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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' REPLY
BRIEF TO DEFENDANT TUSD#1'S
RESPONSE TO FISHER
PLAINTIFFS MOTION TO COMPEL
DISCLOSURE OF EVIDENCE
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 LRCiv 7.2 (d), as well as Rule 26 (b) (1) and Rule 37 FRCP, respectfully submitting their Reply Brief to Defendant TUSD#1's Responsive Brief to *Fisher* Plaintiffs' Motion to Compel Disclosure of Evidence Concerning Academic Achievement, and further requesting that the District Court both sanction the District for failing to provide the requested information earlier, and enter a specific order compelling Defendant Tucson Unified School District #1 ("TUSD#1" or "the District") to produce the statistical data not available on the Arizona Department of Education website concerning the academic achievement of TUSD#1 African American students.

Fisher Plaintiffs' Reply Brief is supported by the attached Memorandum of Points and Authorities, their previously filed Appendix of Exhibits, and the Court record.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

First of all, the most illuminating fact about Defendant TUSD#1's response is that it totally ignores the applicable Federal Rules of Civil Procedure cited by *Fisher* Plaintiffs in their Motion to Compel Disclosure of Evidence Concerning Academic Achievement. This failure is obviously due to the fact that upon the District Court's favorable order, both Rule 26 and 37 would compel the District to produce the requested academic achievement evidence, which, most importantly, the District Court has previously determined was important to its consideration as to whether the Defendant District had complied in *good faith* with the Desegregation Settlement Agreement. *See Fisher v. U.S.*, 549 F.Supp.2d. 1132, 1164 (D.Ariz.2008) [The Honorable David Bury of the U.S. District Court of Arizona specifically held that "student achievement [was a] relevant [tool]" to the District Court's assessment or determination as to whether TUSD had complied in *good faith* with the Desegregation Settlement Agreement.]

Furthermore, instead of addressing the applicable federal rules, or the actual matter at hand, it would appear that the District is attempting to set up a "decoy allegation" about *Fisher* Plaintiffs' purpose, which was merely to provide the additional data requested by Dr. Hendricks in order that he may make an in depth

1 analysis as to the issue of academic achievement of African American students
2 within the Tucson Unified School District.¹ Instead, the District improperly argues
3 that Plaintiffs' purpose was to show that the academic achievement gap between
4 African American students and other racial groups is widening, which was not
5 Plaintiffs' purpose in requesting the information. One might deduce from the
6 District's argument that it is attempting to shift the burden to the Plaintiffs to prove
7 whether the academic achievement gap is widening. It is suggested that such an
8 argument may be an afterthought by the District in an attempt to create a plausible
9 explanation as to why it did not provide the information when originally requested.
10 All the District had to do was merely pick up the phone or send a simple e-mail
11 related to where pertinent information may be found at the Arizona Department of
12 Education website or www.azed.gov/accountability-research/data. In the spirit of
13 collaboration, the District should have provided the location where the data was
14 available, which coincidentally, would not have been too onerous or time
15 consuming, yet would have been the essence of transparency, collaboration and an
16 example of acting in good faith.

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23 Secondly, rather than address the District Court's own present concerns
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26 ¹ See *Fisher* Plaintiffs' Appendix of Exhibits, Exhibit D, 9/11/19 E-mail from
27 Research Scientist Dr. Robert Hendricks specifying 2017 National Study requiring
28 the specific requested array of relevant data related to determining the issue of
academic achievement. As an aside, it may be noteworthy, that the Special Master
has apparently recently changed his mind about the relevancy of the same requested
data related to programs at Booth Fickett Middle School.

1 related to the importance of academic achievement in making an appropriate
2 determination as to the issue of Unitary Status, the Defendant attempts to further
3 obfuscate the issue by going back in time to Judge Frey's original trial order from
4 some forty (40) years ago, to resurrect a terrible misconception that academic
5 achievement was not important to such an analysis.
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8 Finally, it would appear that the District's attempts to disassociate itself from
9 its previous transparency, collaboration and cooperation do not ring true. If the
10 District had previously, and in the spirit of cooperation and collaboration, merely
11 referred *Fisher* Plaintiffs to the requested data it now provides only after the filing
12 of the present Motion to Compel, said motion may not have been necessary at all.
13 All the District had to say was essentially:
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16 "We're too busy to provide the requested data to Dr. Hendricks, yet here is
17 the website on which you may find most of the information."
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19 As the result of the District's unreasonable failure to provide the information
20 requested, and the plain language of both Rule 26 and Rule 37 FRCivP, the District
21 Court should grant *Fisher* Plaintiffs' Motion to Compel Disclosure of Evidence
22 Concerning Academic Achievement requested by Dr. Hendricks that is not available
23 on the Arizona State Department of Education website, and should not only order
24 that the District be required to pay or reimburse *Fisher* Plaintiffs' counsel for
25 Dr. Hendricks' necessary comprehensive report on academic achievement in the
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1 amount of \$5,000, yet should order that the District pay reasonable attorney's fees
2 and costs associated with forcing *Fisher* Plaintiffs' to file their Motion to Compel in
3 order to obtain information that principally could and should have been conveyed in
4 an e-mail to Plaintiffs a number of months ago. Such an award would be appropriate
5 because the plain language of Rule 37 actually requires such an award in the present
6 circumstances.
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9 10 **II. LEGAL ARGUMENT**

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12 The United States District Court should not necessarily pay very much
13 attention to Defendant TUSD #1's argument in their Response to *Fisher* Plaintiff's
14 Motion to Compel Disclosure of Evidence Concerning Academic Achievement
15 because the response not only totally ignores the relevant Federal Rules of Civil
16 Procedure, yet appears to set up a "decoy" allegation about *Fisher* Plaintiffs'
17 motivations in requesting the information. Namely, rather than address Plaintiffs'
18 true intention to properly and fully determine the issue of whether actual
19 improvement or academic achievement of African American students has occurred
20 during a relevant period of time as suggested by their Academic Achievement Expert
21 Dr. Hendricks, which this Court has previously and consistently stated was
22 important to its consideration of the question of Unitary Status, the District
23 obfuscates the simple issue at hand by falsely claiming that Plaintiffs' purpose in
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1 requesting the disclosure is to show that the academic achievement gap between the
2 relevant racial groups is widening.

3 Once again, under the relevant language of both Rules 26 (b)(1) and 37 of the
4 Federal Rules of Civil Procedure (hereinafter “FRCP”) the District Court may order the
5 District to produce the requested discovery.
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7 Under Rule 26 (b) (1) FRCP the court may order discovery of any matter **relevant**
8 to the subject matter involved in the action. For obvious reasons, the requested data is
9 definitely relevant to the subject matter involved in the presented racial discrimination in
10 education suit. Additionally, Rule 37 FRCP provides that a party *may move for an order*
11 *compelling disclosure or discovery, so long as they have in good faith conferred or*
12 *attempted to confer with the person or party failing to make disclosure or discovery*
13 *in an effort to obtain it without court action.*
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17 In this case, Fisher Plaintiffs have requested information that is most relevant
18 to the subject matter in the action², and has previously made good faith efforts to
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21 ² As previously discussed in briefing, the relevance of the evidence in issue
22 concerning Dr. Hendrick’s requested disclosure of academic achievement related data for
23 African American Students from 2012-present is highly evident from both the District
24 Court’s own language in ***Fisher v. U.S.*** and the 9th Circuit’s 2011 opinion in ***Fisher v.***
25 ***TUSD.*** In ***Fisher v. U.S.*** the District Court specifically stated that it had found “that as a
26 measure of effectiveness, student achievement is **relevant** to TUSD’s **good faith**
27 commitment to the entirety of the Settlement Agreement. Further, under the holding in
28 ***Fisher v. TUSD*** the 9th Circuit Court of Appeals has further arguably advanced the
relevancy of the requested data or information in finding that the ultimate inquiry in
determining the issue of Unitary Status in a particular desegregation case is: 1)
“whether the constitutional violator has complied in “good faith” with a
desegregation decree [or agreement] since it was entered” making such a

1 confer with the District to obtain the information prior to filing the present motion
 2 as required by Rule 37(a)(5)(A)(i), yet to no avail. The information requested is not
 3 only highly relevant, yet is important to adequately informing the litigants, as well as
 4 the District Court, especially with regard to an issue of central importance to the present
 5 case. *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

7 Therefore, the District should be appropriately sanctioned for failing to voluntarily
 8 disclose the highly relevant data or information after repeated requests by *Fisher* Plaintiffs.
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 10 Appropriate sanctions may include not only requiring the District to bear the costs for
 11 preparation of the Academic Achievement Report by Dr. Hendricks for the District Court's
 12 consideration (or to reimburse Plaintiffs *Fishers'* counsel in the amount of \$5,000 that he
 13 previously paid to commission the report), yet may also include an order that the District
 14 be required to pay reasonable attorney's fees and costs related to the present motion as
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18 determination central to a federal court's decision in that regard as the District Court
 19 in this case has definitely stated on the record, and 2) a consideration of the non-
 20 exhaustive list of *Green* factors, which arguably may include academic achievement,
 21 in order to determine whether a school district "has eliminated the vestiges of past
 22 discrimination to the extent practicable". *Fisher v. TUSD.*, 652 F.3d 1131, 1132-33
 23 (2011) *citing Board of Educ. of Okla. City Public Schs. v. Dowell*, 498 U.S. 237,
 24 249-50, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) (holding *Green* factors as being non-
 25 exhaustive list). Finally, the plain language of the 2014 Unitary Status Plan (hereafter
 26 "USP") may not be ignored because under the USP the District in this case is actually
 27 required to work to improve the academic achievement of both African American
 28 and Mexican American student populations. In fact, the "Overview" of Section V
 specifically states that "[t]he purpose of this section shall be to improve the
academic achievement of African American [] students".

1 mandated by the plain language of Rule 37 (a) (5) (A) FRCP.³

2 3 4 III. CONCLUSION

5 Defendant Tucson Unified School District #1 had improperly refused to
6 provide highly relevant information related to the academic achievement of African
7 American Students requested by *Fisher* Plaintiffs’ retained expert Dr. Robert
8 Hendricks. The information requested was highly relevant or central to the issue of
9 Unitary Status under applicable law specific to the present case, *supra*, and it also
10 was implicitly required by the USP to be kept and available to both *Fisher* Plaintiffs
11 as well as the District Court itself in order for the Court to make an appropriate
12 determination as to the issue of Unitary Status. Notwithstanding the fact that the
13 District has now, following the filing of *Fisher* Plaintiffs’ motion, provided the
14 Arizona Department of Education website where much of the information requested
15 may be obtained, it is *Fisher* Plaintiffs’ position that the District Court should,
16 nonetheless, order forthwith the discovery of the requested information not available
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24 ³ Rule 37 (a) (5) states in relevant part that: “[i]f the motion is granted—or if
25 the disclosure or requested discovery is provided after the motion was filed—the
26 court must, after giving an opportunity to be heard, require the party or deponent
27 whose conduct necessitated the motion, the party or attorney advising that
28 conduct, or both to pay the movant's reasonable expenses incurred in making
the motion, including attorney's fees.

1 at said website pursuant to Rule 26 (b)(1) and Rule 37 FRCP, and further order
2 Defendant District to not only pay for the preparation of Dr. Hendrick's Academic
3 Achievement Report, yet to also pay reasonable attorney's fees and costs as required
4 by Rule 37 (A) (5) (a) FRCP.
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6 **RESPECTFULLY SUBMITTED** this 22nd day of April 2020.
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9 */s/ Rubin Salter, Jr.*

10 RUBIN SALTER, JR., ESQ.

11 ATTORNEY FOR PLAINTIFFS FISHER
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically submitted the foregoing ***FISHER PLAINTIFFS' REPLY BRIEF TO DEFENDANT TUSD#1'S RESPONSE TO FISHER PLAINTIFFS MOTION TO COMPEL DISCLOSURE OF EVIDENCE 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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