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**

Reconsideration ALE Policy Manual Order (Doc. 2474): Denied

On June 15, 2020, this Court issued an Order (Doc. 2474) finding that the District had not fully complied with directives of an Order (Doc. 2123) issued on September 6, 2018, which had found, generally, that ALEs remained red-flagged for discrimination under the "not less than" 15% rule. In the June 15, 2020, Order the Court called for clarification from the District because it provided ALE information, including related transportation plan details, in multiple documents, making the ALE Policy Manual only partially responsive and compliant with the September 6, 2018, Order. The Court afforded the District an opportunity to clarify the information that was in fact policy by compiling it all in the ALE Policy Manual. Additionally, the Court explained the ALE Policy Manual needed clarification as to how ALE strategies, which the District considered effective, would be used "'to guide the District in the future.'" (Order Doc. 2474) at 2 (quoting Order (Doc. 2123) at 98).

On July 27, 2020, the District refiled the ALE Policy Manual (Doc 2500-1). It simultaneously requested relief from the Order as to those clarifications, which "included substantial forward-reaching commands, including instructions for the District to develop new policies and plans for guiding future ALE operations years into the future." (Supp. NC (Doc. 2500) at 3.) Specifically, it seeks relief from the following directives: 1) that it develop a schedule for Advanced Placement (AP) expansion and a statement as to the "optimal" number of AP courses, 2) the development of a schedule for AVID expansion and prioritization of schools for AVID, 3) the requirement to conduct transportation studies for the expansion of ALE opportunities, generally, and the provisions of the Order which would require a complete redesign of the District's Honors, Advanced and Accelerated courses at the middle and high school level. (Supp. NC (Doc 2500) at 4.) The District argues that these directives are "impractical or inadvisable." (Supp. NC (Doc. 2500) at 2.)

To the extent the District's request is an admission it is noncompliant with the Court's June 15, 2020, Order, the District carries the burden to demonstrate why it is unable to comply. *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992) (citing *Donovan v. Mazzola* (*Donovan II*), 716 F.2d 1226, 1240 (9th Cir.1983). The District must

show it took every reasonable step to comply. *Id.* (citing *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976)). The District does not allege impossibility. The District's request is, therefore, an untimely request for reconsideration because it is filed more than 14 days after the June 15, 2020, Order. *See* LRCIV 7.2(g)(2) ("Absent good cause, motion for reconsideration shall be filed no later than fourteen (14) days after filing date of the Order that is the subject of the motion.")[1]

"Motions to reconsider are appropriate only in rare circumstances." *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D.Ariz.1995). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought through—rightly or wrongly.'" *Defenders of Wildlife*, 909 F.Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983)).

There is no response to a motion for reconsideration, unless requested by the Court, "but no motion for reconsideration may be granted unless the Court provides an opportunity for response." LRCIV 7.2(g)(2). The Court denies reconsideration and strikes the Mendoza Response (Doc. 2506).[2] First, the District misunderstands and misstates the Court's June 15, 2020, directives. The Court did not, as Defendants assert, ask for a

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[1]On September 6, 2018, the Court ordered the District to prepare the ALE Policy Manual, which "should focus on strategies and policies that will create a cohesive ALE program, providing a structure for a GYOP for ALE students beginning in the elementary GATE programs, retaining them through middle school in GATE and Pre-AP programs and into high school AP programs, including UHS. The ALE Policy Manual should guide the District's ongoing operation of the ALE Program pursuant to chosen effective strategies . . . [that] are fiscally sustainable to warrant permanency, including a determination that the District can meet staffing and transportation requirements. In short, the Policy Manual shall make programmatic and strategic choices addressing in sufficient detail the issues identified by the Court in this Order to guide the District in the future." (Order (Doc. 2123) at 98.) The District did not seek reconsideration of the September 6, 2018, Order.

[2] The Mendoza Plaintiffs may file a Response to all the District's ALE filings subsequent to the District's compliance with this Order.

"detailed" plan to grow ALE in the future and it did not ask for detailed transportation studies. The Court asked for information regarding the status of the ALE Plan in comparison to the District's ALE goals, and a prioritization of ALE undertakings, if any, going forward. It remains to be seen whether any such further ALE operations will occur post-unitary status, but even if the Court's directive reaches into the post-unitary realm, it is not ill-advised or impractical.

Perhaps it is time for the Court to remind the Parties of the scope of review the Court applies when considering unitary status. As Defendants may recall in August 21, 2007, this Court refused to grant unitary status until the District established its good faith commitment to the future operation of the school system in compliance with the constitutional principles that were the predicate for this Court's intervention in this case. (Doc. 1239) at 2.) The Court advises the Parties to reread this Order in its entirety.

This Court remains committed to returning oversight of the TUSD schools to the state and School Board for more effective oversight by the public of its public schools. The law has not changed, and it remains this Court's "obligation to provide an orderly means for withdrawing its control that will ensure the public that TUSD will act in good faith in regard to future compliance with the principles of the Settlement Agreement," (Order 1239) at 24), i.e., the principles that were the predicate for the Court's intervention in this case," *id.* at 2, 6, 23, 25.)

What were those predicates? The Court looks back to the Findings of Fact and Conclusions of Law issued by the Honorable William C. Frey, which were as follows: "'some effects of past intentional segregative acts by TUSD remained at" nine specified schools that warranted the Court's "use of its equitable powers to attempt to remedy any [such] segregative effects [],"and that "considering the past segregative acts as found by the Court and the seriousness thereof, a willingness to continue such acts must be inferred, and an injunction must issue to prevent any future reoccurrence of such constitutional violations." (Order (Doc. 1119) at 2 (quoting Findings of Fact and Conclusions of Law at ¶ 59-61)).

Judge Frey referred to the *de jure*[3] segregation under Arizona law of African American students in kindergarten through eighth grades at Dunbar School until 1951-52, when desegregation of Dunbar School placed the majority of the district's African American students at Spring and Safford, at two Tucson schools dominated by Mexican American students. The Mendoza Plaintiffs prevailed on Count One of their Amended Complaint, alleging that the District created and maintained a tri-ethnic segregated system. (Order (Doc. 1119) at 8 n.4.) This Court, after careful review of Judge Frey's Findings of Fact and Conclusions of Law, pages 206 to 223, found this case falls squarely within the confines of a *de jure* case for purposes of determining whether or not TUSD has attained unitary status regardless of the fact that only African American students were statutorily prohibited from attending White schools. Judge Frey found that in dismantling the dual Black and White school system, there was some intentional segregation of minority students (Black and Mexican-American) from Anglo-students. (Order (Doc. 1119) at 15 n. 9.)

Judge Frey issued the following injunction: "Defendants are hereby enjoined from any acts or policies which deprive any student of equal protection of the law whether by intentional segregation or discrimination based on a student's race or ethnic grouping." (Order (Doc. 1119) (quoting (June 5, 1978 Order at ¶¶ 4)). Subsequently, the Parties replaced the injunction more specifically with the provisions of the Settlement Agreement and have now replaced those with the provisions of the USP.

The Court reaffirms its prior findings that the scope of the District's obligation of non-discrimination is first framed by the nature of the case being an order of desegregation, and second framed by the law, which holds that the goal of desegregation under *Brown v. Board of Education* is to improve the quality of education for all students by equalizing access, furthering diversity and giving effect to every child's right to an equal educational opportunity. (Order (Doc. 1119) at 15.) "The idea behind the Court's inquiry is to determine whether TUSD has complied to the extent practicable with the desegregation

[3]Intentional segregation.

decree since it was entered, thereby, eliminating the vestiges of past illegal discrimination to the extent practicable and establishing its good faith so that the public may be confident it will adhere to the Constitution." (Order (Doc. 1239) at 7 (citing *Bd. of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992)).

Whether the vestiges of the de jure discrimination have been eliminated 'to the extent practicable requires the Court to look to 'every facet of school operations,' including the *Green* factors: student assignment, faculty, staff, transportation, extra-curricular activities, facilities, and other resources related quality of education factors." (Order (Doc. 1119) at 17 (quoting *Dowell*, 498 U.S. at 249-50; *Freeman*, 503 U.S. at 492). ALE is an educational resource aimed at improving academic achievement for African American and Latino, including ELL students.

"The good faith component requires TUSD to show past good faith compliance and a good faith commitment to the future operation of the school system, which can be shown through specific policies, decisions, and courses of action that extend into the future." (Order (Doc. 1239) at 6-7 (citing *Lee v. Dothan City Board of Education*, 2007 WL 1856928 (Ala. 2007) (citing *Dowell v. Bd. Of Educ. of the Oklahoma City Public Schools*, 8 F.3d 1501, 1513 (10th Cir. 1993)).

In terms of this case, the Court cannot dissolve the Consent Decree unless it can find: "1) TUSD has complied with the [USP] and related Court orders to the extent practicable for a reasonable period of time; 2) that the vestiges of past de jure discrimination have been eliminated to the extent practicable;[4] and 3) that TUSD has demonstrated a good faith commitment to the whole of the Court's orders, the terms of the [USP], and to the provisions of the law and the Constitution that were the predicate for the Court's intervention in this case." (Order (Doc. 1239) at 6 (citing *Dowell v. Oklahoma City Public Schools*, 498 U.S. 237, 249-50 (1991); *Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 87-89, 101 (1995)).

[4]The obligation to correct the condition of *de jure* segregation is to take whatever steps might be necessary in converting to a unitary system to eliminate racial discrimination "'root and branch.'" *Freeman*, 503 U.S. at 486 (quoting *Green*, 391 U.S. at 437–438).

In 2007, when the Court considered whether the District had attained unitary status, the inquiry spanned the 27 years of operations under the terms of the original 1978 Settlement Agreement. Now, 42 years have passed, with the District operating for the last seven years, since 2013, under the updated Consent Decree, the USP. The Court denied the District's last assertion of unitary status in 2018 based on the status of the ALE program as of SY 2016-17. (Order (Doc. 2123)). Two years have passed and the District again, on December 31, 2019, filed the Supplemental Petition for Unitary Status, which is currently pending before the Court. It does not offer an accounting or future projection for compliance. Instead, the District expressly asserts there are no such requirements. The Court finds the law is to the contrary, unitary status may only be granted on the record,[5] which must reflect that the USP ALE goals, especially those associated with access issues, have been attained to the extent practicable and that the District will not abandon these goals post-unitary status.

In 2007, the Court explained that one of the reasons it could not grant unitary status was because the record was "devoid of any specific policies, decisions, or proposed courses of action that extended into the future." (Order (Doc. 1239) at 5.) Without this and post-unitary transparency, the Court found it could not close the case because there was no way for the community to monitor the District's post-unitary actions for compliance with the constitutional principles underpinning the Settlement Agreement, now the USP. (Order (Doc. 1239) at 5-6.) The Court believes that these remain important post-unitary status considerations, especially because the District insists that there is no constitutional link to § V.A, ALE provisions, which were designed under the USP to ensure equal access to ALEs for African American and Latino students, including ELL students.

In terms of this case, the Court's Order (Doc. 2474) looked at whether the District complied with the directives of the September 6, 2018 Order, i.e., which focused on the first *Dowell*/*Freeman* test of whether the District has complied with the USP § V.A. The

[5] (Order (Doc. 1239) at 6 (citing *United States v. Board of Comm'rs of Indianapolis*, 128 F.3d 507, 512 (7th Cir. 1997) (finding unitary status must be based upon proper findings made upon a record compiled in the district court).

September 6, 2018, Order denied unitary status because there remained proportionality disparities between the numbers of White students enrolled in ALEs compared to African American and Latino, including ELL students, enrolled in ALEs. (Order (Doc. 2123) at 51-53.) The majority of ALEs failed the "not less than 15%" rule and were, accordingly, red-flagged for discrimination. The Court found that while the total number of students enrolled in ALE programs has dramatically increased, but this was not the USP goal. The Court found questions remain as to whether the District is implementing effective access strategies for African American and Latino students to increase access to ALEs for these students. (Order (Doc. 2474) at 2 (relying on Order (Doc. 2123) at 63.)[6]

Also remaining, in the context of the question of unitary status, is the good faith with which the District has embraced the USP goal of increasing access through engagement in ALEs for African American and Latino, including ELL students. As noted above, the *Dowell*/*Freeman* test requires the Court to consider whether the District has complied with the USP and related orders to the extent practicable for a reasonable period of time. This is important because the Court must assess the District's commitment to the USP against a backdrop of 27 years of acting without good faith by using millions of dollars of 910G funding without ensuring the money was being spent to promote equal access to educational opportunities, such as ALEs, and improve student achievement for students of color. The Court also reminds the District that the USP was adopted in 2013, with a potential termination date of "not prior to the end of SY 2016-17." (USP (Doc. 1713) § XI.A.2. This suggests that the Parties contemplated at least 3 years of operations under the USP, but the ALE Action Plan was not adopted until 2015 and required supplementation thereafter. Program effectiveness was not analyzed and reported until the ALE Policy Manual (Doc. 2267), which was filed August 30, 2019.

This is the backdrop for the Court's unitary status assessment. The Court finds that it will not grant unitary status for USP § V.A, Access to and Support in Advanced Learning

[6] This too is part of the first prong of the *Dowell*/*Freeman* analysis, which fishtails into the vestiges' assessment, which looks at whether existing inequities in access to ALE programs is a vestige of discrimination.

Experiences, while the record is "devoid of any specific policies, decisions, or proposed courses of action that extended into the future." (Order (Doc. 1239) at 5.)

The Court clarifies that it did not order the District to provide detailed future operational plans.[7] The District shall identify the policies, decisions, or proposed courses of action that extend into the future in relation to the current status of the ALE program and the USP ALE goals. The District has this information, which it describes as "the nuanced judgment of experienced educators," of the type made by the ALE Director every year based on "established process." (ALE Policy Manual (Doc. 2500-1) at 7-8.) The Court assumes the established process is that which has devolved over the course of the USP to meet the ALE program goals using the most effective strategies. The District submits that the ALE Director can only make this evaluation on an annual basis when he knows the availability of funding and qualified teachers, and "the District cannot accurately forecast which ALEs will be viable in which schools, years into the future." (Request for Relief (Doc. 2500) at 5.) The District defines "Appropriate ALE opportunities" to mean those that can funded and staffed each year, if any. *Id.* at 5. The Court did not, however, ask the District to develop a future ALE operations plan. It seeks a precursor to a detailed operational plan. By analogy, the Court wants the menu supporting a shopping list, not the shopping list. Given the attestations by the District regarding the ALE Director's nuanced judgment based on established processes, the Court finds that the District can comply with the Court's June 15, 2020, Order because the ALE Director knows the ALE menu. The District shall file an ALE Status Report which identifies and prioritizes future growth, if any, necessary to attain the USP goal of providing equal access to ALEs for African American and Latino, including ELL, students.

The District asserts that "there is not a current need to prioritize significant ALE growth in any specific ALE area." As the Court understands it, Pull-out GATE and Resource GATE are offered equally at all schools. Cluster-gate is an ALE strategy to

[7] Because the Court does not ask for an operational plan, the Status Report does not need to accommodate COVID-19 operations. The Court assumes that schools will be operating normally by at the latest SY 2021-22.

expand Pull-out gate opportunities for students, who do not have to qualify for GATE. Resource GATE is an enrichment class which is offered at grades 6-10 to qualifying and non-qualifying students. The Court finds that the evidence presented by the District would support its assertion that there is no further growth needed for Pullout, Resource and Cluster GATE, if the Court ignores that the purpose of the Cluster GATE program was to expand the reach of Pull-out GATE, without the qualifying requirement, to African American and Latino students. In 2018, the Court re-issued a directive, previously issued October 27, 2017, that the District "open Custer GATE programs to at least the level existing in SY 2013-14 [(14 schools)] and place them strategically at schools serving minority students, and especially target them at schools serving substantial numbers of African American students." (Order f(doc. 2123) at 57-58 (citing Order (Doc. 2084) at 11)). The District reports it now has 14 Cluster GATE schools serving approximately 1500 students. This does not, however, support the assertion that there is no need for further growth for Cluster GATE. The Court did not mean to suggest that 14 was the magic number of CLUSTER GATE schools needed in the District; Cluster GATE is uniquely suited to target students of color, especially because the most advantageous GATE program, Self-contained GATE, has been located at the same nine schools since before the inception of the USP. The District's ALE Status Report shall present the record upon which it bases its conclusion that there is no current need for further growth in the Cluster GATE program. The Court defines current to mean over the next three years.

There is, also, no evidentiary foundation for the same assertion as to Self-contained GATE, which exists at only nine schools. Open-GATE is offered at Tully Elementary Magnet School, as a Self-contained GATE program, without the need to qualify to attend the school from any neighborhood. Students may progress from Tully to an open-access strand of GATE content classes at Roberts-Naylor K-8 for grades 6-8.

In the context of the opt-in pilot program for Self-contained GATE students at White Elementary and Pistor Middle schools, the District reports that in 2018-19 there were only 64 students, including five African American students, across the entire District that did

not enter GATE. As the Court understands it, the District's existing programs could have accommodated all these students, therefore, the pilot program did not need to be phased in and "the District does not anticipate a need to develop or implement a phased-in plan or waiting list for Self-contained GATE students." (ALE Policy Manual (Dc. 2500-1) at 9-10.) This establishes that the existing Self-contained GATE programs can accommodate all potential GATE qualifying students. Only the transportation question remains for Self-contained gate: whether the travel distances for these schools exceeds what has been determined to be reasonable[8] for qualified students residing in the existing feeder patterns for these schools? If yes, this transportation issue is impeding access to the Self-contained GATE program, and the District shall address it in the ALE Status Report.

The District reports that the Self-contained TWDL GATE program at Hollinger can accommodate anticipated demand for the "near-term" future, then can expand to "other sites." (ALE Policy Manual (Doc. 2500-1) at 10.) The estimated mean travel time for TWDL students to Hollinger is 25 minutes. The District reports that of 22 ELL students, there were 12 students who lived more than 30 minutes away and two who lived more than 60 minutes away. The Court knows that there are eleven TWDL schools, which like all elementary schools in the District have Pull-out GATE programs, for students who qualify for GATE, including ELL students. Pull-out GATE, which is 90 minutes one day per week, is not a comparable academic resource to Self-contained GATE, which is five days a week. The question remains, how long is the "near-term" that Hollinger can accommodate all the TWDL students, including ELL students, who qualify for GATE? How does the District intend to address the approximately one-half of the ELL students, who qualify for Self-contained GATE, but live more than a reasonable transportation-trip away from Hollinger?

The District seeks relief from the Court's request for future insight to the scope of Advanced Academic Courses (AACs) at the District's middle schools and high schools: Honors, Advanced and Accelerated courses, Advanced Placement (AP) and Dual Credit courses, and the International Baccalaureate (IB) program at Cholla High School. These

[8]Generally, 20 minutes is reasonable, but travel should no be longer than 30 minutes,

courses are all open enrollment and, therefore, available to all students. That does not, however, answer the question of equal access because AAC courses are not all equal and are not equally offered at all schools. "All schools serving students in grades 6-8 offer, at minimum, one Honors, Advanced, or Accelerated class."[9] Middle and K-8 schools offer courses for high school credit, with all offering high school algebra in the 8th grade, but some schools offer other high school credit classes in addition to Algebra 1.[10] Some schools offer these courses on campus, but other schools offer them by providing transportation to another school or by the online learning platform, Edgenuity. The record is devoid of any specifics as to which schools offer which AAC courses on or off-site, or on-line.

Initially, the District proposed transporting middle school students to nearby high schools because smaller middle school campuses in K-8 schools were unable to offer Dual Credit high school courses. The Court approved this proposal, but it now appears this method of providing off-campus Dual Credit courses may be expanding beyond K-8 schools, including being used to provide AP high school courses. The Court finds that off-campus and on-line AACs do not provide equal access compared to ALEs that are offered on-campus. Transportation is a *Green* factor because it places an inequitable burden on students to access resources and discourages access, especially if it involves an unreasonably long trip. The record is silent as to which schools offer which AACs on or off-site, and what the transportation-trip travel time is to access the off-campus resource.

In high school, the District offers AP and Dual Credit courses. There are advantages and disadvantages for both, depending on whether a student intends to attend college in or out-of-state. The District also offers the academically challenging International

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[9] "The Special Master recommends that every middle school should have <u>at least two</u> Pre-AP courses, Honors and Advanced, with at least one being available in SY 2018-19." (Order (Doc. 2123) at 73 (citing (2016-17 SMAR (Doc. 2096) at 39)).

[10] (Order (Doc. 2123) at 74 (citing (Order (Doc. 2084) at 18); (2016-17 SMAR (2096) at 39) (noting Special Master's recommendation, adopted by the Court October 24, 2017, that the District make the Dual Credit program universally available in all middle schools).

Baccalaureate (IB) program at Cholla High School and what has been primarily a Dual Credit program at Santa Rita High school.[11] Pursuant to an order of this Court, the District filed an ALE Revised Analysis of Compliance with USP to the 2016-17 DAR, documenting, generally, which type of AACs are offered at each school. *See* RAC ALE (Doc. 2092-1) at 104-430 (Individual School's Reports through SY 2017-18.) The Court has reviewed the 2018-19 DAR. In neither place has the District documented the current status of AACs in its middle and high schools sufficiently for this Court to determine whether there is program equity within the schools. As an alternative to a post-unitary status plan, the public's ability to monitor the ALE program depends on a clear status report at the time unitary status is attained and post-unitary status transparency. The District shall provide the SY 2018-19 Individual School's Reports, with the addition of information identifying the actual AACs offered at each school and whether they are on-line, on or off-site, and if off-site the travel time needed to access this ALE resource.

The District has applied CRC, the District's strategy for promoting student engagement, to Honors, Advanced, and Accelerated courses to improve engagement and academic achievement by African American and Latino students in ALEs. In the June 15, 2020, Order, the Court directed the District to develop a timeframe for offering one CRC AP or AAC course at each school. The District objects.

In 2018, the Court ordered the District to develop a schedule for offering CRC AP courses because the District had failed to move forward with this ALE Action Plan component. (Order (Doc. 2123) at 75 (referencing 2013 Action ALE Plan provision for District to focus "on AP courses of high-interest to African American and Latino students, including ELL students). In 2018, the Mendoza Plaintiffs had complained that there were still no CRC AP courses. Accordingly, the Court ordered the District to develop a CRC AP course to be implemented first at UHS, *id.*, because most courses at

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[11] For the first time, the District explains the choice to exclusively offer Dual Credit courses to the exclusion of AP courses at Santa Rita High School in the context of a comprehensive program for students to graduate from high school with an Associate degree. (ALE Policy Manual (Doc. 2500-1) at 28.)

UHS are AP. The CRC AP course at UHS would serve the dual purpose of increasing access and academic success for African American and Latino students at UHS. *Id.* at 74-75, 85-87. There was no suggestion by the Court that CRC AP courses should end at UHS.

After reviewing the revised ALE Policy Manual and finding no further action taken by the District to expand the CRC AP courses beyond the one being offered at UHS, the Court reaffirmed the directive and ordered the District to develop a timeline for offering at least one CRC AP course at every high school and at least one CRC AAC at every middle school. (Order (Doc. 2474) at 17.) The Court ordered the District to provide a timeframe for compliance with this component of the 2013 ALE Action Plan because CRC promotes engagement, increasing both access and student achievement for African American and Latino students, including ELL students, in ALEs.

The District "respectfully declines" to comply with the Court's directive that "the District [] ensure that Pre-AP courses function as AP pipelines for high school AP AACs, including mapping and aligning them with College Board standards." (Request for Relief (Doc. 2500) at 13), (Order (Doc. 2474) at 5); (Order (2123) at 60, 74). The District explains that it simply does not offer such Pre-AP courses and does not intend to do so, but to avoid any confusion resulting from its past categorization of the Honors, Accelerated and Advanced courses as Pre-AP, it stopped using the term in the ALE Policy Manual. This is not an option to sidestep compliance with a directive issued over a year ago. In the 2016-17 District Annual Report (DAR), the District reported that Pre-AP courses "are designed as more rigorous studies to prepare students for AP or IB classes [] and are seen as 'a pipeline for eventually taking AP classes in high school,' (Revised ALE USP RAC (Doc. 2092-1)." (Order (Doc. 2123) at 60.) AP classes are College Board approved, college level, classes that use a standard curriculum and students may receive college credit by taking and passing a national exam at the end of the year. *Id.*

In 2016-17, the Special Master reported that students who take Pre-AP courses are only modestly more likely to take AP courses, there is no correlation to achieving a grade

of three or higher on the AP exam, and Pre-AP courses do not "map" the AP curriculum or exam and are not intended to prepare students to succeed in AP classes. (Order (Doc. 2123) at 60) (citing (2016-17 SMAR (Doc. 2096) at 37).

As the Fisher Plaintiffs articulately explained, "it is not enough to just increase the number of Pre-AP courses. 'For this to be effective, the criteria and curriculum for these classes need to be aligned with the College Board,' and 8th grade and earlier grade standards must be aligned to ensure successful transitions from Pre-AP courses to AP courses." (Order (Doc. 2123) at 74) (citation omitted)). Both Plaintiffs asked the Court to direct the District to redesign these courses and to offer additional student support, inclusive but not limited to tutoring, to ensure students successfully transition from Pre-AP to AP programs. *Id.* "Given the critical need for Pre-AP courses to be effective pipelines to AP courses, including the AP curriculum offered at UHS,[12] the Court grant[ed] the Plaintiffs' request." *Id.* The District does not have discretion to "respectfully decline" to comply with this directive and shall act immediately to develop a timeline for fully complying with the directive to develop a Pre-AP pipeline for AP courses. The ALE Status Report shall include the timeframe for completing this work.

The District likewise objects to the Court's directive for AVID. It argues it cannot identify AVID expansion efforts except on a yearly basis, and this year there is no plan to expand it. (Request for Relief (Doc. 2500) at 7.) At the same time, however, the District admits that the AVID Coordinator is responsible to monitor and adjust site plans based on progress towards goals and AVID certification metrics. *Id.* at 48. In the past the District reported its goal was to be an AVID District, which it now restates as a commitment to implement AVID district-wide. AVID instructional practices are used school-wide at the elementary level, and at the secondary level, the AVID Elective class is added which includes an AVID tutoring program. The tutoring program is allegedly being coordinated with MASSD. *Id.,*

[12] Because the majority of courses at UHS are AP, access to UHS is linked to an effective AP pipeline. (Order (Doc. 2123) at 80-87.)

Appendix A[13] (Doc. 2500-1) at 48. The Court notes that, like CRC AP courses, the District's ALE Action Plan called for it to "[c]reate a plan that outlines how [AVID] expansion could take place over a multi-year period." (Order (Doc. 2123) at 96.) The District shall comply with the Court's directive to do this.

Conclusion

The Court finds that the District is capable of complying with all the directives issued by the Court on June 15, 2020.

> Annually, the ALE Director reviews course offerings at each school to look for ways to expand AACs. The ALE Director compiles a comprehensive list of AACs offered by each school and, together with school administration at each campus, reviews the list for accuracy and develops a campus-based plan for adding AACs, as appropriate, to widen students' exposure to an even more rigorous program.
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> The ALE Director and Desegregation Research Project Manager annually review the enrollment trends in all AACs. They share this information with school administrators with a specific focus on the number of course offerings, student enrollment patterns, and integration of the courses.

(ALE Policy Manual (Doc. 2500-1) at 30.) Reportedly, the ALE Director works with the schools and appropriate departments to grow the number of AACs and the teachers for them. Clearly, the ALE Director has the requisite program knowledge to compile the ALE Status Report and the 2018-19 Individual School's Reports, including the additional comparison data necessary to enable future monitoring, whether by the Court or public, of the District's ALE operations.

Rather than revising the ALE Policy Manual yet again, the District shall file the ALE Status Report, which shall identify the current status of ALEs in comparison to the District's USP goals. The District's ALE Status Report shall address the access issues, including those related to transportation, for Cluster and Self-contained GATE, including the TWDL GATE at Hollinger, and for the AACs and AVID. The Status Report shall include the requisite timelines necessary to ensure compliance by the District with prior

[13] The Court treats the Appendix as part of the ALE Policy Manual.

Court Orders related to CRC AACs, including CRC AP courses, Pre-AP courses that map AP courses, and AVID. The District shall attach the SY 2018-19 Individual School's Reports, which shall contain additional data identifying the actual AACs offered at each school, whether they are offered on-line, on or off-site. For off-site resources the District shall report feeder pattern travel times. The District shall identify which AACs are CRCs. The District shall identify the actual AVID program existing at each school (school-wide or elective class, or both).

Following the District's filing of the ALE Status Report and SY 2018-19 Individual School's Reports, the time for Responses to all ALE filings, including the ALE Policy Manual, shall commence**.**

Accordingly,

IT IS ORDERED that the District's Motion for Relief, which is treated like a Motion for Reconsideration (Doc. 2500) is DENIED.

IT IS FURTHER ORDERED that the Mendoza Response (Doc. 2506) is STRICKEN.

IT IS FURTHER ORDERED that, within 21 days of the filing date of this Order, the District shall file the ALE Status Report and 2018-19 Individual School's Reports, and the time to respond to the ALE Policy Manual shall thereby commence.

Dated this 17th day of August, 2020.

David C. Bury
United States District Judge