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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.,
Defendants.

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

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

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

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24 **RESPONSE IN OPPOSITION TO**
25 **FISHER PLAINTIFFS' MOTION TO COMPEL (ECF 2453)**
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1 **Introduction and Summary**

2 The motion to compel should be denied for three principal independent reasons.
3 First, extensive data on academic performance at the District, disaggregated by race,
4 ethnicity, school, and grade level, is available online directly from the Arizona
5 Department of Education. In addition, in September, 2019, the District provided to the
6 Fisher Plaintiffs the complete data set it used for its own in-depth study on the
7 achievement gap. This data is *more than sufficient* to determine that the achievement gap
8 has not widened in recent years at the District, as claimed by the Fisher Plaintiffs.

9 Contrary to the Fisher Plaintiffs’ claims, all of the information and slides presented
10 at the January 30 community meeting relating to AzMerit were taken *from the data*
11 *publicly available* on the website of the Arizona Department of Education. None of that
12 information was based on the additional data requested by the Fisher Plaintiffs, but rather
13 it all came directly from the information publicly available on that website. Thus, any
14 claim that the District has not provided necessary information to the Fisher Plaintiffs is
15 utterly baseless.

16 Second, the Fisher Plaintiffs submitted the request for data they seek here to the
17 Special Master. He reviewed the Fisher Plaintiffs’ request, reviewed the data the District
18 had already provided and the study the District had already done, and rejected the Fisher
19 Plaintiffs’ request for additional data in early October, 2019. The Special Master stated
20 that the information the District had already provided was sufficient to indicate whether
21 the achievement gap had widened.

22 Third, and more fundamentally, elimination of the achievement gap is not a
23 requirement for unitary status, either as a matter of constitutional law or under the Unitary
24 Status Plan. The Unitary Status Plan requires the District to adopt “strategies to seek to
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1 close the achievement gap” but does not (and could not) require actual elimination, or
2 even a reduction, of the achievement gap between African American and other students,
3 in order to terminate court supervision. This is a reflection of well-established federal law
4 that achievement gaps are the result of many factors outside the District’s control, not
5 causally related to the prior dual school system at issue in a desegregation case,
6 particularly when that dual school system was voluntarily dismantled nearly 70 years ago.

7 **The Relevant Facts**

8 The following relevant facts appear from the record and are dispositive of the
9 motion.

10 1. Academic achievement data for the District, as measured by the State of
11 Arizona’s AzMerit test, is available on the website of the Arizona Department of
12 Education at www.azed.gov/accountability-research/data. This information is presented
13 at the District level, at the individual school level, and by grade levels, all disaggregated
14 by race and ethnicity. A copy of exemplary pages of data from that website is attached as
15 Exhibit 1.

16 2. In the summer of 2019, in response to a request from the plaintiffs, the
17 Superintendent asked Dr. Halley Freitas, the director of the District’s Department of
18 Assessment and Evaluation, to analyze AzMerit performance data to determine whether
19 the academic achievement gap was widening while students were enrolled in the District.

20 3. Dr. Freitas conducted the study, which included every third-grade student
21 in the District who took the AzMerit test in the 2014-15 school year and who had an
22 AzMerit score in the District each year for the next four years, thereby analyzing the entire
23 five-year span of available AzMerit data. The study covered five continuous schools years
24 (2014-15 through 2018-19), while the subject students were in third grade through
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1 seventh grade. Third grade is the lowest grade level at which the test is administered, and
2 the 2018-19 school year is the most recent year for which data is available. This provided
3 the longest available continuous window, with the same test, with students who were
4 continuously enrolled at the District. The cohort of students included in the study
5 consisted of just over 2,000 students. The results show a performance gap between
6 African American (“AA”) and white students at the start of testing in the third grade,
7 which persists, without statistically significant change, through the seventh grade. A copy
8 of the study is attached hereto as Exhibit 2.

9 5. The study itself was provided to the Special Master and the plaintiffs in
10 August 2019. The District provided the raw data on which the study was based to counsel
11 for the Fisher Plaintiffs on Monday, September 16, 2019, as shown in Exhibit 3.

12 6. On September 20, 2019, the Fisher Plaintiffs filed a general objection to
13 several of the District’s notices of compliance (ECF 2276). Attached to that objection was
14 a three-page “review” of the District’s study and the underlying data by Dr. Robert
15 Hendrick, a research associate at Georgia State University (ECF 2276, pp. 16-18).

16 7. The District responded to this “review” in its response to the Fisher
17 Plaintiffs’ general objection (ECF 2320, pp. 2-7). In its response, the District pointed out
18 that Dr. Hendrick’s conclusions were (a) apparently based on misunderstandings of the
19 AzMerit scoring system, and (b) not supported by the data. For convenience, the key
20 provisions of this response are attached hereto as Exhibit 4.

21 8. In addition to examining the data underlying Dr. Freitas’ study, Dr.
22 Hendricks requested that the District prepare and provide a different data set, extending
23 back at least two years prior to the start of Dr. Freitas’ study (when the AIMS test, instead
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1 of the AzMerit test, was administered by the state) and including certain additional fields
2 of information. Dr. Hendrick's request is attached as Exhibit 5.

3 9. The District declined to prepare and provide the new data set requested by
4 Dr. Hendricks for multiple reasons: (a) because it believed that the study already
5 conducted by Dr. Freitas was adequate to assess whether there was any material widening
6 of the achievement gap; (b) because the data set proposed by Dr. Hendricks would be
7 difficult to norm across time, due to the change in testing at the State level; and (c)
8 because the request would have required combining data from different student
9 information systems and selection of additional fields not used by the District in the
10 original study and not related to it, including gender and socioeconomic status of
11 individual students.

12 10. The District suggested that if the Fisher Plaintiffs wished to pursue the
13 matter, that they submit the matter to the Special Master for consideration. A copy of the
14 District's response is attached as Exhibit 6.

15 11. Mr. Salter apparently wrote to the Special Master to make that request (the
16 District does not have that correspondence, as Mr. Salter did not copy the District or its
17 counsel). The Special Master considered that request, and he responded that the original
18 District study was adequate and that there was no need for the additional data. The
19 responses are attached as Exhibit 7.

20 12. The AzMerit achievement data presented at the January 30 community
21 meeting was not, as plaintiffs claim, based on the information requested by Dr. Hendrick,
22 but rather was based on the information publicly available on the website of the Arizona
23 Department of Education. A copy of the presentation is attached as Exhibit 8; the AzMerit
24 academic achievement data appears at pages 4-5 and 24-27 of that exhibit.

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Analysis

I. ALL MATERIAL DATA HAS ALREADY BEEN PROVIDED OR IS OTHERWISE PUBLICLY AVAILABLE.

Detailed information on academic achievement on the AzMerit test is available directly from the Arizona Department of Education, which administers and scores the test. The information available on the website includes the performance of students grouped into four categories (highly proficient, proficient, partially proficient, and marginally proficient) and presented for the District as a whole, by individual school, and by grade level, for each racial and ethnic group. This is largely everything that the Fisher Plaintiffs requested. The only exceptions are gender and socioeconomic status, and neither of these two categories would add anything to the analysis of unitary status. Indeed, if anything, adding socioeconomic status as a factor would highlight that the principal driver of achievement gaps is not race/ethnicity at all, but rather socioeconomic status, which is (a) beyond the control of the District and, more importantly, (b) beyond the scope of this desegregation case.

Moreover, the District actually provided to the Fisher Plaintiffs the data set used as the basis of the District's study. That data set showed that the achievement gap was persistent from the first measurement after students entered the District and that it did not widen while students were enrolled in the District.

Finally, without identifying any specific information, the Fisher Plaintiffs claim that the information presented by the District at its January 30 community meeting somehow shows that the District has information it had earlier denied having. But the only information requested by the Fisher Plaintiffs was related to AzMerit performance and related data. A review of the information relating to AzMerit in the January 30 meeting shows that *all of it* is directly drawn from the information available on the

1 Arizona Department of Education website.¹ It is nothing more than the percentages of
2 African American students who scored in each of the four major state categories on the
3 AzMerit test. This is *precisely* the information available on the ADOE website.

4 For these reasons alone, it is clear that there is no material data that the District has
5 not produced or that is not easily available to the Fisher Plaintiffs directly from the
6 Arizona Department of Education.

7 **II. THE COURT SHOULD ADOPT THE SPECIAL MASTER’S DECISION**
8 **REJECTING THE FISHER PLAINTIFFS’ REQUEST FOR THIS DATA.**

9 The Fisher Plaintiffs’ arguments for additional data have already been considered
10 and rejected by the Special Master. This Court should adopt the Special Master’s decision.

11 The Court’s Order Appointing Special Master provides that:

12 Any party requesting data or information from the District shall
13 direct those requests through the Special Master[.]

14 [ECF 1350, p. 16.]

15 Here, the Special Master considered and rejected the Fisher Plaintiffs’ request for
16 additional information beyond the District’s thorough report with underlying data.
17 Specifically, the Fisher Plaintiffs requested information about the achievement gap in the
18 District, and the District provided a detailed and thorough analysis of five years of data
19 in Dr. Freitas’ August 2019 report. In response, the Fisher Plaintiffs asked the District for
20 the raw data analyzed in the report, and the District provided *that* data to the Fisher
21 Plaintiffs and their consultant on September 16, 2019. [Ex. 4.] The Fisher Plaintiffs’
22 consultant examined the data and provided his own report on the data, stating that Dr.
23 Freitas’ study was “well-conceived.” [ECF 2276, p. 16.] Although he disagreed with Dr.
24 Freitas’ conclusions, he acknowledged the data’s accuracy. [*Id.*]

25 ¹ The AzMerit information included in the January 30 presentation appears at pages 4-5
and 24-27 of Exhibit 8.

1 On September 18, 2019, the Fisher Plaintiffs' consultant asked the District for
2 more data. [Ex. 5.] The District declined to prepare and provide the new data set requested
3 by Dr. Hendricks: (a) because it believed that the study already conducted by Dr. Freitas
4 was adequate to assess whether there was any material widening of the achievement gap,
5 (b) because the data set proposed by Dr. Hendricks would be difficult to norm across time,
6 due to the change in testing, and (c) because the request would have required combining
7 data from different systems and selection of additional fields not used by the District in
8 the original study and not related to it, including gender and socioeconomic status of
9 individual students. [Ex. 6.]

10 The Fisher Plaintiffs took the matter to the Special Master, and in response the
11 Special Master said he had read all of the information the Fisher Plaintiffs had provided,
12 that he had all of the data to estimate the achievement gap over the last three to four years,
13 and that "[g]oing back beyond that is not necessary." The Special Master also stated that
14 the information the District had already provided was sufficient to indicate whether the
15 gap had widened. [Ex. 7.]

16 Two days later, on October 3, 2019, the Special Master again denied the Fisher
17 Plaintiffs' request for additional data, stating that Dr. Freitas' report was well done and
18 that it was doubtful that the Fisher Plaintiffs' consultant would find anything different.
19 Additionally, the Special Master stated:

20 *I know you would prefer seven years of data but the tests*
21 *changed in 2014-15 and whatever the district can be held*
22 *accountable for can certainly be discovered in five years of*
analysis.

23 The district's study is superior to the one that David Kruger
24 and I did because they followed individual students whereas
25 the data we have is at school level. Our data, in other words
would not be of use to you or your consultant. *You will note*
that whatever increases and decreases in student

1 *achievement, they are relatively the same for the three*
2 *different racial groups.* There is always some variation from
3 year-to-year when you look at longitudinal data. What is of
4 concern here is that achievement levels drop in middle school
5 for students of all three races. *The district is of course aware*
6 *of this and is struggling with how to deal with a problem that*
7 *is not uncommon throughout the country.* If your consultant
8 has suggestions about how to narrow the achievement gap, I
9 would be delighted to hear them.²

10 [Ex. 7, p. 2 (emphasis added).]

11 The District continues to work to better understand how it can address the
12 nationwide phenomena of achievement gaps based on race, ethnicity, socioeconomic
13 status, and other factors. The Special Master is aware of the District's work in this area,
14 has considered the Fisher Plaintiffs' request for additional data, and has determined that
15 the District need not provide the additional data requested by the Fisher Plaintiffs'
16 consultant. This Court should adopt the Special Master's decision and deny the Fisher
17 Plaintiffs' request and motion.

18 **III. THE DATA THE FISHER PLAINTIFFS SEEK IS NOT RELEVANT TO** 19 **THE COURT'S DETERMINATION OF UNITARY STATUS.**

20 The Fisher Plaintiffs' motion is based on the fundamentally flawed premise that
21 they need the additional data at issue for "a definitive determination to ascertain if the
22 District's efforts had closed the academic achievement gap." [ECF 2453, p. 1:21-25.]
23 They further argue that the data sought is "highly relevant or central to the issue of Unitary
24 Status under applicable law" [*id.*, p. 12:26-27] and that student achievement "is an
25 appropriate factor or measure for determining whether Unitary Status may be appropriate
in the present case." [*Id.*, p. 4:13-16.]

23 ² Despite the provision of five years of data and the Special Master's invitation, the
24 District has not received any suggestions from Dr. Hendrick about how to narrow the
25 achievement gap. It appears the consultant is focused on using District data to expand
academic thought on achievement gaps rather than to reduce achievement gaps in the
District.

1 These statements are simply incorrect. Unitary status does not hinge on the District
2 closing the achievement gap, and a “definitive determination” about the status of the gap
3 is not necessary or relevant to these proceedings. Contrary to the Fisher Plaintiffs’
4 assertions, the Ninth Circuit has not held — in this case or any other — that the status of
5 the achievement gap is even a consideration in the unitary status analysis.³

6 Two factors are considered in determining whether unitary status has been
7 achieved: (a) whether the vestiges of *de jure* segregation by the school district have been
8 eliminated to the extent practicable, and (b) whether the school district has complied in
9 good faith with the desegregation decree. *Bd. of Educ. of Oklahoma City Pub. Sch., Indep.*
10 *Sch. Dist. No. 89, Oklahoma County, Okla. v. Dowell*, 498 U.S. 237, 249-50 (1991).
11 Under the first factor, the achievement gap is not relevant here at all because Plaintiffs
12 have not shown any causal connection between the pre-1951 *de jure* system and any
13 current achievement gap (and indeed, the evidence indicates there is no causal
14 connection). Under the second factor, while the Court may look at the District’s efforts
15 to comply with orders aimed at improving student achievement generally, a determination
16 of whether or to what extent the gap has been reduced, and specifically the particular
17 additional data fields sought by the Fisher Plaintiffs in addition to what has been provided
18 already, are not material to the determination. Because the information the Fisher
19 Plaintiffs seek is not material under either of these factors, and thus would place a burden
20 on the District that is not proportional to the needs of the case, it is outside the scope of
21 discovery under Rule 26(b)(1).

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24 ³ In its 2011 opinion in this case, the Ninth Circuit noted this Court asserted that the
25 District had *failed to review* student achievement, but size of the achievement gap was
not addressed at all. See *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1140 n.19
(9th Cir. 2011).

1 A. The achievement gap is not a consideration in determining whether the
2 vestiges of de jure segregation have been eliminated to the extent
3 practicable.

4 In considering whether the vestiges of *de jure* segregation have been eliminated as
5 far as practicable, courts are directed to consider the six *Green* factors: student
6 assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Dowell*,
7 498 U.S. at 250. Contrary to the Fisher Plaintiffs’ assertions, student achievement is not
8 a *Green* factor. *See, e.g., id.; Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S.
9 430, 435 (1968).

10 The fact that student achievement is not a *Green* factor means Plaintiffs must first
11 prove that the current achievement gap was caused by the District’s pre-1951 dual system
12 in order to bring it within the vestige analysis.⁴ This Court has held that “Plaintiffs have
13 the burden to link disparities that fall beyond *Green*, such as performance disparities in
14 student achievement, to vestiges of *de jure* discrimination.” *Fisher v. Tucson Unified Sch.*
15 *Dist.*, 329 F. Supp. 3d 883, 891 (D. Ariz. 2018) (emphasis added).

16 This is consistent with holdings by courts of appeals around the country that, for
17 non-*Green* factors such as student achievement, there is no presumption that any current
18 racial disparities were caused by prior segregation and thus the burden is on the party
19 opposing unitary status to show a causal link. *See, e.g., Coal. to Save Our Children v.*
20 *State Bd. of Educ. of State of Del.*, 90 F.3d 752, 776-77 (3d Cir. 1996); *United States v.*
21 *City of Yonkers*, 197 F.3d 41, 52 (2d Cir. 1999); *Jenkins by Jenkins v. State of Mo.*, 122
22 F.3d 588, 594 (8th Cir. 1997); *Sch. Bd. of the City of Richmond, Va. v. Baliles*, 829 F.2d

23 ⁴ The only disparities that may be considered are those that are causally linked to the
24 specific, original constitutional violation. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 496
25 (1992) (“The vestiges of segregation [to be eliminated] . . . must be so real that they have
 a causal link to the *de jure* violation being remedied.”); *Missouri v. Jenkins*, 515 U.S. 70,
 89-90 (1995); *Tasby v. Moses*, 265 F. Supp. 2d 757, 764 (N.D. Tex. 2003).

1 1308, 1312-13 (4th Cir. 1987); *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 811 (6th
2 Cir. 1980). Indeed, “[m]ost courts of appeals confronting [the] issue . . . have declined to
3 consider the achievement gap as a vestige of discrimination or as evidence of current
4 discrimination.” *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 330 (4th Cir.
5 2001) (collecting cases from the Second, Third, Fourth, and Seventh Circuits).

6 This makes sense, given that the achievement gap is present in most schools across
7 the country⁵ — regardless of whether they were previously *de jure* segregated — and is
8 caused by external factors outside the control of school districts.⁶ The gap is already
9 present when students enter kindergarten, and it appears to be largely, and perhaps
10 primarily, influenced by socioeconomic factors. *See, e.g.*, Roland G. Fryer & Steven D.
11 Levitt, *Falling Behind: New evidence on the black-white achievement gap*, Education
12 Next (Fall 2004, Vol. 4, No. 4), available at www.educationnext.org/fallingbehind
13 (“[A]djusting the data for the effects of socioeconomic status reduces the estimated racial
14 gaps in test scores by more than 40 percent in math and more than 66 percent in reading.”);
15 *Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 600 (W.D. Pa. 2000) (“Differences in the
16 socioeconomic backgrounds of black and white students are reflected nationally in an
17 achievement gap. This gap appears at all ages in virtually every school system throughout
18 the United States in reading, mathematics and science.”). In fact, as the Special Master
19 has noted, “[n]umerous researchers have studied how much of the variance in student

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21 ⁵ *See School Composition and the Black-White Achievement Gap*, Nat’l Ctr. for Educ.
22 Statistics (June 2015), [https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school-
23 composition-and-the-bw-achievement-gap-2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school-composition-and-the-bw-achievement-gap-2015.pdf).

24 ⁶ The District is not required, for unitary status, to remedy disparities caused by external
25 factors — only those caused by its prior Constitutional violation. As the Supreme Court
has stated, “[j]ust as demographic changes independent of *de jure* segregation will affect
the racial composition of student assignments, so too will numerous external factors
beyond the control of the [school district] and the State affect minority student
achievement. So long as these external factors are not the result of segregation, they do
not figure in the remedial calculus.” *Jenkins*, 515 U.S. at 102 (internal citation omitted).

1 achievement can be accounted for by measurable variations in school characteristics. The
 2 consensus is that schools, on average, account for less than a third of the variance in
 3 student achievement.” [ECF 2014, pp. 9-10.]

4 When Judge Frey specifically addressed the achievement gap in his decision in
 5 1978, he noted the universality of achievement gaps and did not find that the gap in this
 6 District was a vestige of the former *de jure* system:

7 District students . . . have historically exhibited differences in performance
 8 on standardized tests as between Blacks, Mexican-Americans and Anglos.
 9 Present scientific knowledge does not afford satisfactory explanations for
 10 such differences, and the existence of these intergroup differences in average
 11 scores on standardized tests is a common finding in school districts
 12 throughout the united States, and not peculiar in any way to Tucson School
 District No.1. Standardized test results for School District No. 1 students
 indicate that the intergroup differences exist upon the entry of the students
 into the school system and continue through the school career. Consistently
 lower test results for minority group students do not support a reasonable
 inference of unequal provision or delivery of educational services.

13 [ECF 345, pp. 166-67.] Indeed, as reported in the District’s Supplemental Petition for
 14 Unitary Status (ECF 2406, p. 53), the achievement gap in the District is smaller than the
 15 achievement gap in Arizona and in comparable Districts:

Difference in percentage passing ELA on assessment tests⁷		
District	White/AA Gap	White/Hispanic Gap
Arizona (statewide)	26	24
Chandler Unified #80	24	25
Gilbert Unified	29	18
Mesa Unified	30	28
Paradise Valley Unified	27	28
Peoria Unified School	15	17
Deer Valley Unified	26	18
Tucson Unified	24	18

23 _____
 24 ⁷ Combined data from Fall 2018 and Spring 2019 administrations of AzMerit, Multi-State
 25 Alternative Assessment, ACT, and SAT. Arizona Dep’t of Ed., AzMerit, MSAA, ACT,
 and SAT 2019, available at www.azed.gov/accountability-research/data/ (last accessed
 Nov. 26, 2019).

Difference in percentage passing for math on assessment tests⁸		
District	White/AA Gap	White/Hispanic Gap
Arizona (statewide)	29	24
Chandler Unified #80	31	27
Gilbert Unified	29	19
Mesa Unified	36	30
Paradise Valley Unified	29	26
Peoria Unified School	26	18
Deer Valley Unified	30	19
Tucson Unified	25	19

If Plaintiffs want this Court to consider the achievement gap as a vestige of *de jure* segregation that the District must eliminate to the extent practicable, Plaintiffs must first prove a causal link. They have not done so. Nor are they able to do so. Judge Frey found there was nothing unique to the District about the achievement gap in 1978, and that remains true today. The achievement gap in the District remains smaller than those of the State and of comparable districts, and Dr. Freitas' study found that, although students begin school already subject to an achievement gap, the rates of improvement while in school are "comparable" and "fundamentally equivalent" for White, African American, and Hispanic students.⁹

Because there is no presumption that the achievement gap was caused by the District's prior Constitutional violation, unitary status does not hinge on its being eliminated to the extent practicable (or to any extent). The achievement gap is completely outside the Court's consideration under the first prong of the unitary status test, and the additional data and detailed analysis the Fisher Plaintiffs seek is not relevant.

⁸ Combined data from Fall 2018 and Spring 2019 administrations of AzMerit, Multi-State Alternative Assessment, ACT, and SAT. Arizona Dep't of Ed., AzMerit, MSAA, ACT, and SAT 2019, available at www.azed.gov/accountability-research/data/ (last accessed Nov. 26, 2019).

⁹ The Special Master has agreed with Dr. Freitas' findings.

1 **B. Nor is the Fisher Plaintiffs’ desired analysis of the achievement gap a**
2 **consideration in determining the District’s good faith.**

3 The good-faith prong of the unitary status analysis takes a big-picture look at
4 whether the school district “has accepted racial equality and will abstain from intentional
5 discrimination in the future.” *Manning ex rel. Manning v. Sch. Bd. of Hillsborough*
6 *County, Fla.*, 244 F.3d 927, 946 n.33 (11th Cir. 2001). “A history of good-faith
7 compliance [with the court’s orders] is evidence that any current racial imbalance is not
8 the product of a new *de jure* violation, and enables the district court to accept the school
9 board’s representation that it has accepted the principle of racial equality and will not
10 suffer intentional discrimination in the future.” *Freeman*, 503 U.S. at 498.

11 In this analysis, requiring particular results or performance-related tests is
12 inappropriate. As the Supreme Court stated in *Jenkins*,

13 Just as demographic changes independent of *de jure* segregation will affect
14 the racial composition of student assignments, so too will numerous external
15 factors beyond the control of the [school district] and the State affect
16 minority student achievement. **So long as these external factors are not the
17 result of segregation, they do not figure in the remedial calculus.
18 Insistence upon academic goals unrelated to the effects of legal
19 segregation unwarrantably postpones the day when the [school district]
20 will be able to operate on its own.**

21 515 U.S. at 102 (emphasis added and citations omitted).

22 The Fisher Plaintiffs note that certain sections of the USP state that “[t]he objective
23 of this Section is to improve the academic achievement and educational outcomes of the
24 District’s African American and Latino students.” This is correct. But no specific level of
25 academic achievement is required, and unitary status is certainly not contingent on the
26 District eliminating — or even narrowing — the achievement gap. Nor could it be.

27 Where, as here, the gap is primarily caused by external factors and is not causally
28 connected to the prior *de jure* system, “[i]nsistence upon academic goals unrelated to the
29 effects of legal segregation” is unwarranted and improper. *Id.* “Perfect compliance with

1 the court’s remedial orders is not required for a constitutional violator to be released from
2 judicial oversight.” *Berry v. Sch. Dist. of City of Benton Harbor*, 195 F. Supp. 2d 971,
3 994 (W.D. Mich. 2002), *order clarified*, 206 F. Supp. 2d 899, 991 (W.D. Mich. 2002).

4 Even if the Court were to look generally to the District’s efforts related to student
5 achievement as part of its overall, big-picture analysis of good faith, the Court could not
6 require specific levels of student achievement, much less reduction or elimination of an
7 achievement gap that is caused by external factors and is not in any way unique to this
8 District. In such a limited consideration, the specific analysis of the achievement gap that
9 the Fisher Plaintiffs seek — going back years further than Dr. Freitas’ study, to a time
10 when testing was different and thus data would not be comparable to current data —
11 would not aid the Court’s analysis. The data the Fisher Plaintiffs seek is not relevant to
12 this prong of the unitary status analysis, either.

13 Finally, even if the data were of some incredibly limited relevance, the burden
14 without question would outweigh its incredibly low potential benefit. The District would
15 be required to construct a process for norming results across two very different testing
16 regimes (most students got satisfactory ratings under the AIMS tests, but the majority of
17 students across the state do not get satisfactory ratings on AzMerit, and the two testing
18 systems address different curriculum standards), and across two different student
19 information systems in which the data is recorded (Mohave and Synergy), to create the
20 data set the Fisher Plaintiffs seek. Simply put, the data, though collected and available,
21 was not gathered or kept in the aggregation the Fisher Plaintiffs demand. This would be
22 disproportionately burdensome to the potential “benefit” of the data.

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Conclusion

For the foregoing reasons, the District respectfully urges the Court to deny the motion to compel.

Respectfully submitted this 15th day of April, 2020.

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District No. 1*

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CERTIFICATE OF SERVICE

The foregoing document was filed with the Court electronically through the CM/ECF system this 15th 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 Dickinson Wright PLLC