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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,
Plaintiffs,
and
Maria Mendoza, et al.,
Plaintiffs,
v.
Tucson Unified School District No. One, et al.,
Defendants.

Case No. 4:74-CV-00090-DCB
**FISHER PLAINTIFFS' CERTIFIED
MOTION TO COMPEL/ORDER
DISCOVERY RE: DATA
REQUESTED BY FISHER
PLAINTIFFS CONCERNING
ACADEMIC ACHIEVEMENT**
[Rules 26 (b)(1) and 37 FRCP]

(Assigned to: **Hon. David C. Bury**)

(Oral Argument Requested)

COMES NOW Plaintiffs *Fisher*, by and through counsel undersigned, and pursuant to Rule 26 (b) (1) and Rule 37 FRCP respectfully requesting that the District Court enter an order compelling Defendant Tucson Unified School District #1 (“TUSD#1” or “the District”) to produce previously and repeatedly requested statistical data concerning the academic achievement of TUSD#1 African American students for analysis by *Fisher* Plaintiffs’ retained Statistical Expert Dr. Robert Hendricks related to a definitive determination to ascertain if the District’s efforts had closed the academic achievement gap.

Fisher Plaintiffs’ Motion to Compel is supported by the attached Memorandum of Points and Authorities, the separately filed Appendix of Exhibits, and the Court record.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The underlying background and basis for the *Fisher* Plaintiffs' present Motion to Compel or Order Discovery essentially lies in a longstanding dispute between the parties as to whether or not "achievement" may be an appropriate factor for the District Court to consider with regard to whether Defendant TUSD#1 (hereinafter "the District" should be granted "Unitary Status". Plaintiffs *Fisher* contend that achievement is wholly relevant to the inquiry, and both the District Court and 9th Circuit Court of Appeals with respect to the present case have stated or indicated that "achievement", together with a consideration of other *Green* factors, would be an important tool or indicator as to whether Unitary Status has actually been accomplished or should be awarded.¹ In fact, Section V of the District Court approved 2014 Unitary Status Plan (USP) mandates that the District work to improve the academic achievement of both African American and Mexican American student populations.²

¹ For example, in *Fisher v. U.S.*, the District Court itself found or held that "student achievement [was] relevant" to its assessment as to whether TUSD had complied in *good faith* with the Desegregation Settlement Agreement. *Id.*, 549 F.Supp.2d. 1132, 1164 (D.Ariz.2008). Moreover, in *Fisher v. TUSD*, the 9th Circuit Court of Appeals held that not only was "good faith" central to a District Court's decision to declare a school system unitary and withdraw its supervision, yet that a consideration of the non-exhaustive list of *Green* factors was important to determining whether "the school district has eliminated the vestiges of past discrimination to the extent practicable." *Id.*, 652 F.3d 1131, 1132-33 (2011).

² See *Unitary Status Plan*, 11/6/2014 (DOC 1714) at p. 32, Section V (Quality

1 Recently, Defendant District provided to the *Fisher* Plaintiffs its own in-
2 house study concerning academic achievement relating to African American
3 students. The study was authored by the District's own statistician, Dr. Frietas, and
4 was dubious, at best, because it was based upon the District's own statements and
5 conclusions. Rightfully questioning the District's conclusions, *Fisher* Plaintiffs
6 retained an expert (Georgia State Research Scientist Dr. Robert Hendricks) who
7 reviewed the study and opined that it was based upon insufficient data, whereby it
8 may not be a fair and accurate assessment. The *Fisher* Plaintiffs, by and through Dr.
9 Hendricks, thereafter requested specific additional data or information from the
10 District's statistician.
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15 After initially providing very limited information, and upon reviewing
16 Dr. Hendricks' second specific request for the required data, the District claimed that
17 it not only did not have the requested data³, yet further insisted that its collection
18 would be too time consuming. The District's general counsel Robert Ross advised
19 *Fisher* Plaintiffs' counsel that if the *Fisher* representatives were not satisfied with
20 the District's denial as to providing the requested information to properly determine
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of Education), Subsection E, Para. 1 (a).

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26 ³ It is noteworthy that in its 2011 opinion reversing the District Court's prior
27 granting of Unitary Status in the present case in exchange for promised future
28 compliance, the 9th Court of Appeals had specifically addressed the District's failure
to monitor its own progress under the existing Desegregation Agreement. *Fisher v.*
TUSD at 652 F.3d 1131, 1132-33 (2011).

1 achievement, they could contact the Special Master. Regrettably, the Special
2 Master concurred with the decision of the District not to provide the requested
3 information.
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5 This series of events leads *Fisher* Plaintiffs, having exhausted its available
6 remedies without the District Court's assistance, to pursue the present Motion to
7 Compel or Order Discovery under both Rules 26 (b)(1) and 37 of the Federal Rules
8 of Civil Procedure.
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10 II.

11 OPERATIVE FACTS SUPPORTING MOTION TO COMPEL

12 As previously described, the *Fisher* Committee has maintained that
13 "achievement" is an appropriate factor or measure for determining
14 whether Unitary Status may be appropriate in the present case. *Supra*.
15 Substantially related to this view, which is wholly consistent with
16 prior published opinions by both the United States District Court and
17 9th Circuit Court of Appeals in the present case, *supra*, *Fisher* Plaintiffs have actually
18 suspected that Defendant Tucson Unified School District #1 (hereinafter "the
19 District") in its annual reports was not necessarily reporting accurately the status of
20 academic achievement deemed vitally important by the District Court itself and
21 required by 2014 Unitary Status Plan, *supra*, especially with regard to the academic
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1 achievement by African American students.⁴ The *Fisher* Committee, therefore,
2 requested that Superintendent Trujillo do a study or conduct an appropriate analysis
3 of how the District was meeting the achievement gap. Although it took the District
4 approximately 6-7 months, eventually the District's statistician, Dr. Frietas, came up
5 with or provided the requested report. *See Fisher* Plaintiffs' Appendix of Exhibits,
6 Exhibit A, *Frietas Academic Achievement Report (AzMERIT AfrAm Cohort Study*
7 *Rept. 8-07-19)* with Cover E-mail from TUSD#1 Director of Desegregation (Ms.
8 Martha Taylor) to Counsel for *Fisher* Plaintiffs dated 8/28/19.
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12 Subsequently, *Fisher* Plaintiffs' Counsel contacted Dr. Gwendolyn T.
13 Benson of Georgia State University, a renowned African American Educator who
14 had previously done a report for the District related to the present case, for assistance
15 in properly evaluating the District's in-house Academic Achievement Report or
16 "AAR", and Dr. Benson referred the report to Georgia State Research Scientist and
17 Statistician Dr. Robert C. Hendricks who then rendered a preliminary report
18 suggesting that while additional information was required from the District, Dr.
19 Hendricks would be willing to re-analyze the data for a more detailed and accurate
20 Academic Achievement Report or "AAR" concerning TUSD #1 African American
21 Students, requesting additional data from the 2012-13 school year through 2018-19
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27 ⁴ *See Fisher v. U.S.*, 549 F.Supp.2d. 1132, 1164 (D.Ariz.2008) and *Unitary*
28 *Status Plan*, 11/6/2014 (DOC 1714) at p. 32, Section V (Quality of Education),
Subsection E, Para. 1 (a).

1 school year from the District, whereby he could properly “examine trends” over 7
2 school years and the AzMerit results (if available) for that cohort and specifically
3 requesting the following additional important data for the students being analyzed:
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5 1) School Year, 2) Grade Level, 3) Student Unique Identifier (State Number), 4)
6 Gender, 5) Race/Ethnicity, 6) SES Indicator (ie. eligibility for Free or Reduced
7 Lunch), 7) AzMERIT ELA Scaled Score, and 8) AzMERIT Math Scaled Score. *See*
8 *Fisher* Plaintiffs’ Appendix of Exhibits, Exhibit B, 9/5/19 Email from Dr.
9 Gwendolyn Benson w/ attached E-mail and Preliminary Report by Georgia State
10 Research Scientist and Statistician Dr. Robert Hendrick.
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13 Thereafter, *Fisher* Plaintiffs’ Counsel was not only formally introduced by
14 Dr. Benson to fellow Georgia State Research Scientist Dr. Robert Hendricks, yet
15 counsel retained Dr. Hendricks at his own expense for the sum of \$5,000 to properly
16 complete a more detailed and accurate Academic Achievement Report or “AAR”
17 for the TUSD #1 African American Students. *See Fisher* Plaintiffs’ Appendix of
18 Exhibits, Exhibit C, Additional Emails exchanged between Dr. Gwendolyn Benson,
19 *Fisher* Plaintiffs’ Counsel and Georgia State University Research Scientist, Dr.
20 Robert Hendricks dated 9/6/19 and 9/10/19, respectively.
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24 Sadly, although Dr. Hendricks was properly retained and subsequently
25 contacted the District regarding the additional specific information required to
26 complete an appropriate, fair and more accurate AAR for the TUSD #1 African
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1 American Students (*See Fisher* Plaintiffs' Appendix of Exhibits, Exhibit D, 9/11/19
2 E-mail from Research Scientist Dr. Robert Hendricks)⁵, the District ultimately
3 ***refused*** to provide all of the requested data, claiming that *Fisher* Plaintiffs request
4 for the data by and through Dr. Hendricks was too onerous and unnecessary. *See*
5 *Fisher* Plaintiffs' Appendix of Exhibits, Exhibit E, Collective or Relevant E-mails
6 as follows: 1) E-mail from TUSD #1 General Counsel Robert Ross providing limited
7 information to Dr. Hendricks dated 9/16/19, 2) Subsequent E-mail from Dr.
8 Hendricks to *Fisher* Plaintiffs' Counsel regarding the limited or inappropriate data
9 received as opposed to the actual data requested, with Dr. Hendricks specifically
10 suggesting that the District's failure to properly disclose the requested information
11 *may be an attempt to hide incriminating data* that actually showed that *the academic*
12 *achievement gap related to African American Students was **actually widening*** dated
13 9/17/19 and 3) Multiple E-mails dated from 9/17/19 through 9/25/19 establishing
14 *Fisher* Plaintiffs' Counsel repeated *good faith* efforts and related requests for
15 necessary discovery of relevant information and disclosure from the District for
16 retained Expert Dr. Hendricks, with the District's ultimate ***refusal*** to provide the
17 requested information provided by General Counsel Ross.
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26 ⁵The information was appropriately requested following *Fisher* Plaintiffs'
27 counsel properly communicating both the importance and need for the requested
28 discovery from Tucson Unified School District and the District's acknowledgement
thereof by the TUSD #1 Sr. Director of Desegregation herself.
(*See Fisher* Plaintiffs' Appendix of Exhibits, Exhibit E, 9/10/19 E-mail from the
TUSD #1 Sr. Director of Desegregation, Dr. Martha G. Taylor)

1 Subsequently, although *Fisher* Plaintiffs' counsel initially let the issue go, it
2 came to the forefront once again, when, quite surprisingly, part of the requested
3 information which the District claimed to be too onerous or unreasonable to provide
4 to Dr. Hendricks on 9/25/19 was actually part of the District's own subsequent
5 surreptitious and bad faith Viscount Hotel dinner "presentation" of incorrect and/or
6 biased information held four (4) months later on 1/30/20, which alleged bad faith
7 misconduct is the subject of *Fisher* Plaintiffs' Motion for Sanctions, previously filed
8 on 3/17/20. See *Fisher* Plaintiffs' Appendix of Exhibits, Exhibit F, E-mail from
9 Superintendent Trujillo to *Fisher* Plaintiffs' Counsel Rubin Salter, Jr., Esq. dated
10 2/15/20 with attached copy of TUSD #1's Viscount Hotel Power Point Presentation.⁶

11 **III. LEGAL ARGUMENT**

12 The United States District Court should compel Defendant TUSD #1 to
13 produce requested information or provide the requested relevant disclosure pursuant
14 to Rule 26 (b) (1) and Rule 37 of the Federal Rules of Civil Procedure. As set
15 forth herein, the data or information sought by
16 *Fisher* Plaintiffs is not merely relevant to Plaintiff's claims, the data is actually central to
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25 ⁶ A review of the District's 1/30/20 Power Point Presentation strikingly
26 reveals that contrary to the District's 9/25/19 assertions that Dr. Hendricks'
27 requested information was too onerous and required an additional 2 weeks to
28 provide, a substantial part of Dr. Hendrick's requested data was part of the Viscount
Hotel Presentation and included information related to: 1) the Participation by
African American Students in Summer Tutoring Programs, 2) AZ MERIT Scores
for African American Students for various subjects for 1-3 year periods, and 3) the
SES Indicator (ie. eligibility for Free or Reduced Lunch).

1 the present desegregation and racial discrimination case itself as the importance of
2 academic achievement in this case has not only been recognized by the District Court itself
3 ⁷, as well as the 9th Circuit Court of Appeals⁸, and has been emphasized in the Unitary
4 Status Plan governing this case.⁹ Moreover, under United States Supreme Court authority,
5 the federal discovery rules are to be accorded "a broad and liberal treatment to effect their
6 purpose of adequately informing litigants", especially with regard to issues of central
7 importance to a particular case. *Herbert v. Lando*, 441 U.S. 153, 177 (1979).
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10 First of all, under both Rules 26 (b)(1) and 37 of the Federal Rules of Civil
11 Procedure (hereinafter "FRCP") the District Court may order the District to produce the
12 requested discovery.

13 Rule 26 (b) (1) FRCP states in relevant part:

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16 "Parties may obtain discovery regarding any matter, not privileged, that is
17 relevant to the claim or defense of any party... For good cause, the court may order
18 discovery of any matter relevant to the subject matter involved in the action.
(Emphasis added to original.)
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25 ⁷ See *Fisher v. U.S.* at 1164.

26 ⁸ See *Fisher v. TUSD* at 1132-33.

27 ⁹ See *Unitary Status Plan*, 11/6/2014 (DOC 1714) at p. 32, Section V
28 (Quality of Education), Subsection E, Para. 1 (a).

1 In agreement with or in a complimentary fashion Rule 37 FRCP states as follows:

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3 “Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
4 (a) Motion For An Order Compelling Disclosure or Discovery.

5 (1) In General. On notice to other parties and all affected persons,
6 a party may move for an order compelling disclosure or
7 discovery. The motion must include a certification that the
8 movant has in good faith conferred or attempted to confer with
9 the person or party failing to make disclosure or discovery in
10 an effort to obtain it without court action.

11 Secondly, the relevance of the evidence in issue concerning Dr. Hendrick’s
12 requested disclosure of academic achievement related data for African American Students
13 from 2012-present is highly evident from both the District Court’s own language in *Fisher*
14 *v. U.S.* and the 9th Circuit’s 2011 opinion in *Fisher v. TUSD* as follows. Of utmost
15 importance as to the relevance of the evidence sought to be disclosed is the fact that in
16 *Fisher v. U.S.* the District Court specifically stated:

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20 The Court, therefore, finds that as a measure of effectiveness, student achievement
21 is relevant to TUSD’s good faith commitment to the entirety of the Settlement Agreement,
22 even if “the Stipulation does not make any specific reference to minority student
23 achievement, nor [] required that TUSD close the gap between minority student test scores
24 and Anglo student test scores.”¹⁰

25 Further, pursuant to the holding in *Fisher v. TUSD* the 9th Circuit Court of Appeals has

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¹⁰See *Fisher v. U.S.*, 549 F.Supp.2d. 1132, 1164 (D.Ariz.2008).

1 arguably added to the mix as to the relevancy of the requested data or information in
2 finding that the ultimate inquiry in determining the issue of Unitary Status in a
3 particular desegregation case is: 1) “whether the constitutional violator has complied
4 in “good faith” with a desegregation decree [or agreement] since it was entered”
5 making such a determination central to a federal court’s decision in that regard as
6 the District Court in this case has definitely stated on the record, and 2) a
7 consideration of the non-exhaustive list of Green factors, which arguably may
8 include academic achievement, in order to determine whether a school district “has
9 eliminated the vestiges of past discrimination to the extent practicable”. *Fisher v.*
10 *TUSD.*, 652 F.3d 1131, 1132-33 (2011) [citing by ultimate reference *Board of Educ.*
11 *of Okla. City Public Schs. v. Dowell*, 498 U.S. 237, 249-50, 111 S.Ct. 630, 112
12 L.Ed.2d 715 (1991) (holding *Green* factors as being non-exhaustive list).

17 Finally, under the plain language of the 2014 Unitary Status Plan (hereafter “USP”)
18 the District in this case is actually required to work to improve the academic
19 achievement of both African American and Mexican American student
20 populations.¹¹ In fact, the “Overview” of Section V specifically states that “[t]he
21 purpose of this section shall be to improve the academic achievement of African
22 American [] students”.

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27 ¹¹ See *Unitary Status Plan*, 11/6/2014 (DOC 1714) at p. 32 et seq., Section V
28 (Quality of Education), Subsection E, Para. 1 (a).

1 Therefore, under an application of the federal rules related to discovery in this case,
2 as well as the consideration of the United States Supreme Court's decision in *Lando*
3 requiring that Rules 26 (b) (1) and 37 be interpreted liberally to provide for the requested
4 discovery, *supra*, both the law of the case as reflected by both the District Court's and 9th
5 Circuit opinions referenced herein, *supra*, and the plain language of the current USP, it is
6 highly arguable that the District is required to produce the requested and highly relevant
7 TUSD #1 academic achievement data or information for review by *Fisher* Plaintiffs'
8 Expert Dr. Hendricks so that he may render a full, fair and accurate report regarding an
9 issue that is central to present litigation and the question of "Unitary Status". As such, the
10 District should be appropriately sanctioned for failing to voluntarily disclose the
11 information after repeated requests by *Fisher* Plaintiffs by requiring the District to bear the
12 costs for preparation of the Academic Achievement Report by Dr. Hendricks or reimburse
13 Plaintiffs *Fishers'* counsel in the amount of \$5,000 for the District Court's consideration.
14 Additionally, the District should be ordered to pay reasonable attorney's fees and costs
15 related to the present motion as required by Rule 37 (a) (5) (A) FRCP.

20 IV. CONCLUSION

21 Defendant Tucson Unified School District #1 has improperly refused to
22 provide highly relevant information related to the academic achievement of African
23 American Students requested by *Fisher* Plaintiffs' retained expert Dr. Robert
24 Hendricks. This information is highly relevant or central to the issue of Unitary
25 Status under applicable law specific to the present case, *supra*, and it is also
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1 implicitly required by the USP to be kept and available to both *Fisher* Plaintiffs as
2 well as the District Court itself in order for the Court to make an appropriate
3 determination as to the issue of Unitary Status in this case. As the result, it is *Fisher*
4 Plaintiffs position that the District Court should order forthwith the discovery of the
5 requested information pursuant to Rule 26 (b)(1) and Rule 37 FRCP, and further
6 order Defendant District to not only pay for the preparation of Dr. Hendrick's
7 Academic Achievement Report, yet to also pay reasonable attorney's fees and costs
8 as required by Rule 37 (A) (5) (a) FRCP.
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12 **RESPECTFULLY SUBMITTED** this 2nd day of April 2020.

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15 */s/ Rubin Salter, Jr.*
16 RUBIN SALTER, JR., ESQ.
17 ATTORNEY FOR PLAINTIFFS FISHER
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CERTIFICATION

Pursuant to Rule 37 (a) (1) FRCP, *Fisher* Plaintiffs' counsel, Rubin Salter, Jr., Esq. does hereby certify, swear and affirm that movant has in good faith conferred or attempted to confer with Defendant Tucson Unified School District #1, the party failing to make the requested disclosure or discovery, by and through its general counsel Robert Ross, Esq., in an effort to obtain same without court action.

DATED this 2nd day of April 2020.

/s/ Rubin Salter, Jr.
RUBIN SALTER, JR., ESQ.
ATTORNEY FOR PLAINTIFFS FISHER

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2020, I electronically submitted the foregoing **FISHER PLAINTIFFS' CERTIFIED MOTION TO COMPEL/ORDER DISCOVERY RE: DATA REQUESTED BY FISHER PLAINTIFFS CONCERNING ACADEMIC ACHIEVMENT** to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECT registrants:

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