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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,
Plaintiffs
and
United States of America,
Plaintiff-Intervenor,
v.
Tucson Unified School District, et al.,
Defendants,
and
Sidney L. Sutton, et al.,
Defendants-Intervenors,

No. CV-74-00090-TUC-DCB
(Lead Case)

Maria Mendoza, et al.,
Plaintiffs,
and
United States of America,
Plaintiff-Intervenor,
v.
Tucson Unified School District, et al.
Defendants.

No. CV-74-0204-TUC-DCB
(Consolidated Case)

ORDER

1 Fisher Motions for Sanctions and to Compel-Denied

2 Motion for Sanctions

3 On March 18, 2020, the Fisher Plaintiffs filed a Motion for Sanctions, complaining
4 that the Defendant, the District, has acted with egregious dishonesty and in bad faith and
5 committed unethical misconduct through improper and surreptitious contact with class
6 members to interfere with, through conspiratorial subterfuge, and to undermine the
7 integrity of the class “by inviting said class members to a clandestine meeting at the
8 Viscount hotel for an extravagant dinner with TUSD Superintendent Trujillo held on
9 January 31, 2020,” to entice and solicit members of the class to support the District’s claim
10 of unitary status. (Motion for Sanctions (Doc. 2450) The Court denies the motion. It will
11 decide the question of unitary status based on the record in this case, not public opinion.

12 It appears that the District paid approximately \$2,500 for a dinner, funded through
13 African American Student Services Department (AASSD), (Motion, Ex. C (Doc. 2450-2),
14 to which it invited leaders and other members of the Black community, including those
15 who attended as follows; the NAACP; The Tucson Chapter of the Buffalo Soldiers; the
16 Prince Hall Masons of Tucson, Lodge No. 10; a local barber shop, the Barbea Williams
17 Performing Arts Company; I am You 360, and TEEM, Rising Star Baptist Church. (Motion
18 (Doc. 2450) at 4.) First, the list of the other attendees, (Response, Ex. 5 (Doc. 2452-1) at
19 87), and the invite list, *id.*, Ex. 2 (Doc. 2452-1) at 9-10), reflect that the District invited
20 members of the Black community at large, not parent and student class members. Second,
21 as noted by the District, the African American Academic Achievement Task Force
22 (AAAATF) and Trayben & Associates, both on behalf of the Fisher Plaintiffs, advised such
23 community outreach and the USP instructs the District to adopt strategies that include
24 “collaborating with . . . community groups to provide information and guidance designed
25 to improve the educational outcomes of African American . . . students.” (USP (Doc. 1713)
26 at 50.) The question is whether the community dinner, allegedly touting improved
27 academic achievements by Black students, met the USP goal of community collaboration
28 designed to improve the educational outcomes of African American students. But this is

1 not the issue raised by the Motion for Sanctions, and if it were, the Court would not find
2 bad faith based on one arguably wasteful misadventure by the District.

3 The Court summarizes the relevant facts underlying the Motion for Sanctions,
4 construed in favor of the Plaintiffs, after reviewing all the briefs and exhibits, but especially
5 relies on all the emails attached to both Parties' briefs, the declaration of Dr. Richardson,
6 a member of the Fisher Committee and Chairwoman of the AAAATF, and the declaration
7 of Gabriel Trujillo, Superintendent for the District Defendant. The Court finds that since
8 Trujillo became Superintendent, he regularly¹ met "with counsel for the Fisher Plaintiffs,
9 Rubin Salter, and those he chose to invite," the Fisher Committee.² (Trujillo Decl. (Doc.
10 2452-1) ¶ 2.) "The purpose of these meetings [was] to provide a forum for informal
11 discussion of issues, in the hopes that this would reduce tensions and unnecessary [USP]
12 litigation of issues." *Id.* "Separately, the African American Student Services Department
13 (AASSD) held regular quarterly parent and community meetings to discuss issues of
14 interest to the community." *Id.* ¶3. On August 28, 2019, the Defendant informed counsel
15 for the Fisher Plaintiffs that "the District intended to invite community members to
16 subsequent meetings." *Id.* ¶4. On October 30, 2019, the District invited counsel for the
17 Fisher Plaintiffs to attend the second quarterly meeting scheduled for December 11, 2019,
18 subsequently rescheduled and held on January 30, 2020. *Id.* ¶5. Counsel for the Fisher
19 Plaintiffs responded that attending a meeting with external attendees 'would only be a
20 distraction." *Id.* ¶5 (quoting email November 1, 2019); Ex. 1 (Doc. 2452-1) at 6.)
21 Admittedly, "[t]he purpose of the [January 30, 2020] meeting was to discuss issues of
22 interest to the community regarding the education of African American students at the
23 District. The purpose was not in any way to seek support for unitary status." *Id.* ¶6
24 (emphasis added). There was no reason for the Fisher Plaintiffs to have understood that the
25 AASSD quarterly community meetings, including the one being held on January 30, would

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27 ¹ Meetings were originally held monthly, then became quarterly meetings.

28 ²The Court understands the Fisher Committee to be self-appointed, interested individuals, who are neither the Fisher class representative members nor members of the class.

1 replace the quarterly meetings by Defendant with Fisher Plaintiff's counsel and the Fisher
2 Committee because the two were held for separate and different purposes. As noted by
3 Fisher Plaintiff's counsel, external attendees from the community at large, would not be
4 well versed in the USP litigation and would be a distraction.

5 The Motion for Sanctions is not, however, aimed at reinstating the quarterly
6 meetings between the District and the Fisher Plaintiff's counsel and the Fisher Committee.
7 There is no USP requirement for Defendant to regularly meet with Plaintiffs' counsel, with
8 or without committees or party representatives. The Fisher Plaintiffs do not argue that
9 cancelling these regularly scheduled, previously held, quarterly meetings which are related
10 to the USP litigation is a show of bad faith, especially so close to the end-date review of
11 the USP provisions.

12 Without such argument, the Court turns to the District's assertion that the
13 community engagement challenged by the Fisher Plaintiffs was a recommendation from
14 AAAATF and the Trayben Report. Both provided guidance to TUSD for implementing the
15 USP § V provisions. *See* (AASSD Plan (Doc. 2151) at 2: "This Operating Plan is the result
16 of experience gained by AASSD under the last five years operating under the supervision
17 of the Court pursuant to the USP, discussions and consultations with representatives of the
18 Fisher Plaintiffs, and consultation with a range of experts, beginning with the distinguished
19 panel of experts who served on the African American Academic Achievement Task Force
20 in 2013, continuing through the engagement of Dr. Dale Fredericks and Dr. Joseph Hines
21 in the spring of 2016, and culminating with the comprehensive study and report by Dr.
22 Gwendolyn Benson of Georgia State University and her team of experts from Trayben
23 Associates in the summer of 2018, which report included specific recommendations for the
24 reorganization of AASSD.") The AASSD Plan is currently under review by the Court for
25 the purpose of determining unitary status. The Court has previously refused to finalize it
26 because the Special Master expressed concerns that its departmental structure and
27 operations were not such as would accomplish its primary goal of providing support
28 services to Black students to improve academic achievement and disciplinary outcomes for

1 Black students. This is where the Court's unitary status focus will be, and this brings the
2 Court to the Motion to Compel. The Court considers it in the context of the Fisher
3 Plaintiffs' need for discovery to address the AASSD plan and operations or any other
4 AAAATF or Trayben Report recommendations aimed at improving academic achievement
5 for Black students. This inquiry is currently pending before the Court.

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7 Motion to Compel

8 On September 6, 2018, the Court conducted a comprehensive evaluation of the
9 Unitary Status Plan (USP) and granted Defendant's Motion for Unitary Status in part, but
10 denied it in large part. The Court set out the status of each USP provision, identified work
11 that remained to be done under the USP, called for the District to report completion of these
12 various endeavors, with subsequent briefing by all Parties and Report and
13 Recommendations (R&Rs) from the Special Master, for further review by the Court and
14 rulings from the Court as to whether the District has in fact completed the work set out in
15 the USP and attained unitary status. Section V of the USP is the subject of the Fisher
16 Plaintiff's Motion to Compel, which asserts that the District has failed to disclose data
17 necessary to determine whether the achievement gap for Black students has improved over
18 the course of the USP. Section V of the USP includes the program provisions aimed at
19 improving student achievement, as follows: § V.A: Access to and Support in Advanced
20 Learning Experiences (ALE); § V.B: OELAS³ Extension; § V.C: Dual Language
21 Programs; § V.D: Exceptional/Special Education; § V.E: Student Engagement and
22 Support; § V.F: Maintaining Inclusive School Environments, and § V.G: Reporting. In its
23 September 6, 2018, Order the Court granted unitary status only for subsection D,
24 Exceptional/Special Education.

25 Since then, the District reported its progress relevant to § V of the USP on December
26 1, 2018, by filing the ELL Action Plan, a Post-USP Plan for AASSD and MASSD, a Plan

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³ A reading block program offered by the Arizona Department of Education Office of Language Acquisition Services (OELAS) for provide rigorous mainstream courses and address ELL literacy needs.

1 for Maintaining Inclusive School Environments and a Professional Learning Plan. On
2 September 1, 2019, the District filed the ALE Policy Manual, the Dual Language Plan and
3 the Culturally Relevant Curriculum (CRC) Plan & Culturally Relevant Pedagogy (CRP)
4 Learning Plan. Since then, the Court has, with full briefing from the Parties and R&Rs
5 from the Special Master, considered whether provisions were adequate to attain unitary
6 status and called for further improvements when necessary. The Court notes these repeated
7 reviews because it is only now, after multiple briefings regarding substantive provisions of
8 these various USP programs aimed at improving student achievement, that the Fisher
9 Plaintiffs complain that they have insufficient data to prove how wide the student
10 achievement gap remains between Black students and White students. If data reporting has
11 been an issue, it could readily have been addressed numerous times before now, such as:
12 during the September 6, 2018, comprehensive review; by an objection to any of the
13 District's Annual Reports, or an earlier filed motion to compel.

14 Specifically, the Fisher Plaintiffs' expert asks for the following data: Student
15 Unique State Number; Gender; Race/Ethnicity; SES (Free or Reduced Lunch Eligibility;
16 Grade Level (3 through 11); School Code; School Name, and AZMerit scores for Reading
17 and Math. (Fisher Motion to Compel (Doc. 2454), Ex. B: September 11, 2019 email at 38.)
18 This data will enable the Fisher's expert, Dr. Hendricks, to drill down further than the
19 cohort analysis done by Dr. Freitas.⁴ Dr. Hendricks proposes to examine the achievement
20 gap through several lenses: poverty, race, race and poverty, racial density within schools,
21 and how those factors may affect reading and math scores over time. To "produce
22 persuasive findings regarding the total TUSD efforts over the last seven years." *Id.*, Ex. E
23 (Doc. 2454) at 41: September 17, 2019 email.)

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26 ⁴ Dr. Freitas, PH.D. is Senior Director of assessment and program evaluation,
27 curriculum, and instruction for the District, and according to the District, the Freitas Report
28 was prepared at the behest of the Fisher Plaintiffs to look at longitudinal data based on
AZMerit testing, disaggregated by grade and race, for cohort information for more than
2000 students over five consecutive years tracking them from third grade through seventh
grade. (D Response to F Objection to notice of Compliance (Doc. 2320) at 2.)

1 According to Dr. Hendricks, he believes this additional data will show that “black
2 students lagged two years behind white students by the time they reach the seventh grade.”
3 *Id.* at 45: September 24, 2019 email. The Court notes that the emails attached to the Motion
4 to Compel asking for this data are dated in early September 2019, (Motion to Compel, Ex.
5 A, C, E (Doc. 2454), and that Dr. Hendricks prepared a report, including the above
6 assertions the Fisher Plaintiffs allege as the basis for needing the data it seeks now. The
7 Hendricks report was provided to the Court September 20, 2019, as an attachment to the
8 Fisher Plaintiff’s Objection to the District’s Notices of Compliance related to AASSD and
9 other USP programs, (Response, Ex. 1 (Doc. 2276) at 14-18.) The Court intends to consider
10 Dr. Hendricks’ report and will not discount its premises because he did not substantiate the
11 underlying data for his report. His opinion stands on the same data foundation as Dr.
12 Freitas’ report. The Court will not be deciding the issue of unitary status based on these
13 dueling expert reports. Both experts agree and it is nationally recognized that there is an
14 achievement gap between Black and White students, which is pervasive and exists in
15 TUSD. It is also nationally recognized that this achievement gap is generally attributed to
16 factors other than racial discrimination, including some that Dr. Hendricks proposes to
17 investigate, like poverty. The national recognition of the existing achievement gap formed
18 the basis for the Section V provisions in the USP. That gap remains by both accountings
19 of the data.

20 Student achievement, “together with a consideration of other *Green* factors,”
21 specifically those addressed by the provisions of § V of the USP, expressly designed to
22 target Black students, will instruct this Court’s determination as to whether unitary status
23 has been attained in respect to the student achievement gap that exists between Black and
24 White students. More relevant than statistical arguments over the degree of gap, the Court
25 will focus on the degree of implementation and operation of the USP § V provisions, as
26 recommended by the AAAATF and in the Rayden Report. This is the context of this
27 Court’s judicial authority over the District.

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1 The unitary status inquiry does not begin in a void. It begins with the District's
2 implementation of the USP provisions which have been regularly reported by the District
3 in annual reports since the adoption of the USP. The Court will look carefully at the Fisher
4 Plaintiffs' briefs relevant to the USP § V provisions, especially those aimed at improving
5 student achievement for Black students. The one § V provision intended for the exclusive
6 benefit of Black students is the AASSD⁵ plan. The Court notes that the Fisher Plaintiffs
7 have filed only one Objection in the context of the AASSD, while this Court has repeatedly
8 rejected it, noting frustration with the AASSD and MASSD plans because they failed to
9 reflect the many changes seen over the course of the Districts' operation under the USP or
10 address the Special Master's concern that the two large and expensive departments
11 duplicated efforts and wasted resources to little effect. (Order (Doc. 2359)). On November
12 6, 2019, the Court ordered the District to make changes within 30 days, provide the
13 Amended AASSD and MASSD plans to the Plaintiffs for objections within 14 days, and
14 called for the Special Master to take into consideration the recommendations of the
15 Trayben Report and prepare the AASSD and MASSD plans, accordingly. The Special
16 Master filed an R&R on December 23, 2019. TUSD filed an objection, but the Fisher
17 Plaintiffs did not. The Court assumes that the AASSD was discussed by the District in its
18 Executive Summary and the Supplement to the Petition for Unitary Status. The Mendoza
19 Plaintiffs have filed an Objection to the Supplemental Petition for Unitary Status, but the
20 Fisher Plaintiffs have not.

21 The Court's final review of the AASSD and MASSD remains pending as do most
22 of the other USP § V provisions. The Court clarifies that all USP provisions were intended
23 to address the needs of Black and Hispanic students. This was not, and is not, a lawsuit
24 about improving the quality of education for all students in TUSD. The USP was designed
25 to address access to education issues, including academic achievement, for Black and
26 Hispanic students. It is expected that White students will benefit from many of the USP

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28 ⁵ The Court notes that in previous Orders the Court referred to this as the AASS
plan, but this was prior to the Court's determination that the AASSD would remain post-
unitary status.

1 provisions alongside their fellow Black and Hispanic students, and that will not defeat
2 unitary status, but the USP goals and provisions remain for the benefit of Black and White
3 students. Because the student body is integrated, in some instances statistical data will
4 reflect that all boats have risen or fallen together, but the question is: whether the District
5 has acted in good faith to implement the various USP provisions designed to improve
6 academic achievement for Black and Hispanic students. This is why the District has been
7 required to report on its efforts annually and why there has been robust disclosure and
8 review of the District's plans and operations under the USP. Evidence is, and has been
9 since the adoption of the USP, readily available regarding the District's efforts under the
10 USP. This ongoing dynamic requiring reporting and review was intentional, USP § X,
11 Accountability and Transparency, including § F, Reporting. The Fisher Plaintiffs have had
12 every opportunity to review USP related efforts over the course of this litigation and object
13 when appropriate. The Fisher Plaintiffs have access to the Arizona Department of
14 Education data equal to the District, and this data formed the basis for the Frietas' report.
15 The Court denies the Motion to Compel.

16 To the extent, the Fisher Plaintiffs are surprised by the Court's clarification provided
17 in this Order regarding the limited inquiry the Court intends to conduct relevant to the
18 student achievement gap between Black and White students, the Court will afford the
19 Fisher Plaintiffs an opportunity to present any further objections they may have to the
20 AASSD or any other USP program.

21 Likewise, the Court has considered the need for the Mendoza Plaintiffs to be heard
22 one last time. The Court, therefore, reviews the procedural posture of the case and ripeness
23 for determining unitary status. The Defendants have filed Notices of Compliance relevant
24 to the various USP programs and relevant Orders issued by the Court directing the District
25 to complete its work under the USP for attaining unitary status, all of which have been fully
26 briefed by the parties and R&Rs filed by the Special Master. The District has filed a
27 Supplemental Petition for Unitary Status, with Plaintiffs Mendoza objecting, and the
28 Special Master's R&R due shortly. Given the close proximity in time between the various

1 notices of compliance and the Supplemental Petition for Unitary Status, and because the
2 Court has not yet ruled on the pending objections to the notices of compliance, the Court
3 anticipates that the arguments for or against unitary status in the supplemental Petition will
4 reflect or at least involve arguments made in relation to the notices of compliance. The
5 posture for briefing the Supplemental Petition for Unitary Status ends with the Special
6 Master filing an R&R, but this will not afford the Parties to be heard one last time if they
7 object to the Special Master's recommendations for or against unitary status. The Court
8 finds that awarding unitary status without this opportunity to be heard would be contrary
9 to the Court's previous scheduling orders that it would afford the Parties an opportunity to
10 be heard last before reconsidering unitary status. (Order (Doc. 2243). Therefore, the Court
11 will allow the Parties to file Responses/Objections to the Special Master's R&R to the
12 Supplemental Petition for Unitary Status. This will also address the Fisher Plaintiff's
13 failure to file an Objection to the Supplemental Petition for Unitary Status.

14 **Accordingly,**

15 **IT IS ORDERED** that the Motion for Sanctions (Doc. 2450) is DENIED.

16 **IT IS FURTHER ORDERED** that the Motion to Compel (Doc. 2453) is DENIED.

17 **IT IS FURTHER ORDERED** that within 14 days of the filing date of this Order,
18 the Special Master shall file the R&R to the Supplemental Petition for Unitary Status.

19 **IT IS FURTHER ORDERED** that within 30 days of the filing date of the R&R to
20 the Supplemental Petition for Unitary Status, the Parties may file Responses/Objections,
21 and the supplemental Petition shall be ripe thereafter for determination by the Court.

22 Dated this 28th day of April, 2020.

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Honorable David C. Bury
United States District Judge