.,  
18 **Defendants.**

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

19 Maria Mendoza, et al.,  
20 **Plaintiffs,**  
21 v.  
22 Tucson Unified School District No. 1, et al.,  
**Defendants.**

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

23  
24 **RESPONSE IN OPPOSITION TO**  
25 **FISHER PLAINTIFFS' MOTION FOR SANCTIONS (ECF 2450)**  
26

1 **Introduction and Summary**

2 The motion for sanctions should be denied. The District’s community meeting was  
3 not only proper, it was a commendable example of the community engagement  
4 encouraged by the USP, the African American Academic Achievement Task Force, and  
5 the Trayben Report. Community leaders, not class members, were invited to the open  
6 meeting. Counsel for the Fishers was informed in advance, and declined to participate.  
7 The information presented not only was accurate, but had been publicly reported before.  
8 No effort was made to solicit support for unitary status, but even if so, that would not  
9 have been improper. There was simply no conduct that was improper in any way, and ther  
10 is no basis for any sanctions.

11 **The Relevant Facts**

12 The following facts are established by the Declaration of Gabriel Trujillo, attached  
13 hereto as Exhibit A (“Trujillo Decl.”).

14 1. Since he became Superintendent, Dr. Trujillo has held regular meetings  
15 with counsel for the Fisher Plaintiffs, Rubin Salter, and others Mr. Salter wished to invite.  
16 The purpose of these meetings is to provide a forum for informal discussion of issues, in  
17 the hopes that this would reduce tensions and unnecessary litigation of issues. [Trujillo  
18 Decl., ¶ 2.]

19 2. Separately, the African American Student Services Department of the  
20 District has held regular quarterly parent and community meetings to discuss issues of  
21 interest to the community. These meetings have been reported in District Annual Reports  
22 for several years. [Trujillo Decl., ¶ 3.]

23 3. On August 28, 2019, Dr. Trujillo met with Mr. Salter at the first regular  
24 meeting of the current school year. Dr. Trujillo informed Mr. Salter that the District  
25

1 intended to invite community members to subsequent meetings. Mr. Salter stated that he  
2 might not attend such a meeting. [Trujillo Decl., ¶ 4.]

3 4. On October 30, 2019, the District sent an invitation to Mr. Salter to attend  
4 the second quarterly meeting scheduled for December 11, 2019. After several weeks  
5 passed with no response from Mr. Salter, on November 18, 2019, the District again sent  
6 an email to Mr. Salter regarding his attendance at the second quarterly meeting. On  
7 November 21, 2019, Mr. Salter responded by email that he and “the Fishers” would not  
8 be attending the meeting as he believed that external attendees “would only be a  
9 distraction.” A copy of this email exchange is attached as Exhibit 1 the Trujillo  
10 Declaration. [Trujillo Decl., ¶ 5.]

11 5. A conflict arose for the originally scheduled date for the meeting, and it was  
12 rescheduled to January 30, 2020. In January, 2020, the District sent invitations by email  
13 to over fifty community members for the meeting. The group represented a wide cross-  
14 section of retired educators, community activists, and leaders from various African  
15 American-serving entities including small business owners, University of Arizona staff,  
16 the local chapter of the NAACP, the Tucson Urban League, Dunbar Cultural Center,  
17 Black Women’s Task Force, Black Greek organizations, and retired educators. There was  
18 no effort to target or invite members of the Fisher class. A very few of the invitees may  
19 also have been parents of students enrolled at the District, but that was not a factor in the  
20 decision as to whom to invite.<sup>1</sup> Attendance was not limited to those who were sent an  
21 invitation; anyone showing up for the meeting was able to attend. A list of those to whom  
22 the invitation was sent is attached as Exhibit 2 to the Trujillo Declaration. [Trujillo Decl.,  
23 ¶ 6.]

24 \_\_\_\_\_  
25 <sup>1</sup> The District believes that only four of those in attendance have children enrolled in the District.

1           6.       The purpose of the meeting was to discuss issues of interest to the  
2 community regarding the education of African American students at the District. The  
3 purpose was not in any way to seek support for unitary status. A copy of the invitation is  
4 attached as Exhibit 3 to the Trujillo Declaration, and a copy of the presentation materials  
5 for the meeting is attached as Exhibit 4 to the Trujillo Declaration. [Trujillo Decl., ¶ 7.]

6           7.       The meeting was held as scheduled on January 30, 2020. A list of those  
7 who actually attended the event (other than District staff) is attached as Exhibit 5 to the  
8 Trujillo Declaration. [Trujillo Decl., ¶ 8.]

9           8.       Dr. Trujillo presented and discussed the information in the presentation  
10 materials, including African American students' academic achievement for the past few  
11 years; attendance and suspension rates; percentages of African American students on free  
12 and reduced lunch and those receiving exceptional education services; schools with the  
13 highest African American student percentages; and ALE participation rates. Several key  
14 staff members then presented data and information about a number of areas including  
15 discipline, advanced learning experiences, the structure and services provided by the  
16 African American Student Services Department, and the status of the new JTED high  
17 school and the reopening Wakefield middle school. [Trujillo Decl., ¶ 9.]

18           9.       The presentation included information that was both positive and negative,  
19 reflecting both achievements of which the District is justifiably proud, and other areas  
20 where the District acknowledges that it has continuing work to do. At no time during the  
21 meeting did any member of the District staff solicit support for unitary status, or attempt  
22 to influence class members. No attempt was made to ask anyone present to do anything,  
23 or to communicate with counsel for the Fisher Plaintiffs or the Court. Ms. Daisy Jenkins  
24 was present and critical of the District, as on other occasions. [Trujillo Decl., ¶ 10.]

25

1 Analysis

2 **I. THE DISTRICT'S COMMUNITY MEETING WAS PROPER.**

3 **A. Community Leaders, Not Class Members, Were Invited.**

4 The Fisher Plaintiffs' motion rests entirely on a completely inaccurate factual  
5 allegation: that the District somehow improperly communicated with class members. But  
6 it was **community** members who were invited, **not** class members: community activists,  
7 small business owners, University of Arizona staff, the local chapter of the NAACP, the  
8 Tucson Urban League, Dunbar Cultural Center, Black Women's Task Force, Black Greek  
9 organizations, and retired educators. If any of the attendees had children in the District, it  
10 was purely incidental to their status as community leaders.<sup>2</sup> For this reason alone, the  
11 motion must be denied.

12 **B. Community Meetings Are Not Prohibited as a Matter of Law.**

13 Tellingly, the Fisher Plaintiffs cite no case law prohibiting the meeting.<sup>3</sup> A school  
14 district is permitted to communicate freely with community leaders about issues relevant  
15 to the community (for example, student achievement), and the Motion cites no authority  
16 holding that this right is eradicated during the pendency of a lawsuit.

17 The authority the Fisher Plaintiffs do cite is completely inapposite. In *Moser v. Bret*  
18 *Harte Union High School District*, 366 F. Supp. 2d 944 (E.D. Cal. 2005), the Eastern  
19 District of California imposed sanctions against a party and its counsel for misrepresenting  
20 facts and law to the court in violation of Rule 11, violating the duty of candor to the court,  
21 and "willfully and vexatiously multiplying the proceedings." *In re Akros Installations, Inc.*,  
22 834 F.2d 1526 (9th Cir. 1987), also involved sanctions for a court filing (a motion for

23 \_\_\_\_\_  
24 <sup>2</sup> The District believes that only four of the listed attendees actually have children enrolled  
in the District.

25 <sup>3</sup> Nor do they cite any case law supporting their radical argument that the District's event  
went so far as violating the Constitution. [Mot., ECF 2450, pp. 16:27-17:5.]

1 protective order that was not substantially justified).<sup>4</sup> Plaintiffs have cited no case law  
2 addressing communications with the community — or, for that matter, communications  
3 with anyone other than the court itself.

4       Indeed, the District should be encouraged to engage in community outreach such as  
5 the one at issue. Open channels of communication between the District and members of  
6 the community, particularly groups/demographics with specific needs or concerns (such as  
7 the African American community), permit the District to better hear and respond to  
8 concerns and suggestions and, by extension, to better serve students within those segments  
9 of the population. Community outreach of this type is in line with several of the goals  
10 underlying the Unitary Status Plan, as addressed below.

11       The presence of a very few individuals who, by virtue of being parents to African  
12 American students in the District, are members of one of the plaintiff classes does not  
13 change this. Counsel for the District are aware of no case in any jurisdiction holding that,  
14 during pendency of a lawsuit, a school district cannot address community gatherings  
15 merely because a few such individuals may be present. The Fisher Plaintiffs have cited no  
16 such authority. Indeed, approximately 70% of students within the District are members of  
17 one or the other of the two plaintiff classes in these cases, and the certified classes include  
18 all of those students' parents. Surely the Fisher Plaintiffs are not suggesting that the District  
19 cannot communicate with 70% of its students and all of the parents of those thousands of  
20 children about such topics as student achievement. Such an inhibition would not serve the  
21 interests of the citizens of Tucson, the African American community generally, or the  
22 members of the plaintiff classes. The District's holding of the community meeting was  
23 permissible and is not a basis for sanctions.

24 \_\_\_\_\_  
25 <sup>4</sup> These cases certainly do not address contact with class members, as suggested by the  
Fisher Plaintiffs. [Mot., ECF 2540, at 11:17-23.]

1  
2 **C. Community Meetings are Approved and Encouraged by the USP, the**  
3 **AAAATF Task Force, and the Trayben Consultants report.**

4 Community meetings, such as the January 30 meeting with African American  
5 community leaders in Tucson shows the District's good faith compliance with the USP  
6 and with the recommendations of the African American Academic Achievement Task  
7 Force and Trayben & Associates. First, the USP instructs the District to adopt strategies  
8 that include "collaborating with . . . community groups to provide information and  
9 guidance designed to improve the educational outcomes of African American and Latino  
10 students." (ECF 1713, p. 50.)

11 Second, the USP also instructed the District to appoint a Task Force to consult  
12 with experts to consider options for improving academic achievement for African  
13 American students. (ECF 1713, p. 40.) The report by that Task Force recommended that  
14 the District "inform and communicate with the AA community." (ECF 1690-1, p. 86.)

15 Finally, when the District engaged Trayben & Associates, an outside consultant  
16 selected by counsel for the Fisher Plaintiffs, to provide recommendations for improving  
17 African American achievement in the District, Trayben & Associates likewise  
18 recommended that the District provide information regarding student achievement to  
19 community stakeholders (ECF 2303-4, p. 96.), and that District staff "[s]erve as a conduit  
20 connecting the African American community to TUSD." (ECF 2303-4, pp. 99, 101.)

21 Rather than showing bad faith, the District's January 30 meeting with African  
22 American business and community leaders was a clear example of good-faith compliance  
23 with the USP and with recommendations provided by the African American Academic  
24 Achievement Task Force and experts and consultants who have advised the District.  
25

1           **D. The Community Meeting Was Open and Public, and Counsel for the**  
2           **Fishers was Informed in Advance.**

3           The Fisher Plaintiffs repeatedly make the ludicrous assertions that an open, public  
4 meeting of community leaders was “surreptitious,” “clandestine” and “secret,” and a  
5 matter of “conspiratorial subterfuge.” It is simply impossible that a meeting including  
6 members of the NAACP, Tucson Urban League, President of Raytheon Black Employees  
7 Network, pastors, business owners and other community members, was in some way  
8 “surreptitious” or “clandestine.” This is particularly true given that frequent District critic  
9 Daisy Jenkins was both invited and present.

10           More fundamentally, though, the email exchange between the District and Mr.  
11 Salter makes it plain that Mr. Salter was informed of the meeting and declined to attend.  
12           Replying to the second inquiry about his availability for the meeting, Mr. Salter said:

13           The Fishers after thoughtful discussion determined that whoever the  
14 external attendees are would only impede any meaningful or productive  
15 progress. . . .

16           It is the Fishers believe [sic] that external attendees would only be a  
17 distraction. Therefore the Fishers will not be attending the meeting.

18           [Trujillo Decl., Ex. 1.] For Mr. Salter now to assert that the meeting was somehow  
19 “secret” or “surreptitious” is disingenuous at best.

20           **E. No Effort Was Made to Seek Support for Unitary Status or to**  
21           **Undermine the Integrity for the Fisher Plaintiffs.**

22           The Fisher Plaintiffs incorrectly assert, *without any foundation*, that the meeting  
23 was used to improperly influence class members to seek support for unitary status, and  
24 “undermine” counsel for plaintiffs. The only evidence presented – the affidavit of Daisy  
25 Jenkins – does not mention *any statements* by District staff at the meeting soliciting  
support for unitary status or “undermining the integrity of the present class action.” To  
the contrary, Dr. Trujillo’s declaration makes it clear that nothing of the sort transpired at



1 the meeting. At no time during the meeting did any member of the District staff solicit  
2 support for unitary status, or attempt to influence class members. No attempt was made  
3 to ask anyone present to do anything, or to communicate with counsel for the Fisher  
4 Plaintiffs or the Court.

5       Though it did not happen, even if the District had asked members of the  
6 community at large to support the District's petition for unitary status, there is absolutely  
7 nothing wrong with doing so. As noted above, there is nothing that prevents the District  
8 from advocating its position in the community at large. Further, there were no disparaging  
9 remarks about the Court, the system, the process or the Fisher Plaintiffs' counsel. The  
10 District simply wanted the opportunity to discuss its efforts with African American  
11 community leaders, present the progress it has made, and listen to concerns and  
12 suggestions. There is nothing improper with this conduct.

13 **II. THE INFORMATION PRESENTED WAS ACCURATE AND HAD BEEN**  
14 **PREVIOUSLY REPORTED.**

15       The Fisher Plaintiffs complain that the District presented "misleading and biased"  
16 information at the community meeting. But the Fisher Plaintiffs do not identify any  
17 inaccurate data that was presented. The District presented relevant data on the topics  
18 addressed at the meeting, both positive and negative, without censorship, as noted by the  
19 Fisher Plaintiffs. [*See* Motion, ECF 2450, at 5:7-12] Beyond that, the Fisher Plaintiffs are  
20 simply incorrect about the meaning or import of data on the achievement gap, student  
21 discipline, and advanced learning programs. Additionally, it is important to note that  
22 nothing presented at the meeting was unknown to the Fisher Plaintiffs — all information  
23 presented had been previously reported.

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1           A.     The District correctly stated that African American student  
2                     achievement shows general upward trends, despite the continued  
3                     existence of an achievement gap common across the country.

4           The District presented accurate information related to student achievement for  
5 African American students. The Motion argues that “Dr. Trujillo tried to convince the  
6 audience . . . that African American students were on an upward trend in their academic  
7 performance” and that Dr. Trujillo made “unsupported arguments concerning an alleged  
8 upward academic performance trend for African American students.” [Mot., ECF 2450,  
9 at 4:24-5:2.] But in fact, the data presented by the District does show that test scores for  
10 African American students have improved. For example, three-year comparisons of  
11 AzMERIT scores in English language arts and math show that the percent of African  
12 American students over the proficiency level has improved in both areas, as presented by  
13 the District in the PowerPoint used at the meeting. [ECF 2450-2 at 14-15.] Five-year  
14 summaries also show an upward trend. [*Id.* at 36.] The Motion presented no contrary data.

15           Rather, the Fisher Plaintiffs’ real contention seems to be that African American  
16 academic performance cannot possibly be on an upward trend and cannot be portrayed  
17 positively so long as there is an “achievement gap.” [Mot., ECF 2450, at 4:21 (Dr. Trujillo  
18 tried to “put a positive spin on data that highlighted academic performance issues for  
19 African American students”), 5:7-9 (“[A] summary of the data presented showed . . .  
20 African American students are still performing poorly in AZ Merit testing in all  
21 areas . . .”).] This position is logically incorrect: the continued existence of a discrepancy  
22 that is found in school districts nationwide and exists before students even begin school  
23 does not mean a lack of academic improvement.

24           The achievement gap is undisputedly a national phenomenon, not one specific to  
25 the District. *See, e.g., School Composition and the Black-White Achievement Gap*, Nat’l  
Ctr. for Educ. Statistics (June 2015), <https://nces.ed.gov/nationsreportcard/>

1 [subject/studies/pdf/school\\_composition\\_and\\_the\\_bw\\_achievement\\_gap\\_2015.pdf](#). The  
2 gap is already present when students enter kindergarten and appears to be largely, and  
3 perhaps primarily, influenced by socioeconomic factors. *See, e.g.*, Roland G. Fryer &  
4 Steven D. Levitt, *Falling Behind: New evidence on the black-white achievement gap*,  
5 *Education Next* (Fall 2004, Vol. 4, No. 4), *available at*  
6 [www.educationnext.org/fallingbehind](http://www.educationnext.org/fallingbehind) (“[A]djusting the data for the effects of  
7 socioeconomic status reduces the estimated racial gaps in test scores by more than 40  
8 percent in math and more than 66 percent in reading.”); *Hoots v. Pennsylvania*, 118 F.  
9 Supp. 2d 577, 600 (W.D. Pa. 2000) (“Differences in the socioeconomic backgrounds of  
10 black and white students are reflected nationally in an achievement gap. This gap appears  
11 at all ages in virtually every school system throughout the United States in reading,  
12 mathematics and science.”). In fact, as the Special Master has noted, “[n]umerous  
13 researchers have studied how much of the variance in student achievement can be  
14 accounted for by measurable variations in school characteristics. The consensus is that  
15 schools, on average, account for less than a third of the variance in student achievement.”  
16 [ECF 2014 at 9-10.]

17 Crucially, data shows that, although African American students enter school  
18 already subject to an achievement gap, their progress under the District’s tutelage is  
19 comparable to that of White and Hispanic students. Halley Freitas, Ph.D., senior director  
20 of assessment and program evaluation, curriculum, and instruction for the District,  
21 studied and prepared a report on longitudinal data on District student academic  
22 performance in AzMERIT testing, disaggregated by grade level and race/ethnicity (the  
23 “Freitas Report”). The Freitas Report compared performance of the same cohort of more  
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1 than 2,000 students during five consecutive years, tracking them from third grade through  
2 seventh grade.

3 The Freitas Report documented and concluded that, although achievement gaps  
4 existed at all grade levels compared in her study, the rates of improvement over the five-  
5 year period studied were “comparable” and “fundamentally equivalent” for White,  
6 African American, and Hispanic students. The Special Master reviewed the Freitas Report  
7 and confirmed that the study shows increases and decreases in student achievement over  
8 the studied period that are substantially the same for the three racial/ethnic groups.

9 The District’s statements at the community meeting that data shows general  
10 upward trends in African American student achievement were correct and cannot  
11 realistically be disputed. The fact that there is still an achievement gap (as there is in all  
12 school districts) does not render those statements inaccurate or misleading. Indeed, the  
13 District did not try to hide the achievement gap — it is clearly reflected in the data that  
14 was presented. [*See, e.g.*, ECF 2450-2 at 14-15.] The information was properly, not  
15 misleadingly, presented.

16 **B. The District presented data that accurately reflected that African**  
17 **American students in the District are subject to notably low levels of**  
18 **disciplinary actions, despite the existence of a (decreasing) disciplinary**  
19 **gap.**

20 The District also presented accurate information related to discipline of African  
21 American students. The Motion does not challenge that data at all. Rather, the Fisher  
22 Plaintiffs’ only comment as to student discipline is that “a summary of the data presented  
23 showed . . . African American students still experience suspensions and harsher discipline  
24 than other racial or ethnic groups.” [Mot., ECF 2450, at 5:7-11].

25 The District does not dispute that African American students in the District (as  
they are across the country) are generally disciplined at rates higher than those of White

1 students. The District did not suggest otherwise at the community meeting. Indeed, this  
2 was reflected in the PowerPoint presentation. [*E.g.*, ECF 2450-2 at 46-47.]

3 However, as the District has pointed out before, the disparity in this district is far  
4 less than the state or national average disparity. In short, this district is doing better than  
5 most other school districts in the country, including many with no history of *de jure*  
6 segregation, which cuts any causal connection to the pre-1951 dual elementary school  
7 system in this district.

8 But more fundamentally, the District is right to be proud of the progress it has  
9 made in this area. For example, the data presented at the meeting accurately showed that  
10 African American students in the District are subjected to decreasing levels of long-term  
11 exclusionary discipline. [*Id.* at 46.]<sup>5</sup>

12 Moreover, disciplinary figures produced by the District with its most recent  
13 Annual Report show that the disciplinary gap between African American students and  
14 White students is, in fact, decreasing. While there was a 9% difference in discipline rates  
15 between the two groups in SY2013-14, that has been cut in half to a current difference of  
16 4.60%. In fact, discipline rates for African American students in the past two years  
17 (10.39% and 10.93%, respectively) were lower than the discipline rate for White students  
18 in SY2013-14 (11.56%). [ECF 2298-1 at VI-150.]

19 The discrepancies in out-of-school suspensions, a particularly noteworthy  
20 disciplinary action (because it limits in-person educational time), has also been  
21 dramatically reduced. In SY2014-15, African American students were 3.2 times more  
22 likely than White students to have a short-term suspension, and 3.5 times more likely to

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23  
24 <sup>5</sup> Short-term exclusionary discipline has increased in recent years for all racial groups [*id.*  
25 at 47], because the District worked to reduce long-term suspensions and instead give  
short-term suspensions, because of their lesser impact in interrupting instruction.

1 have a long-term suspension. By SY2018-19, a mere four years later, the likelihood ratio  
2 had dropped to 1.7 times for short-term suspensions and 2.1 times for long-term  
3 suspensions. [ECF 2298-1 at VI-151.]

4 It is unclear whether (or how) the Fisher Plaintiffs think information about  
5 disciplinary data was misleadingly presented at the community meeting, but the data  
6 supports the District's characterization that progress has been made in this area. The fact  
7 that there is still a disciplinary gap does not render the District's statements misleading  
8 — particularly given that the gap is decreasing and discipline of African American  
9 students in the District is lower than ever. Information in this area was also properly, not  
10 misleadingly, presented.

### 11 **C. Alternative Learning Experiences.**

12 Regarding the District's presentation of Advanced Learning Experience ("ALE")  
13 data, the Fisher Plaintiffs *do not even argue that the data is incorrect*. (ECF 2450, pp.  
14 4-5.) Instead, they argue that the data demonstrates that the District has not done enough  
15 to be declared unitary. (Id.) The Fisher Plaintiffs' disagreement with whether the District  
16 should be declared unitary (an issue that was not discussed at the community meeting) is  
17 not a valid basis for seeking or awarding sanctions.

18 More fundamentally, the Fisher Plaintiffs' argument is based on data they either  
19 misunderstand or misrepresent. Their statement that African American students  
20 constitute less than 1% of self-contained GATE students is false. As demonstrated by the  
21 District's ALE Progress Report, in 2017-18, African American students constituted **6.5%**  
22 of students who qualified for self-contained GATE and **7%** of qualified students who  
23 enrolled in self-contained classes, and in 2018-19, African American students constituted  
24 **6.5%** of students who qualified for self-contained GATE and **8.7%** of qualified students

25

1 who enrolled in self-contained classes. (ECF 2267-2, p. 21.) This is a massively mistaken  
2 assertion by the Fisher Plaintiffs.

3 **Conclusion**

4 For the foregoing reasons, the District respectfully urges the Court to deny the  
5 motion for sanctions.

6 Dated this 1<sup>st</sup> day of April, 2020.

7 Respectfully submitted,

8 **DICKINSON WRIGHT PLLC**

9 By: /s/ P. Bruce Converse  
10 P. Bruce Converse  
11 Timothy W. Overton  
12 **DICKINSON WRIGHT, PLLC**  
13 1850 N. Central Avenue, Suite 1400  
14 Phoenix, Arizona 85004-4568  
15 *Attorneys for Tucson Unified School*  
16 *District No. 1*  
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**CERTIFICATE OF SERVICE**

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The foregoing document was filed with the Court electronically through the CM/ECF system this 1<sup>st</sup> day of April, 2020, causing all parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

/s/ P. Bruce Converse  
Employee of DickinsonWright PLLC