

1 P. Bruce Converse (#005868)
Timothy W. Overton (#025669)
2 **DICKINSON WRIGHT PLLC**
1850 N. Central Avenue, Suite 1400
3 Phoenix, Arizona 85004-4568
bconverse@dickinsonwright.com
4 toverton@dickinsonwright.com
courtdocs@dickinsonwright.com
5 Phone: (602) 285-5000
Fax: (844) 670-6009

6 Robert S. Ross (#023430)
7 Samuel E. Brown (#027474)
TUCSON UNIFIED SCHOOL DISTRICT
8 **LEGAL DEPARTMENT**
1010 East Tenth Street
9 Tucson, Arizona 85719
Robert.Ross@tusd1.org
10 Samuel.Brown@tusd1.org
Phone: (520) 225-6040
11 *Attorneys for defendant*
Tucson Unified School District No. 1

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.,
18 Defendants.

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

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

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

24 **REPLY TO MENDOZA PLAINTIFFS' OBJECTIONS (ECF 2529)**
TO SUPPLEMENTAL NOTICES AND REPORTS OF COMPLIANCE:
25 **ADVANCED LEARNING EXPERIENCES (ECF 2500, 2520)**
26

1 On September 8, 2020, the District filed its Second Supplemental Notice and
2 Report of Compliance: Advanced Learning Experiences (ECF 2520), describing its
3 compliance with the Court's August 17, 2020 Order (ECF 2512). Specifically, the
4 District provided timelines for expanding specific ALEs described in the Court's June 15,
5 2020 Order (ECF 2474), as well as providing (a) an ALE Status Report, (b) individual
6 school reports identifying ALE data for each school, (c) feeder pattern travel times for
7 off-site ALEs, and (d) identification of CRC AACs and AVID programs at each school.
8 [ECF 2520, pp.2-3; ECF 2512, pp. 26-17.]¹ This reply responds to the objections raised
9 by the Mendoza Plaintiffs in response to that notice of compliance.²

10 The Mendoza Plaintiffs' objections, while nominally phrased in terms of reporting
11 and compliance with the Court's directions regarding reports to be filed, are actually
12 additional, and repeated, substantive opposition to the District's position that it is
13 operating in unitary status, and entitled to termination of Court supervision. This is
14 perhaps most plainly demonstrated by their arguments regarding the 15% rule, essentially
15 asserting that because not every individual ALE program meets the 15% rule regarding
16 participation, the District has not done enough and must remain under Court supervision.

17 There is, of course, no constitutional requirement that school districts achieve
18 compliance with the 15% rule in order to preserve their local autonomy. Indeed, there is
19 no constitutional requirement for a school district to achieve any particular outcome or
20 balance regarding participation in ALEs. The basis for any application of the 15% rule
21 to the District must come, then, within the context of this desegregation case.

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23 ¹ Through an inadvertent error, entirely attributable to counsel and not to the District, the
24 ALE status report did not include the timeline for expansion of CRC AP courses. The
25 District has filed herewith a supplemental notice of compliance setting out that timeline.

26 ² The Mendoza Plaintiffs' response appears at ECF 2529. Neither the Fisher Plaintiffs
nor the Department of Justice filed a response or objection to the District's Second
Supplemental Notice and Report of Compliance.

1 Two factors are paramount in assessing the significance of the fact that some ALE
2 programs are not in compliance with the 15% rule. First, advanced learning experience is
3 not a *Green* factor: any present disparity is not presumed to be causally related to the prior
4 segregated dual school system. In the absence of proof that a disparity is causally tied to
5 the prior dual school system, there is no authority to order a remedy addressing the
6 disparity. *Missouri v. Jenkins*, 515 U.S. 70, 102 (U.S. 1995) (to require a remedy, a
7 disparity must be proven to have resulted from *de jure* segregation).

8 As found by Judge Frey, differences in academic achievement between different
9 ethnicities are “a common finding in school districts throughout the United States,” are
10 “not peculiar in any way to Tucson School District No. 1,” and “do not support a
11 reasonable inference of unequal provision or delivery of educational services.” [ECF 345,
12 pp. 166-67.] Thus, not only is there no proof of causation, there is actually a prior finding
13 in this case that academic achievement issues are **not** causally related to the prior dual
14 school system.

15 As the Supreme Court has declared, although “numerous external factors beyond
16 the control of the [school district] and the State affect minority student achievement,”
17 “[s]o long as these external factors are not the result of segregation, they do not figure in
18 the remedial calculus. Insistence upon academic goals unrelated to the effects of legal
19 segregation unwarrantably postpones the day when the [school district] will be able to
20 operate on its own.” *Jenkins, supra*, 515 U.S. at 102.

21 The second paramount factor to consider is that the Mendoza Plaintiffs do not even
22 suggest that the disparity can be causally connected to the past *de jure* segregated school
23 system. Indeed, they do not even suggest that there is any current *de jure* discrimination
24 in connection with the District’s advanced learning experiences. Their only argument is
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1 that the District is not doing enough to remedy a general social issue that is not the
2 District’s fault, is not the District’s constitutional obligation to fix, and which thus cannot
3 form the basis for continued federal court authority over the District.³

4 However, the absence of constitutional requirements, and the limits of authority
5 to impose remedies, does not limit the District’s own ability to do what is right for its
6 students. The District wants to be sure that the Court, the parties and the community
7 understand clearly that, even without the compulsion of a court order, the District remains
8 fundamentally committed to integration, diversity and equity. Earlier this year, the
9 District’s Governing Board adopted formal policy AAC that expressed that commitment
10 in the following manner as relates to advanced learning experiences:

11 “The District is committed ... to reduce any disparities in access,
12 participation and performance in academic achievement and educational
13 opportunities, including, but not limited to, advanced learning opportunities
... , across all communities served by the District.”

14 TUSD Governing Board Policy AAC.⁴ The District also created the new position of
15 Assistant Superintendent for Equity, reporting directly to the District Superintendent, to
16 supervise and coordinate the District’s efforts to implement its commitment. Finally, over
17 the last several years, the District has made great strides in institutionalizing processes
18 and procedures to realize and implement its commitment.

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21 ³ The District is aware that the Mendoza Plaintiffs have argued that the authority to
22 impose the remedy arises from the USP, which they contend is a consent decree. As the
23 District has pointed out elsewhere (ECF 2448, pp. 5-14), however, the record in this case
24 is clear that the USP was entered over the objections of the District, and as a matter of
state organic law cannot in any event be considered a consent decree as against any
Governing Board other than the Governing Board in office at the time the USP was
entered in 2013, as the 2013 Governing Board does not have the power to bind future, as-
yet-unelected boards.

25 ⁴ Available at <http://govboard.tusd1.org/Policies-and-Regulations/Policy-Code-ACC>,
last visited on October 13, 2020.

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2 Moreover, the District has made major progress in improving participation and
3 success in advanced learning experiences among African American and Hispanic
4 students. The Special Master’s 2019 Report and Recommendation recognized this
5 success: “It seems worth noting that between 2012-13 and 2018-19, the numbers of
6 African American students participating in ALE has increased 41% and the number of
7 Latino students has increased 23%. For both racial groups, the sharpest rise in
8 participation occurred over the last two years after a drop in enrollment” [ECF 2376,
9 p. 2.]

10 Indeed, the District’s African American and Hispanic students have achieved
11 significant academic success when compared with state and national averages, and when
12 compared to other districts in the state and around the nation. [ECF 2406, pp. 50-55.] The
13 District’s African American and Hispanic students have achieved an increase in
14 graduation rates and a decrease in dropout rates, as well as increased access to,
15 participation in, and completion of ALEs. [ECF 2267-2, pp. 5-22, 34-45, and 59-63.] In
16 fact, more African American and Hispanic students are participating in ALEs in the
17 District than ever before, despite declining enrollment.

18 The District’s ALE success, particularly for African American and Latino
19 students, should be celebrated. The Court should reject the Mendoza Plaintiffs’ arguments
20 regarding the 15% Rule and declare the District unitary. The balance of this reply
21 addresses the Mendoza Plaintiffs’ arguments regarding specific programs within the area
22 of advance learning experiences.
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1 **A. The District’s GATE Program is Exemplary, Far Larger Than Required by**
2 **Statute, and Has Grown Significantly Over the Last Few Years.**

3 The Mendoza Plaintiffs argue that the District could do more to improve its GATE
4 program. These arguments completely ignore educational realities and what is best for
5 the District’s students and their families, including, specifically, African American and
6 Latino students and families.

7 As noted in prior filings, the District’s GATE program is exemplary, is far larger
8 than required by statute, and has grown significantly over the last few years. [ECF 2520-
9 1, p. 30.]. The District’s 14 Cluster GATE programs provide full-time GATE services to
10 more than 2,000 students, including 1,069 Hispanic and 222 African American students.
11 [ECF 2520-1, p. 6.] This means the District provides more GATE services through its
12 Cluster GATE Program than it does through the Self-Contained program or its Pullout
13 program (around 1,300 students each).

14 While the District’s Cluster GATE program serves more than 1,000 Hispanic
15 students (more than 50% of participants) and more than 200 African American students
16 (more than 10%), Self-Contained GATE serves about 600 Hispanic students (less than
17 50%) and about 100 African American students (less than 10%). [ECF 2520-1, pp. 6-8.]

18 The Mendoza Plaintiffs’ argument that the District should create a new elementary
19 school Self-Contained GATE program is based on the incorrect assumption that Self-
20 Contained GATE is somehow superior to other forms of GATE, including Cluster GATE.
21 Cluster GATE programs, however, provide full-time GATE services (a) without requiring
22 travel in order to participate and (b) to a broader group than just students who have
23 qualified for GATE services, both of which are important factors the District considers in
24 determining how to expand access, participation, and success in ALEs.⁵ To be very clear:

25 ⁵ Their argument also appears to be based on both an exclusion of middle school Self-
26 Contained GATE schools and upon a misrepresentation of the area in which Self-

1 the District does not intend to expand its Self-Contained GATE program to new schools.
2 Expansion will be focused on the Cluster GATE program instead, because the impact is
3 greater and the impediments fewer.

4 The Mendoza Plaintiffs also suggest that the District apply an opt-out policy to all
5 students who qualify for Self-Contained GATE. But the District already **does** use an opt-
6 out policy wherever possible: all students who qualify for Self-Contained GATE are
7 automatically enrolled in the Self-Contained GATE program *if available at their home*
8 *schools*.⁶ However, if a qualifying student's current school does not have a self-contained
9 GATE program, the District cannot automatically enroll a student in a different school
10 requiring transportation without parent consent.

11 The Mendoza Plaintiffs also complain that more students participate in Cluster
12 GATE at Fruchthendler (a school with a high percentage of White students) than
13 participate at Blenman (a school with a higher percentage of African American students)
14 or Grijalva (a school with a higher percentage of Latino students). However, the number
15 and percentage of how many students can participate in a Cluster GATE program depends
16 on how many students qualify for GATE services.

17 Ideally, a cluster classroom will combine a smaller number of students who
18 qualified for GATE services with more students who did not qualify for GATE services.
19 See Dina Brulles, Ph.D., and Susan Winebrenner, M.S., *Maximizing Gifted Students'*
20 *Potential in the 21st Century*, <https://www.aasa.org/content.aspx?id=17446>, last visited
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22 Contained GATE schools are located. The District's 9 Self-Contained GATE schools are
23 located across the District (not, as characterized by the Mendoza Plaintiffs, only in certain
24 areas). Moreover, the District's 14 Cluster GATE programs provide additional GATE
25 coverage across the District.

26 ⁶ Although the Special Master recommended and the District agreed to pilot this option
at two schools, the District opted to implement it District-wide for students with self-
contained programs at their home schools.

1 October 12, 2020. Thus, if a school has a higher number and percentage of students who
2 qualified for GATE programs, they will have a larger number of cluster classrooms and
3 an even higher number of non-qualified students participating in those cluster classrooms.

4 In SY19-20, 108 students qualified for GATE services at Fruchthendler, compared
5 with 12 qualified students at Blenman, and 26 at Grijalva. Because there were more
6 GATE qualified students at Fruchthendler, there were in a higher number of Cluster
7 GATE classrooms, and a higher number of non-qualifying students were also able to
8 receive GATE services. In fact, a combined 140 African American (25) and Latino (115)
9 students participated in Fruchthendler's Cluster GATE program in SY19-20, more than
10 the same combined total of African American and Latino students at either Blenman or
11 Grijalva.⁷

12 The Court should reject the Mendoza Plaintiffs' GATE objections and declare the
13 District unitary in this area.

14 **B. The District's AP Program is Unitary Despite Fluctuations in Success on AP**
15 **Exams.**

16 The Mendoza Plaintiffs argue that the District has not done enough to address
17 issues related to African American and Latino students' enrollment and successful
18 completion of AP courses because AP exam scores have fluctuated over the last five
19 years. This completely ignores the very document to which they are objecting (the ALE
20 Status Report), in which the District showed a continuous increase in AP participation by
21 African American and Latino students over the last eight years. [ECF 2520-1, p. 22.] It

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23 ⁷ The Mendoza Plaintiffs also complain about the push-in program the District piloted at
24 Fruchthendler. Fruchthendler piloted a program under which instead of sending GATE-
25 qualified students to an itinerant pullout GATE teacher throughout the week, teachers
26 provided GATE within the classroom and an itinerant GATE teacher was brought in one
day a week into the regular classroom. Because Fruchthendler did not see results that
justified continuing the pilot push-in program, it did not continue that program after
SY19-20.

1 cannot be disputed that the District’s significant efforts have been successful in increasing
2 African American and Latino participation in AP courses. [ECF 2520-1, p. 22.] The
3 Mendoza Plaintiffs’ argument to the contrary should be rejected.

4 The Mendoza Plaintiffs also argue that the District should not be declared unitary
5 in its AP program because the District “has barely budged the needle in closing the gap
6 in percentage of students with qualifying scores between Latino students and white
7 students,” and because the number of African American students with qualifying AP
8 exams was lower in 2019 than it was in 2015. Response, p. 17.

9 While AP test scores have fluctuated within the District, 25% more Hispanic
10 students had a passing AP exam in 2019 (498) than in 2015 (393). [ECF 2267-2, p. 56.]
11 There was also an increase among Hispanic students in number of exams taken, going
12 from 1,228 in 2015 to 1,608 in 2019. [ECF 2267-2, p. 56.] Clearly the District has made
13 significant progress in Hispanic students taking and passing AP exams.

14 African American students also took more AP exams in 2019 (144) than in 2015
15 (138). However, because there was a decrease in number of African American students
16 with one or more qualifying exams from 2015 (42) to 2019 (37), the Mendoza Plaintiffs
17 argue the District is not doing enough. [ECF 2267-2, p. 56.] A review of the data over a
18 five-year period shows small increases from 2015 through 2017, and small decreases in
19 2018 and 2019. [ECF 2267-2, p. 56.] Such fluctuations do not evidence a lack of good
20 faith efforts by the District or a worrisome trend among African American students taking
21 AP exams, particularly with the small number African American students in the District.
22 Instead, they are common variations in data that occur in every school and district across
23 the country.

1 Indeed, the District’s African American and Hispanic students have a far better AP
2 exam success rate than African American and Hispanic students nationwide. Specifically,
3 even with the lowest percentage of passed AP exams in five years for the District’s
4 African American students (43%), that percentage was 11 percent higher than the national
5 average of 32% of African American test takers achieving a passing exam score.
6 Likewise, the District’s Hispanic AP test takers pass at least one exam at a rate of 58%,
7 while nationally Hispanic students pass AP exams at a rate of 44%.⁸

8 Moreover, the College Board emphasizes that students benefit from taking AP
9 courses even if they do not take or pass AP exams.⁹ For example, taking AP courses can
10 help students build skills and confidence, get into college, and have more success in
11 college. Moreover, as shown above, the number of African American and Hispanic
12 students participating in the AP program has increased significantly over the last several
13 years. This increased participation has led to an increase in successfully completing AP
14 courses, regardless of whether they also pass and receive college credit for an
15 accompanying AP exam.¹⁰ The District is unitary in its AP program. The Mendoza
16 Plaintiffs’ arguments should be rejected.

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21 ⁸ See <https://research.collegeboard.org/programs/ap/data/participation/ap-2019>, last
visited October 8, 2020.

22 ⁹ See <https://apcentral.collegeboard.org/about-ap-20-21/discover-benefits>, last visited on
October 9, 2020.

23 ¹⁰ The Mendoza Plaintiffs also argue the District should expand its AP Summer Boot
24 Camp and target African American students in that program. Response, p. 17. The
25 District’s description of its targeted outreach to African American students is included
26 throughout the District’s ALE filings, and information describing its AP Summer Boot
Camp can be found at ECF 2267-2, pp. 57-58. The District will continue to focus on
increasing African American participation in all ALEs and ALE supports, including the
AP Summer Boot Camp.

1 **C. University High School is one of the Most Integrated Exam Schools in the**
2 **Nation.**

3 The Mendoza Plaintiffs argue the District has not done enough to integrate UHS.
4 However, the Mendoza Plaintiffs admit that the District uses alternative assessments to
5 identify additional African American and Latino students for admission and that UHS is
6 more diverse than any other exam schools to which it has been compared.¹¹ Response,
7 pp. 20-21. The Mendoza Plaintiffs also admit that UHS has more National Hispanic
8 Scholars than any other high school in the country. Response, pp. 22-23. Nevertheless,
9 they argue the District should not be declared unitary because it has not further integrated
10 UHS.

11 The District's efforts to integrate UHS have been reported multiple times in
12 multiple submissions [ECF 2267-2, pp. 63-72; ECF 2500-1, pp. 38-40; ECF 2517-5, pp.
13 57-59], and UHS is a national leader in integration and minority success among exam
14 schools [ECF 2384-1, pp. 16-17.].¹²

15 The Mendoza Plaintiffs claim that the fact that 6 African American students, and
16 49 Hispanic students, qualified for admission but chose not to enroll at UHS somehow
17 indicates a problem. But in the *very paragraph* to which the Mendoza Plaintiffs cite for
18 these figures (ECF 2513-6, p. 58), the Mendoza Plaintiffs omit the preceding sentence:

19 In 2019-20, qualified students chose to enroll at about the same rate across
20 racial/ethnic groups: 66.3% of admitted White students enrolled, 66.7% of
21 admitted African American students enrolled and 70.3% of admitted
22 Hispanic students enrolled.

23 ¹¹ The Mendoza Plaintiffs have not named any exam schools that are more diverse than
24 UHS.

25 ¹² The Mendoza Plaintiffs also identify a difference in language between the ALE Policy
26 Manual and the UHS addendum to the ALE Policy Manual regarding the allowing 7th
graders who achieve a 6 Stanine score to re-test as 8th graders. The District has revised
the UHS addendum to align with the ALE Policy Manual and published that information
on the District's website.

1 Clearly, then, there is no differential, and no problem with the District's outreach to
2 admitted students.

3 Indeed, it is hard to imagine what more the District could do. The District calls
4 every African American and Hispanic student (and their families) who qualifies for
5 admission to UHS to invites and encourages them to enroll at UHS, as well as to attend
6 UHS's summer bridge program (BOOST) that prepares students for UHS. Students who
7 qualified but did not accept enrollment are contacted to determine why they declined
8 placement, to address those concerns, and to invite them to attend Boost.¹³ Additionally
9 the District works with current African American and Hispanic UHS students and their
10 families to contact African American and Hispanic prospective students (and their
11 families) to invite and encourage them to attend UHS and to answer any questions or
12 concerns. The District also works with current UHS students and their families to host
13 zip code parties to reach out to reach out to incoming students.

14 The Mendoza Plaintiffs' arguments should be rejected, and the District should be
15 declared unitary.

16 **D. The District's Middle School Advanced and Honors Courses Prepare**
17 **Students for High School ALEs.**

18 The Mendoza Plaintiffs argue the District has not complied with the Court's orders
19 because the District's middle school advanced courses should align more closely with
20 advanced high school courses. Response, p. 26. They argue that although the District
21 created a plan to better align middle school ALEs with high school ALEs, the District
22 purportedly has not done enough.

23 The District's ALE Status Report Addendum Alignment of Advanced Courses
24 with AP Courses (ECF 2520-1, pp 39-44) explains in detail the District's efforts and plan

25 _____
26 ¹³ Those who attend Boost are invited to enroll at UHS as sophomores

1 to align honors and advanced courses with corresponding AP curricula where feasible and
2 to study where such alignment may be feasible. As explained by the District (and the
3 College Board), many middle school advanced course simply cannot align with AP
4 courses both because of timing and content, among other issues. [ECF 2520-1, pp. 42-
5 43.]

6 For example, there is no AP course to which accelerated middle school math
7 courses can align or map: the only AP courses in math are AP Calculus AB, and AP
8 Calculus BC.¹⁴ A middle school math curriculum simply does not align or map to a
9 senior-level high school calculus course. There are too many intervening high school
10 courses upon which calculus is built, including algebra II, geometry, and trigonometry.
11 And the District's advanced middle school math courses prepare students for these
12 intervening courses.

13 Similarly, there are only two AP courses in English at the high school level: AP
14 English Language and Composition, and AP English Literature and Composition. Both
15 are designed as courses for high school juniors and seniors. Again, the three or four years
16 between the middle school honors English, the change in maturity, sophistication and
17 experience during those years makes it very difficult to map directly to these AP level
18 courses, other than in the general way that the overall ELA curriculum progresses through
19 the fundamentals of critical reading and analysis, and writing skills, over years from
20 middle school through high school.

21 Nevertheless, as explained in the Alignment of Advanced Courses addendum,
22 during SY20-21, the ALE Department, in conjunction with the Curriculum and
23 Instruction Department, will review middle school honors courses to determine if there is
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25 ¹⁴ Some high schools also offer AP Statistics, but this also does not map in any significant
26 way to middle school math.

1 any way that revision or alignment of curriculum can provide meaningful preparedness
2 for future AP courses. [ECF 2520-1, pp. 42-43].

3 While the Mendoza Plaintiffs reluctantly admit the District's progress in meeting
4 the Court's directives in this area, they argue the District is "not yet fully compliant, and
5 that the District therefore should be ordered to undertake a more comprehensive
6 assessment." Response, p. 28. This incessant refrain that regardless of the District's
7 efforts or success that it simply has not done enough should be rejected, and the District
8 should be declared unitary.

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10 **E. The District Opted Not to Implement AVID's Long-Term English Learners
Can Excel Class Because the Cost Does Not Justify the Benefit.**

11 The Mendoza Plaintiffs argue the District should adopt the AVID Long-Term
12 English Learners Can Excel elective class before being declared unitary. Response, p. 30.
13 However, the District already considered whether to implement that elective class, and
14 decided against it because the class would be very expensive to implement and is only
15 designed for 7th and 8th grade students on the cusp of passing the AZELLA exam, having
16 the potential to benefit very few students. Moreover, because AVID already has strategies
17 that specifically support EL students, and because many AVID teachers have received
18 additional training in strategies specifically designed to benefit EL students (and which
19 are used at each AVID school), spending time and money to implement the Long-Term
20 English Learners Can Excel class is not an educationally sound strategy for the District.

21 The Mendoza Plaintiffs acknowledge the District's compliance with Court orders
22 by admitting the District's AVID Expansion Plan addresses the expansion of the AVID
23 program into additional schools. Response, p. 28. Nevertheless, they argue the District
24 should do more by implementing this additional strategy. However, the District has
25 already considered and rejected this specific strategy because its potential benefits are too
26

1 narrow to justify its costs. The Mendoza Plaintiffs' arguments regarding the District's
2 AVID Expansion Plan should be rejected, and the District should be declared unitary.

3
4 **F. Innovation Tech and Wakefield Already Have ALEs and Will Continue to
Grow Their ALE Programs.**

5 Finally, the Mendoza Plaintiffs argue the District should not be declared unitary
6 because it has not sufficiently reported on its new schools' ALE programs. Response, p.
7 30. First, both schools opened for the first time this fall. Wakefield currently has only a
8 sixth grade class, and enrollment at Innovation Tech is still building. It is not sufficient
9 to argue against terminating supervision merely because the District has opened new
10 schools.

11 Moreover, Innovation Tech currently offers MAT 151 College Algebra for Dual
12 Credit, and Wakefield (having only 6th graders) offers Honors Science 6th grade and
13 Accelerated 6th grade Math. These new District schools, like all other District schools,
14 work with the District's ALE Director and other District departments to review, analyze,
15 plan and implement ALEs to benefit all District students. The Mendoza Plaintiffs'
16 arguments in this area should be rejected, and the District should be declared unitary.

17 **Conclusion**

18 The District has complied in good faith with the Court's ALE orders, has improved
19 its ALE programs, has increased ALE participation among African American and Latino
20 students, and is a national leader in many ALEs. The District should be declared unitary.

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Dated this 13th day of October, 2020.

Respectfully submitted,

DICKINSON WRIGHT PLLC,

By: /s/ P. Bruce Converse
P. Bruce Converse
Timothy W. Overton

**TUCSON UNIFIED SCHOOL DISTRICT
LEGAL DEPARTMENT**

Robert S. Ross
Samuel E. Brown
*Attorneys for Tucson Unified School
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 13th day of October, 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

P. Bruce Converse