LOIS D. THOMPSON, Cal. Bar No. 093245 (Admitted Pro Hac Vice)
lthompson@proskauer.com
JENNIFER L. ROCHE, Cal. Bar No. 254538 (Admitted Pro Hac Vice)
jroche@proskauer.com
PROSKAUER ROSE LLP
2049 Century Park East, 32nd Floor
Los Angeles, California 90067-3206
Telephone: (310) 557-2900
Facsimile: (310) 557-2193

JUAN RODRIGUEZ, Cal. Bar No. 282081 (Admitted Pro Hac Vice)
jrodriguez@maldef.org
THOMAS A. SAENZ, Cal. Bar No. 159430 (Admitted Pro Hac Vice)
tsaenz@maldef.org
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND (MALDEF)
634 S. Spring St.
11th Floor
Telephone: (213) 629-2512 ext. 121
Facsimile: (213) 629-0266

Attorneys for Mendoza Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs,

v.

United States of America,

Plaintiff-Intervenors,

v.

Anita Lohr, et al.,

Defendants,

Sidney L. Sutton, et al.,

Defendant-Intervenors,

Case No. 4:74-CV-00090-DCB

MENDOZA PLAINTIFFS' OBJECTIONS TO ANALYSIS OF COMPLIANCE WITH UNITARY STATUS PLAN BY TUCSON UNIFIED SCHOOL DISTRICT NO. 1 [ECF 2075 – ECF 2075-10]

Hon. David C. Bury

Maria Mendoza, et al., Plaintiffs, United States of America, Plaintiff-Intervenor, v. Tucson United School District No. One, et al., Defendants.	Case No. CV 74-204 TUC DCB

INTRODUCTION

Under this Court's May 17, 2017 Order (Doc. 2023), as clarified by its May 25, 2017 and July 19, 2017 Orders (Docs. 2025 and 2037, respectively), the District filed the Analysis of Compliance with the Unitary Status Plan by Tucson Unified School District No. 1 (Docs. 2075 to 2075-10) ("USP Analysis") on October 2, 2017.[1] Mendoza Plaintiffs file these objections to the District's USP Analysis under the parties' and Special Master's agreement that the Plaintiffs may file objections to the District's USP analysis no later than October 31, 2017. (*See* Exhibit 1.)

Mendoza Plaintiffs do not believe that at this stage in the process to which the parties agreed for addressing issues concerning whether the District will petition the Court for a finding of unitary status that it is appropriate to submit a point-by-point response to

[1] While this Court contemplated that the District's analysis relating to its progress in achieving unitary status would be filed as part of its Annual Report for the 2016-17 school year (*see* Docs. 2025 at 2:18-21 and 2037 at 2:3-9), the District filed its USP Analysis separate from its Annual Report for the 2016-17 school year, and described it as an annex to that annual report. (*See* Doc. 2057 (TUSD Annual Report for 2016-17 School Year filed on September 1, 2017).)

Additionally, on October 4, 2017, it filed a further "annex" to the 2016-17 Annual Report that in large part was an untimely response to Plaintiffs' July 2017 objections (Docs. 2031 and 2035) to the Special Master's Annual Report (Doc. 2026) but that also set forth argument relating to the standards and analysis required in assessing the District's progress toward unitary status, some of which therefore is addressed here. (*See* Doc. 2076-1 ("Annual Report Annex").)

each assertion and all information included in the District's USP Analysis. In any event, Mendoza Plaintiffs would need District responses to the information requests they submitted regarding the 2016-17 TUSD Annual Report, 40th day enrollment data for 2017-18, and additional time to be able to do so given the length (approximately 700 pages) and extreme granularity of the District's submission.

Mendoza Plaintiffs can, however, comment on and object to glaring omissions from the District's USP Analysis, including the absence of any discussion of the many instances in which the District took action to implement provisions of the USP only after the Plaintiffs or the Special Master intervened, which often required this Court's assistance as well. Indeed, the many instances in which intervention was required raise serious questions about whether the District has demonstrated sufficient fidelity to the USP to be relieved of Court supervision. (*See Fisher v. Tucson Unified School District*, 652 F.3d 1131, 1141, n.25 (9th Cir. 2011) ("one of the ***prerequisites to relinquishment of control***… is that a school district *has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution"*) (citing *Freeman v. Pitts*, 503 U.S. 467, 490 (1992)); *see also* id. at 1143-44: "We…order [the court below] to maintain jurisdiction until it is satisfied that the School District has met its burden of *demonstrating* – not merely promising – its 'good-faith compliance… with the [Settlement Agreement] over a reasonable period of time.'" (emphasis in original).)

Before turning to the significant omissions from the District's USP Analysis, Mendoza Plaintiffs are constrained to address Section I of the USP Analysis, titled "Standards for Assessment and Compliance" (Doc. 2075-1), as it contains striking inaccuracies concerning the law of this case and the burden the District must meet to secure relief from court supervision.

//

//

//

ARGUMENT

The Ninth Circuit and This Court Have Clearly Held that TUSD Must Eliminate the Vestiges of Discrimination to the Extent Practicable with Respect to ALL Green Factors, and This Court Has Expressly and Repeatedly Rejected the District's Effort to Argue for USP Compliance Without Addressing Program Effectiveness and Outcomes

A. TUSD Must Eliminate the Vestiges of Discrimination to the Extent Practicable with Respect to ALL *Green* Factors

In the USP Analysis, the District again asserts that, in 1977, "the only vestige of the prior discrimination which Judge Frey found continued to exist as of the time of trial was in the racial and ethnic makeup of students at nine schools in the District," and cites to a small part of the District Court's August 21, 2007 Order (Doc. 1239) and the 1979 Order relating to student assignment to then assert that "there can be no vestiges of discrimination existing today which are causally linked to the de jure discrimination which is the foundation of this case"[2] and that, therefore, "the only issue properly remaining in this case …. [is its] 'good faith." (USP Analysis, Section I (Doc. 2075-1) at 6-7 and 2.)

The District again is wrong. The law of this case, as established by both the Ninth Circuit and this Court, is clear: the District must demonstrate that it has eliminated the vestiges of discrimination to the extent practicable with regard to ALL *Green* factors. In 2011, when the Ninth Circuit reversed this Court's 2009 Order granting unitary status, it also ordered that the District Court maintain jurisdiction until it is "convinced that the District has eliminated the vestiges of past discrimination… to the extent practicable' **with regard to all of the Green factors**." *Fisher*, 652 F.3d at 1144 (*citing Freeman,* 503 U.S. at 492) (emphasis added). Further, when this Court adopted the USP, it rejected the very argument the District makes in the USP Analysis that "there can be no vestiges of

[2] Among the instances in which the District has recently raised this argument are in its March 7, 2017 Motion for Partial Unitary Status (s*ee* Doc. 1993 at 3-8) and Response to the Mendoza Plaintiffs' Objections to the Special Master's Report and Recommendation Regarding Advanced Learning Experiences (*see* Doc. 2073 at 204).

discrimination existing today which are causally linked to the de jure discrimination which is the foundation of this case." In its 2013 Order, the Court stated:

> According to the District, the only findings of fact and conclusions of law establishing the constitutional violation at issue in this case were those dated June 4, 1978… This is an old argument seen and rejected by this Court in 2006, when this Court issued the Order defining the scope of the unitary status proceeding… The Ninth Circuit's ruling… established unequivocally that the District had not attained unitary status... [T]he Ninth Circuit reversed this Court's finding that unitary status was attained and found the contrary because: [as argued by the Mendoza Plaintiffs,] the 'District failed the good faith inquiry *and* [this Court's findings] raised significant questions as to whether the District had eliminated the vestiges of racial discrimination to the extent practicable.'**… [I]t would be error for the Court to adopt the District's assertion that certain Green factors are not at issue in this case now because they were not at issue in 1978… Given the express directive of the court of appeals that this Court, upon remand shall consider all of the Green factors… this Court finds them all at issue now.**

Doc. 1436 at 8:5-21; citations omitted; emphasis in italics in original; emphasis in bold added. As was true on February 6, 2013, when the Court issued the above referenced Order, it remains the case that "it would be error for the Court to [to now] adopt the District's assertion" concerning the scope of its desegregation obligations.

B. TUSD Must Implement Strategies Directed at Improving Outcomes, Including Analyzing Outcomes as Part of its Assessment of Program/Strategy Effectiveness under the USP

In its effort to avoid being held accountable for the outcomes of its desegregation efforts, the District has at various times asserted that it is not required to improve outcomes or use outcome data to guide its desegregation efforts, most notably with respect to student completion rates in Advanced Learning Experiences ("ALEs").[3] Most recently, in the

[3] The District, for example, in responding to the Mendoza Plaintiffs' objection to the failure of the Special Master's R&R on ALEs to assess completion rates, attempted to

Annual Report Annex, the District again sought to avoid accountability relating to desegregation outcomes when it argued the following with respect to ALEs: "Good faith compliance with a desegregation decree focuses on the District's actions and consequences, and *not [] outcomes or results*… participation and academic results [are an inappropriate] measurement of good faith… .[P]erformance-related tests are not appropriate" in measuring progress toward unitary status. (Doc. 2076-1 at 29.)

TUSD's assertions to the contrary notwithstanding, the Ninth Circuit and this Court have expressly rejected the District's position, making clear that TUSD is obligated to focus on outcomes, in part through assessments of programs and strategies that analyze outcome data. For example, when the Ninth Circuit reversed this Court's order awarding unitary status because the Court's findings of fact failed to support that outcome, it wrote: "with regard to student achievement, the [district] court found that except for an analysis conducted in 1982, the District had 'failed to review student achievement as a measurement for program effectiveness despite the fact that 'ongoing review of program effectiveness is the only way to ensure that program changes address… quality of education for minority students.'"[4] *Fisher*, 652 F.3d at 1140, n.19.

This Court recently directly addressed and rejected the District's argument, as it specifically related to ALEs, when it wrote: "The goal of the USP ALE provisions, USP § V, is for the District to implement strategies designed to increase participation by African American and Latino students in ALE programs. The USP calls for the design, implementation, and ongoing operation, ***which <u>necessarily</u> includes review and revision when warranted, of strategies to increase <u>access, participation, and completion</u> by***

---

equate "participation" in ALEs with student "completion" of ALEs rather than address actual success in and completion of the District's ALE offerings. (Doc. 2073 at 12.)

[4] Other bases for the Ninth Circuit's reversal were that the "District had failed to make 'the most basic inquiries necessary to assess the ongoing effectiveness of its student assignment plans;' had 'exacerbated the inequities' of racial imbalances through its 'failure to assess program effectiveness;'… had never 'undertaken a comprehensive analysis of suspension and expulsion data by ethnicity and race;'… and had failed to review program effectiveness in order to ensure quality education for minority students." (*Id.* at 1142.)

African American and Latino students in ALE programs." (Doc. 2084 at 17:2-10; emphasis added) This Court further affirmed the District's legal obligations relating to program efficacy assessments, outcomes and ALE completion rates when it struck the ALE section of the USP Analysis (*id*. at 19: 4-6) and stated that it "defines participation as the number of students enrolled in ALE courses and **includes completion**, defined as the number of students passing ALE courses and number of students taking and passing requisite certification tests necessary for African American and Latino students to secure the benefit of participating in ALE programs." (*Id*. at 17:17-21; emphasis added.)

Significant Omissions from the District's USP Analysis Demonstrate that, with Respect to Whether TUSD Has Met the Prerequisite to Relinquishment of Court Oversight by Demonstrating its Good-Faith Commitment to the Whole of the USP, TUSD Has Repeatedly Failed to Faithfully Implement the USP on Its Own Such that There Has Been an Ongoing Need for Court Intervention and Special Master Oversight, Indicating that Withdrawal of Judicial Supervision is Not Yet Warranted

In *Freeman*, the Supreme Court made clear that "*one of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment* to a course of action that gives full respect to the equal protection guarantees of the Constitution." (503 U.S. at 490.) Indeed, the purpose of this prerequisite is to "demonstrate[], to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." (*Id.* at 491.) Further, a "school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its *policies form a consistent pattern of lawful conduct directed to eliminating earlier violations*." (*Id.*)

As shown below, the District has, through the life of the USP, consistently failed to adequately implement various components of the USP such that Plaintiff and Special Master intervention, often with Court assistance, was required to secure District

implementation.[5] Indeed, these issues, together with ongoing issues concerning Plaintiff and Special Master access to data sufficient to make informed comment, and inadequacies in District compliance with notice and request for approval procedures set forth in the USP, show that the District is not yet at a point that it can be trusted to "do the right thing" in the absence of judicial supervision.[6]

A. Culturally Relevant Courses ("CRCs")

With respect to both the expansion of CRCs and fidelity to the Itinerant Teacher Model of the CRC Intervention Plan, Plaintiff and Special Master action was required to ensure District compliance with the CRC provisions of the USP and the stipulated CRC Intervention Plan.

1. Expansion of CRCs

A key USP strategy to "increase academic achievement and engagement among African American and Latino students" is the "develop[ment] and implement[ion including as core English and Social Studies classes in all high schools in the District, of] culturally relevant courses of instruction designed to reflect the history, experiences, and culture of African American and Mexican American communities" and to expand such courses initially to the sixth through eighth grades and then throughout the K-12 curriculum. (USP, V,E,6,a,ii.)

During the summer of 2014, after determining that TUSD had failed to implement the CRC provisions of the USP requiring expansion of the courses, Mendoza Plaintiffs asked the Special Master to bring this instance of USP noncompliance to the Court's attention under USP Section X, E, 6. Thereafter, he did so. (Doc. 1700.) To obviate the

[5] Mendoza Plaintiffs do not catalogue all such instances but, rather, provide a representative set of examples.

[6] As Mendoza Plaintiffs stated in their opposition to the District's motion for partial unitary status, they are encouraged by recent changes in District governance and administration and are hopeful that, going forward, the District will be able to demonstrate the required commitment.

need for further court proceedings, Mendoza Plaintiffs and TUSD entered into a stipulation pursuant to which the District adopted an Intervention Plan to remediate then existing areas of noncompliance and to expressly address CRC expansion through the 2017-18 school year. (Doc. 1761 ("CRC Intervention Plan"); so ordered by the Court by Order dated 2/12/15, Doc. 1768.)

2. Itinerant Teacher Model of CRC Intervention Plan

Following the development of the CRC Intervention Plan, there were disagreements between the parties concerning the District's implementation of the Plan. Notwithstanding the fact that the Special Master and the Court subsequently declined to hold the District noncompliant, this Court also expressly directed that "the Special Master should monitor the Intervention Plan **to ensure** the District continues its efforts to implement and expand the CRC program." (Order dated 12/17/16, Doc. No. 1982, at 2:15-17; emphasis added.)

Further, with respect to the explicit requirement in the Plan that the District assign 12 Itinerant Teachers to, *inter alia*, provide effective CRC teacher support regarding CRC instruction, develop CRC curriculum, and recruit students to the classes (a requirement with which both the Special Master and the Court found the District had failed to comply), this Court wrote:

> Like the Mendoza Plaintiffs, the Court is concerned that the reduction in itinerant staff may correspond to a reduction in their duties and, correspondingly, a dilution of the planned intensity of the Itinerant Teacher Model….The Court is not prepared to say that six versus 12 is enough. The Special Master notes that TUSD offers no program-based rationale for estimating that it needs one itinerant teacher for every ten CRC teachers….Assuming there was a rational basis for the original estimate that the program needed 12 itinerant teachers and the large unexplained disparity between that planned number of itinerant teachers and the actual number hired, the **Court finds that monitoring is warranted**. The Special Master shall review the District's use of itinerant staff to ensure full compliance with the Intervention Plan's Itinerant Teacher Model.

Doc. 1982 at 3:18-4:4; emphasis added. The Court reaffirmed its intent that the District's actions be carefully monitored when it then "ORDERED that the Special Master shall review the District's use of itinerant staff to ensure full compliance with the Intervention Plan's Itinerant Teacher Model" (*id.* at 4:20-22) and "FURTHER ORDERED that TUSD shall develop a meaningful itinerant teacher-CRC teacher ratio sufficient to meet the needs of the Itinerant Teacher Model agreed to by the parties pursuant to the stipulated Intervention Plan, and this ratio shall be developed and used for the 2017-18 USP budget. The Special Master shall develop a data gathering and review plan, both substantive and procedural, to monitor the effectiveness of TUSD's itinerant teacher-CRC teacher ratio for use in the 2016-17 Special Master's Annual Report (SMAR)." (*Id.* at 4:23-5:2.)

B. Expansion of Dual Language Programs

The USP recognizes that "Dual Language programs are positive and academically rigorous programs designed to contribute significantly to the academic achievement of all students who participate in them" (USP, V, C.) Accordingly, it provides that the District "shall build and expand its Dual Language programs in order to provide more students throughout the District with opportunities to enroll in these programs." (*Id.*)

The District's failure to implement that clear directive was succinctly described and addressed in this Court's January 28, 2016 budget order when it wrote:

> Again, the Mendoza Plaintiffs express concern that the District failed to use 910(G) funding to expand the dual language program. Last year, the Mendoza Plaintiffs challenged proposed expenditures for dual language teachers on supplant vs. supplement grounds, and noted that the District must "'build and expand the Dual Language Programs in order to provide more students throughout the District with opportunities to enroll in these programs.'" Still this year, the District fails to budget 901(G) money to expand dual language programs, "in fact, the number of schools offering dual language programs and overall enrollment in the programs has substantially declined." (citing Mendoza Plaintiffs' Objections, Doc. 1833, Ex. B.) Suffice it to say: "If not now, when?" ….

> The Court adopts the Special Master's recommendation that the District be required to develop a plan for increasing the student access to dual language programs which must be implemented in 2016-17. Given the delay in moving forward with the dual language component of the USP, the District should engage one or more nationally recognized consultants to assist in studying and developing the plan, which must be prepared and presented to the parties and the Special Master for review and comment in a timely fashion for implementation in SY 2016-17.

Order dated 1/28/16, Doc. 1897, at 6:10-7:2; some citations omitted.

C. Student Assignment

1. Magnet Schools

The USP provides that the "District shall continue to implement magnet schools and programs as a strategy for assigning students to schools and to provide students with the opportunity to attend an integrated school." (USP, II, E, 1.) Under the USP, by April 1, 2013, the District was to have developed a Magnet Plan that, *inter alia*, would improve existing magnet schools and programs that were not promoting integration and/or educational quality, consider changes to schools that were not promoting integration and/or educational quality, include strategies to specifically engage African American and Latino families, including the families of English language learner students, and identify goals to further the integration of each magnet school. (USP, II, E, 3.)

As this Court has observed, the Magnet Plan is "the USP's key component for integration." (Order dated 1/16/15, Doc. 1753, at 12:4-5.) The Magnet Plan therefore has received a great deal of attention from the Plaintiffs, the Special Master, and this Court. For example, in its Order dated 1/16/15, the Court recited relevant case history relating to the preparation of a Magnet Plan, focusing on the Comprehensive Magnet Plan ("CMP") adopted by the Governing Board in July 2014 and a subsequent, Revised CMP, modified to address certain objections raised by the Special Master and the Plaintiffs with respect to the July CMP. This Court then wrote: "The Court…cannot approve the CMP, adopted by the School Board on July 15, 2014, or the Revised CMP. Neither is a comprehensive plan as required by the USP….In short, the CMP fails to reflect the District's vision for a

meaningful operational Magnet School Plan, [which] it can support long term." (Doc. 1753 at 16:1-13.) This Court then added:

> [T]he CMP fails to identify the specific activities which must be undertaken by each school to attain magnet status. There is no budgetary assessment as to how much money it will take to make the requisite improvements or [even] how many schools it can maintain as magnets long term. There is no transportation component in the CMP, which is the most expensive factor in operating a magnet school system. School boundaries have not been factored into the plan. The CMP speaks to developing Improvement Plans, but until detailed plans, complete with budget and resource estimates, are prepared for a school, it is impossible to ascertain what actions, if any, a school can undertake to attain true magnet status by the USP target date for attaining unitary status: SY 2016-17.

Doc. 1753 at 13-22. The Court then directed as follows:

> The District, in consultation with the Special Master, shall work with its schools to prepare the Improvement Plans over the next three months, which shall identify clear and specific annual bench marks for attaining magnet status by SY 2016-17. **The Special Master shall monitor compliance by each school regarding its Improvement Plan.** The Special Master shall file reports as necessary with the Court identifying any failure to attain a requisite benchmark….
>
> The Special Master, in consultation with TUSD, shall… prepare a logical schedule for data gathering and reporting by TUSD necessary to enable him to monitor the Implementation Plans and report to the Court. In four months, TUSD shall file a Revised CMP, which will be a comprehensive gathering together of the relevant information, including the Improvement Plans. The CMP should be a one-stop, road map for future review by the Parties, the Special Master, the TUSD schools, this Court, and the public.

Id. at 17:17-18:6; emphasis added. In June 2015, TUSD filed a Revised CMP with the Court. Thereafter, having received objections from the Plaintiffs, the Special Master worked with the parties to address the Plaintiffs' concerns and filed an R&R with the Court, recommending approval of the Revised CMP, with certain additional changes to which TUSD agreed.

Separately, in connection with a stipulation TUSD and the Mendoza Plaintiffs filed seeking an extension from the Court of time for it to take action on the Special Master's recommendations to have magnet status withdrawn from certain magnet schools or programs,[7] Mendoza Plaintiffs had insisted on inclusion of a provision requiring the District to "develop and propose initiatives to increase the number of students attending integrated schools" in TUSD given their belief that the District had inadequately moved this USP priority forward.[8] In an Order addressing both the Revised CMP and the stipulation concerning magnet schools,[9] the Court approved the Revised CMP inclusive of the changes agreed to by the District. (Order dated 11/19/15, Doc. 1870.) Significantly, the Court also "s[ought] to **ensure** [that the stipulation provision concerning development and implementation of integrative initiatives] does not reproduce a generalized discussion of initiatives, which is already contained in the CMP" (*id.* at 8:1-4; emphasis added), and therefore clarified that as part of that provision, TUSD must "research and propose alternative, more integrative, magnet themes or programs and to assist the schools in assessing the strength of their existing magnet programs and themes in comparison to any stronger more integrative programs" (*id.* at 10:16-19).[10] However, the Court's Order of

---

[7] Mendoza Plaintiffs do not here detail the case history relating to the Special Master's recommendations concerning withdrawal of magnet status or of the development of the stipulation filed with the Court, but note that the stipulation included "very specific undertakings by TUSD to ensure the magnet schools and programs receive the resources they require to implement their Improvement Plans." (Order dated 11/19/15, Doc. 1870 at 3:4-6)

[8] While the Mendoza Plaintiffs understand the District does not agree with the basis underlying their having sought to include a provision concerning District integrative initiatives in the Magnet Stipulation, the District did agree to include such a provision in the stipulation filed with the Court.

[9] TUSD and the Mendoza Plaintiffs filed a stipulation for Court approval on October 23, 2015, which was supplanted on November 6, 2015 by a Second Stipulation Regarding Magnet School Enrollment Data and Magnet School Supplemented Improvement Plan (Doc. 1865) ("Magnet Stipulation") that took into account student enrollment at the magnet schools on the 40th day of the 2015-16 school year. (*See* Doc. 1870 at 2:25-3:2.)

[10] The District subsequently moved the Court for reconsideration of its clarification of the magnet stipulation provision calling for development and implementation of integration initiatives, in which Mendoza Plaintiffs joined, mistakenly believing the Court may have misread that provision as specifically relating to magnet schools and programs, rather than as contemplating District-wide integrative initiatives as was intended. The Court

November 19, 2015 did not eliminate the need for further Special Master and Court engagement with the Magnet Plan.

The District updated the magnet schools' Improvement Plans as part of the 2016-17 budget process. As they had the prior year, Mendoza Plaintiffs commented on the substance of the plans in the context of their budget review. Here, they focus on only one issue: magnet school goals for academic achievement.[11]

During the 2015-16 budget cycle, Mendoza Plaintiffs had objected to the fact that three magnet schools set achievement goals in their Improvement Plans that were lower than what the schools previously had achieved. In the face of that objection, the District agreed to revise the school goals. Then, in the 2016-17 budget cycle, it filed Improvement Plans in which **five** magnet schools set goals that were lower than what the schools previously had achieved. Again, Mendoza Plaintiffs objected. (*See*, Doc. 1948-13 at 4-5 for a recitation of this history.) In his R&R on the 2016-17 budget, the Special Master wrote: "While not a funding matter, the District was previously not allowed to ascribe academic goals for magnet schools that were lower than the goals they already had attained. That the District permitted this for 2016-17 is unacceptable and sends a bizarre message to families, staff and students: 'we are satisfied to do less this year than we have in the past.'" (Doc. 1954 at 7:8-11.) This Court rejected TUSD's assertion that no order was needed because, after the R&R had been filed, it had agreed to this and other of the Special Master's recommendations, and expressly adopted the Special Master's recommendations in its Order. (Doc. 1981 at 2:12; 10:4-6.)

---

subsequently denied the motion for reconsideration request, explaining that its clarification did not preclude the type of District-wide integrative initiatives that had been intended, but, rather, that the Court's Order was requiring "the District to consider, within the context of these initiatives, the integrative strength of various magnet strategies." (Order dated 12/11/15, Doc. 1878, at 4:4-9.)

[11] This Court has stressed the importance of high academic standards in magnet schools, writing, for example: "[H]igh academic standards will draw students to a magnet school, and an effective magnet program will improve student achievement." (Doc. 1753 at 10:11-12.)

Notwithstanding the many challenges being faced by the District's magnet schools and the overall magnet program, during the 2016-17 budget cycle the District proposed to staff the position of Magnet Director "on a half-time basis" and to fill the position with someone who had "no experience with magnet schools." (Special Master R&R, Doc. 1954, at 6:18.) (The other responsibility proposed to be assigned to this position was to serve as Coordinator of Advanced Learning Experiences.[12]) Only after the Special Master had filed his R&R did the District say that it would fund two full positions. The Court observed: "The Court notes the eleventh-hour agreement from TUSD and that TUSD's plan to have a single person serve as Magnet Director and ALE Coordinator means that these two very important administrative positions remain understaffed and/or unfilled approximately five years after the adoption in SY 2012-2013 of the USP. Like the CMP, the ALE…component to the USP is critical to its success because it is a key mechanism for ensuring equal educational opportunities to all students in the District."

2. Grade Reconfigurations: Failure to Follow USP Section II, D, 2 Procedures Directed at Advancing Integration or Review and Comment Procedures

USP Section II, D, 2 requires that whenever the District seeks to undertake any of a list of enumerated actions that involve drawing of attendance boundaries, it must "consider the following criteria: (i) current and projected enrollment; (ii) capacity; (iii) compactness of the attendance area; (iv) physical barriers; (v) demographics (i.e., race, ethnicity, growth projections, socioeconomic status); and (vi) effects on school integration. In applying these criteria, the *District shall propose and evaluate various scenarios with, at minimum, the Plaintiffs and the Special Master, in an effort to increase the integration of its schools*." (USP Section II, D, 2; emphasis added.)

In April 2015, the TUSD sought Court approval of plans to add a 6th grade at Fruchthendler Elementary School, to add 7th and 8th grades at Sabino High School, and to

[12] The USP provides that the District is to hire or designate a District employee to be the Coordinator of ALEs. ALEs include Gifted and Talented ("GATE") programs, Advanced Academic Courses ("AACs") [Pre-AP courses, AP courses, middle school courses for high school credit, AP courses, Dual-Credit courses, and I.B. courses]. (USP V, A, 2, a.)

create an "Honors pipeline" at these schools. (*See* Order dated 5/12/17, Doc. 1799, at 2:4-6.) In rejecting the District's proposal, this Court noted that the "record reflects that the student assignments proposed by TUSD were not considered in the context of the four integration strategies required by the USP [under Section II, D, 2]" and that the District was not exempted from this required USP "effort to increase the integration of TUSD schools." (*Id.* at 5:11-20.) The Court further detailed the District's failure to consider "how the [proposed] Fruchthendler-Sabino Honors Pipeline plan fits into these plans and strategies, and if not, why." (*Id.* at 5:20-24.)

With respect to Plaintiff and Special Master review and comment, the Court noted the Plaintiffs' and Special Master's "complain[t] that TUSD fast-tracked these changes without involving them or the Boundary Change Committee [that then was considering boundary proposals] in discussion," and stated that the fact that the procedure was a NARA[13] request "do[es] not, however, create some lesser review and input requirements for the Plaintiffs and Special Master than they hold pursuant to the USP [Section] I.D.1 in respect to changes affecting school attendance." (*Id.* at 3:4-14.)

Significantly, in addressing the USP Section II, D, 2 requirements with which TUSD had failed to comply the Court referenced its April 26, 2013 Order (of two years earlier), concerning Boundaries for Schools Closing and Receiving Schools in which it detailed the District's then failure to comply with USP Section II, D, 2. (*See* Order dated 4/26/13 at 4-5.) That Order had similarly concerned issues relating to the District's compliance with review and comment procedures. (*See id.* at 3:1-6 ([T]his is the *third* time [the Court] has been asked to approve some action by the District, which requires review and comment from the Special Master and the Plaintiffs, where the process for review adhered to by the District has resulted in this Court deciding a question without adequate review from the Plaintiffs and Special Master… the District ignores the Court's frustration with this reoccurring problem.").

[13] The NARA process is further described below in the following subsection.

3. Grade Reconfigurations: Failure to Propose Changes That Would Advance Integration

Under the Order Appointing Special Master, the District must provide the Special Master and the Plaintiffs with notice and request for approval ("NARA") of all attendance boundary changes and changes to student assignment patterns. (Order dated 1/6/12, Doc. 1350, at 3:8-15) All such requests are to be accompanied by a desegregation impact analysis.

Most recently, in March 2016, this Court denied the District's NARA request to change the grade configuration of Borman Elementary School (as well as those relating to Collier and Fruchthendler Elementary Schools and Sabino High School, as discussed below) because the District could not demonstrate that the proposed changes would advance the integration of the District's schools.

Addressing the request to add 7th and 8th grade levels to Borman, this Court first noted that it had seen (and rejected) a comparable request in 2007 when it denied the District's application to reopen Lowell Smith Elementary School on the Davis-Montham Air Force Base ("DMAFB") as a middle school. (Order dated 3/8/16, Doc. 1909, at 3:22-18; amended by Order dated 4/28/16, Doc. 1928.) The Court further noted that at the time of the 2007 proposal, as was true with respect to the reconfiguration proposal then before the Court, Roberts-Naylor, the K-8 school serving DMAFB, had an enrollment that was 80% minority and was low achieving academically. (*Id.* at 3:22-4:15.) Responding to the District's assertion that its proposal should be approved because it "will not change anything; it neither improves nor exacerbates ethnic imbalances" (*id*. at 4:15-17), the Court stated:

> The USP requires more than just doing no harm; it requires TUSD to take affirmative actions to do good in the context of improving integration and the quality of education for minority students, if it can…. Roberts-Naylor is a [predominately minority] school uniquely situated adjacent to DMAFB, an unusual source of Anglo students, which could affirmatively impact integration at Roberts-Naylor if they could be directed there. Until the Court is certain that Roberts-Naylor cannot be a viable K-8 program for Borman students, it will not approve

> a plan which will ensure that Roberts-Naylor can never be such an alternative.[14]

Id. at 5:28-6:8.

The Court therefore denied the District's request to reconfigure Borman K-5 into a K-8 school. Further, in express recognition that improved academic achievement at Roberts-Naylor could make it an attractive school to DMAFB students to potentially move Roberts-Naylor toward achieving integration and given the District's apparent failure to have considered how to do so, the Court ordered the District to within 30 days "prepare a detailed report regarding the academic achievement and demographic conditions at Roberts-Naylor and describe the measures, if any, which have been or could be taken by TUSD to transform Roberts-Naylor into a viable K-8 program capable of competing with the middle schools now attracting Borman students. TUSD should explain why or why not it is feasible to implement any such identified measures. TUSD should consider a timeline to accomplish a transformation at Roberts-Naylor sufficient to begin attracting students that currently choose elsewhere." (*Id.* at 17:10-23.)

4. Grade Reconfiguration Proposals: Magee Attractiveness for Integrative Purposes

In the Court's March 8, 2016 Order, the Court also addressed the District's proposal to reconfigure the Fruchthendler and Collier elementary schools from K-5 to K-6, with a middle school component added at Sabino High School. In reference to an identical proposal submitted by the District in April 2015, the Court stated that "[t]hen as now TUSD admitted [the proposal] would draw Anglo students away from Magee, but [it asserts] that Magee had a sufficient Anglo student population to withstand the loss of white students." (*Id.* at 7:5-7.) The Court then addressed the fact that no evidence was presented

[14] The District's reconfiguration proposals and this Court's analysis are particularly relevant to the assessment of its good faith. As the Supreme Court wrote in *Green v. Co. School Bd. of New Kent Co*., 391 U.S. 420, 439 (1968): "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation….Of course, the availability to the [school] board of other more promising courses of action may indicate a lack of good faith, and, at the least, it places a heavy burden upon the board to explain its preference for an apparently less effective method."

showing that the primarily white students not then attending TUSD schools who might be attracted to attend Fruchthendler, Collier, or Sabino under the District's proposal would help integration efforts and stated that "the intent [of the proposal] is contrary: TUSD intends that these students will attend Fruchthendler, Collier, and Sabino… There will be no new pool of potential attendees for the purpose of integrating any other TUSD schools." (*Id.* at 13:3-7.)

Moreover, in addressing the District's proposal, including the "mitigation" measures of adding express bussing and ALE programs at Magee to combat the loss of primarily white students that Magee was expected to experience under the proposal, which would in turn negatively affect Magee's academic achievement and attractiveness, the Court said the following:

> Is this enough? No… Embarking on this plan closes the door for Magee Middle School or any other existing TUSD school, with higher percentages of minority students than Sabino, to be the subject of a plan to attract Anglo students currently not attending TUSD schools…The Court cannot find any positive impact on integration from the reconfiguration… [proposed, which] simply provides more opportunities to Anglo students in predominantly Anglo schools. As the Fisher Plaintiffs note: if White-flight is a factor in the resistance by Anglo students to travel south in the TUSD district [to schools with higher concentrations of racial minorities], TUSD should reconsider a plan that would facilitate White-flight.

Id. at 15:22-16:27. Further, consistent with the Court's direction that "TUSD should consider whether the possibility exists for Magee Middle School or any other TUSD school to become an attractive option" in order to increase integration (*id.* at 16:-10), the Court "approve[d] the NARA in respect to TUSD's plan to add express bussing and the AVID and AP programs at Magee Middle School and… [ALEs] such as GATE and pre-AP classes" (*id.* at 17:24-18:3). Significantly, the Court approved these measures directed at creating pro-integrative initiatives notwithstanding that it rejected the District's

reconfiguration proposal of which the Magee express bussing and ALE introduction plans were a part. (*Id.*)

D. Diversity of Certificated Staff

Under USP Section IV, E, 2, the District is required to "identify significant disparities (*i.e.*, more than a 15 percentage point variance) between the percentage of African American or Latino certificated staff or administrators at an individual school and district-wide percentages for schools at the comparable grade level," and the USP expressly contemplates "reassign[ment of] personnel between schools" as one strategy to address those disparities (USP Section IV, E, 3). Having noted that this was an area in which the "District is out of compliance with the USP" and that "[t]here does not appear to be a plan for resolving this problem" in his annual report for the 2014-15 school year (Doc. 1890), the Special Master, on March 23, 2016, recommended that the Court "*direct the District to immediately develop and implement a plan* to reduce by half by the beginning of the 2016-17 school year the number of schools in which there are existing racial disparities, as defined by the USP, among the teaching staffs" particularly because the related USP provisions were "intended to implement one of the key standards established by the Supreme Court in [the] *Green*" case "to determine whether a school district has met its obligations under the Constitution of the United States to remedy the vestiges of discrimination." (Doc. 1913 at 2:7-11; 3:2-6; emphasis added.)

On March 28, 2016, the Court agreed and adopted the Special Master's recommendation, ordering that the District shall develop and implement a plan to address this USP requirement. (Order dated 3/28/16, Doc. 1914, at 2:4-8.) Thus, it was over three years after the USP was adopted and only after the Court issued its March 28, 2016 Order, that the District developed specific strategies to address this USP requirement. (*See, e.g.*, Special Master's Annual Report for the 2015-16 school year (Doc. 2026) at 8:14-16. ("Until 2016, the District did not have a specific plan for achieving this [USP] goal.").)

E. Advanced Learning Experiences

Recently, in the Mendoza Plaintiffs' objection to the Special Master's report and recommendation concerning ALEs (Doc. 2041), in which the Mendoza Plaintiffs called attention to the growing ALE participation gaps between TUSD's Latino and African American students on one hand, and white students on the other, the Mendoza Plaintiffs addressed the absence of information in the report on white student participation in ALEs as required to adequately assess the District's efforts to "ensure that African American and Latino Students have equal access to the District's" ALEs under USP Section V, A, 1. (Doc. 2069 at 2-4.) In its response to the Mendoza Plaintiffs' objection, the District went so far as to assert that "the District does **not** 'operate[] under a mandate to increase the relative participation of the Latino and African American students in ALEs in the District.'" (Doc. 2073 at 7:1-3; emphasis in original.)

Further, the District responded to the Mendoza Plaintiffs' argument that the Special Master's report and recommendation insufficiently addressed ALE completion rates with an odd argument premised on equating ALE "participation" with ALE "completion" to then assert that because the Special Master addressed "participation" rates, he did indeed address "completion" rates. (*See Id.* at 12.)

In rejecting the District's argument and reinforcing the USP's equal ALE access provisions, this Court stated that "[w]hat is relevant is whether the District has simply increased access to ALEs or has *increased access to ALEs for minority students… [I]t is the latter which is required under the USP*. Without comparative data for White students, the District runs the risk of increasing White student participation at the expense of African American and Latino students. The Court rejects the District's objection to providing comparative date [sic] for White students." (Order dated 10/24/17, Doc. 2084, at 9:16-22; emphasis added.) The Court further rejected the District's argument seeking to avoid analysis of completion rates when it agreed with the Special Master that the USP required goals to increase participation *and completion* rates in ALEs, stating that this was "in

accordance with the USP provisions contained in § V," including sections, 1, 2.a, 2.b, 2.c, 2.d, and 2.v. (*Id.* at 4:4:13-5:5.) Moreover, the Court seemingly rejected the District's odd attempt to equate ALE "participation" with ALE "completion" by expressly defining each of those terms in its Order. (*Id.* at 17:16-21.).

Significantly, given the centrality of analyzing relative participation rates in assessing equal ALE access for African American and Latino students, as well as African American and Latino student ALE completion rates (among other things), to measure the District's progress toward unitary status in this area, the Court "**ORDERED** STRIKING the ALE section in" the District's USP Analysis, and "**FURTHER ORDERED** that within 60 days of the filing date of [the] Order, the District shall file a Revised ALE section" to the USP Analysis that is in accordance with the Court's Order.[15] (*Id.* at 19:4-10.)

F. Discipline

Addressing the Special Master's recommendation that, pursuant to USP VI, F, 3, TUSD develop a viable plan for identifying and sharing effective disciplinary practices and finance that plan, in an Order dated December 27, 2016, the Court wrote:

> The Special Master notes 'that disciplinary problems in TUSD receive considerable negative attention in the community and generate concerns among teachers and principals, [yet] the District has not taken this provision of the USP seriously.' The Court notes that since the 1974 inception of this case, TUSD has failed to takes its disciplinary practices and procedures seriously. Discipline was one of the *Green*-factor challenges raised by the Plaintiff Fishers and remedied by the Settlement Agreement of 1978, paragraph 14, which required TUSD to implement good faith efforts that no student is discriminated

[15] The Court further adopted many of the Special Master's recommendations "calling for immediate action by the District to increase access to ALE programs" (*id.* at 16) that relate to GATE testing, ALE marketing, increasing GATE-certified teachers at TUSD, ALE expansion and access disparities, and AP testing, among other things (*id.* at 18:11-23). Of these ordered "immediate actions," most notable is the Court's "ORDER[] that the District shall open cluster Pullout GATE programs to at least the 2013-14 level [of 14, up from the current level of three] and place them strategically at schools serving minority students, and especially target them at schools serving substantial numbers of African American students." (*Id.* at 18:24-27.)

> against in the implementation of the District's uniform suspension and expulsion policy. In 2008, when this Court considered whether unitary status had been attained after approximately 30 years of operations pursuant to the 1978 Settlement Agreement, it questioned whether paragraph 14 had been addressed in good faith because there was no evidence of any ongoing monitoring and review of TUSD's disciplinary practices and policies to ensure the District maintained over all those years a uniform suspension and expulsion policy and no student was discriminated against.
>
> This Court, therefore, does not take lightly the Special Master's concern that $25,000 in the 2017 budget fails to move TUSD forward in respect to satisfying the USP § VI, F, 3 disciplinary provision to identify and share successful practices….TUSD agreed to this, but the Court notes that the Special Master made this recommendation to TUSD in his 2014-2015 Annual Report to the Court.

Doc. 1981 at 7:7-8:15, also ordering the Special Master to provide a detailed progress report on the District's implementation of the section of the USP governing discipline.

G. Desegregation Impact Analysis (DIAs) and Notice and Request for Approval (NARA) procedures

1. Dietz Portables

In connection with the NARA procedures described in the Order Appointing Special Master (Doc. 1350) for attendance boundary changes, the sale or purchase of District property and other changes or projects that affect student assignment, the USP requires that the District "submit with each [NARA], a Desegregation Impact Analysis, ("DIA"), that will assess the impact of the requested action on the District's obligation to desegregate and *shall specifically address how the proposed change will impact the District's obligations under this Order.*" (USP Section X, C, 2; emphasis added)

In April 2015, the District's Governing Board, without any consultation with the Plaintiffs or Special Master, approved a proposal to add portable classrooms to Dietz K-8, and, two weeks later, submitted that proposal to the Plaintiffs and Special Master under the NARA procedures for review and comment. (Order dated 6/12/15 ("Dietz Order"), Doc. 1809, at 5:19-25.) In the Dietz Order that followed, the Court addressed the ongoing issue

with the District taking actions subject to the NARA process before consulting with the Plaintiffs and Special Master as required by the USP and Order appointing Special Master as follows:

> In both this proposal and the Fruchthendler-Sabino Honors program proposal, 'the Board [did] not have the benefit of any perspective that the plaintiffs and the Special Master might offer'… When the Board acts without considering input from the Plaintiffs and the Special Master, especially if it acts even before the preparation of the DIA, the Board has not acted consistently with the USP requirement that it consider the impact of its proposals in respect to its obligations under the USP… The Board is at a disadvantage if it must assess and commit to a project prior to preparation of the DIA. After-the-fact preparation of the DIA delays meaningful discussions and is contrary to the usual expedited nature of NARAs.

Id. at 4:23-5:5; 6:13-16. To address this issue, the Court therefore ordered that the "District shall prepare a DIA and allow a one-week turn around review and comment period and for *both the DIA and comments to be presented to the Board when it is assessing whether or not to approve a proposal governed by NARA provisions*." (*Id.* at 6:22-25; emphasis added.)

2. Sale of Bonanza Property and Davis Parking Lot

Notwithstanding the Court's clear directive concerning NARA review and comment procedures and the need for both the DIA and those comments to be provided to the Board "when it is assessing whether or not to approve a [NARA] proposal," on June 13, 2017, the TUSD Board approved the sale of the Bonanza lot without having complied with review and comment procedures under the USP and Order Appointing Special Master or the Court's Dietz Order, and apparently without having presented its Board with Plaintiff and Special Master comment or a DIA. (*See* http://govboard.tusd1.org/Portals/TUSD1/GovBoard/docs/actions/06-13-17R.pdf (item 3, l).) Indeed, it was not until August 9, 2017, almost two months after its Board approved the

sale, that the District provided the Plaintiffs and Special Master with a DIA addressing the approved proposal's impact on TUSD desegregation efforts. (*See* M. Taylor August 9, 2017 email, attached as Exhibit 2.)

Separately, on April 4, 2017, the District's Governing Board approved entering an agreement for the sale of the Davis parking lot, also having apparently done so without the preparation of a DIA, delivery of such DIA to the Plaintiffs and Special Master for review and comment, and without those items having been delivered to the Board at the time it considered approving and did approve the sale. (*See* http://govboard.tusd1.org/Portals/TUSD1/GovBoard/docs/actions/04-04-17R.pdf (item 9, i).) With respect to the Davis parking lot, it was not until July 14, 2017, three months after the Board approved the proposed sale, that the District provided the Plaintiffs and Special Master with a DIA addressing the impact of the proposed sale on the District's desegregation efforts. (*See* S. Brown July 14, 2017 email, attached as Exhibit 3.) (Notably, the District's cover email transmitting the DIA noted that the proposal would again go before the Board for "final approval," reflecting what appears to be an understanding that the approval that already had been obtained involved a procedure that conflicts with the Court's Dietz Order (*see id.*), and a procedure to which both the Special Master and Mendoza Plaintiffs objected (*see* Special Master's July 17, 2017 email and J. Rodriguez July 18, 2017 email, attached as Exhibits 4 and 5, respectively).)

H. Access to Needed Information

As the Court is aware, the Plaintiffs and the Special Master have repeatedly objected to the District's failure to provide in a timely fashion, or at all, information they needed to respond to the District's budget proposals, NARA requests, and proposed USP implementation action plans. This issue has been addressed by the Court on multiple occasions, particularly when the District moved to strike the following statement in the Special Master's 2014 Annual Report: "The continuing problem of the inability of the District to provide Plaintiffs and the Special Master with information they believe they

need to exercise their roles as specified in the USP in a timely and effective way was noted above." (Doc. 1641-1 at 7.) The Court denied the motion, stating: "The Court finds the record accurate as reflected in the Special Master's report and Mendoza Plaintiffs' memorandum (Response (Doc. 1680) at [2-7])."

Even after the Court ruled, the Plaintiffs and the Special Master continued to encounter difficulties obtaining needed information in a timely fashion. Thus, in his R&R on last year's budget, the Special Master wrote: "The Special Master believes that there are no significant problems with the budget process agreed to by the parties. The problem is that the District did not comply with the process established and did not adequately provide information requested by the plaintiffs and the Special Master." (Doc. 1954 at 3:9-12; filed 8/22/16.) Thereafter, this Court rejected the District's suggestion that no order was needed on the budget process. Instead, it set forth specific components to be included in the process, including a requirement that the District file a notice of compliance within five days of each benchmark deadline in the budget process. (Doc. 1981 at 2:12-3:4 and 10:10-20.)

CONCLUSION

None of the foregoing bespeaks a District that to date has demonstrated "an affirmative commitment to comply in good faith with the entirety of a desegregation plan". (*Freeman*, 503 U. S. at 499.) Rather, it evidences a District that, going forward, must demonstrate that commitment.

//

//

//

//

Dated: October 31, 2017

MALDEF
JUAN RODRIGUEZ
THOMAS A. SAENZ

/s/ Juan Rodriguez
Attorney for Mendoza Plaintiffs

PROSKAUER ROSE LLP
LOIS D. THOMPSON
JENNIFER L. ROCHE

/s/ Lois D. Thompson
Attorney for Mendoza Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on I electronically submitted the foregoing MENDOZA PLAINTIFFS' OBJECTIONS TO ANALYSIS OF COMPLIANCE WITH UNITARY STATUS PLAN BY TUCSON UNIFIED SCHOOL DISTRICT NO. 1 [ECF 2075 – ECF 2075-10] 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/ECF registrants:

P. Bruce Converse
bconverse@steptoe.com

Paul K. Charlton
pcharlton@steptoe.com

Timothy W. Overton
toverton@steptoe.com

Samuel Brown
samuel.brown@tusd1.org

Robert S. Ross, Jr.
robert.ross@tusd1.org

Rubin Salter, Jr.
rsjr@aol.com

Kristian H. Salter
kristian.salter@azbar.org

James Eichner
james.eichner@usdoj.gov

Shaheena Simons
shaheena.simons@usdoj.gov

Peter Beauchamp
peter.beauchamp@usdoj.gov

Special Master Dr. Willis D. Hawley
wdh@umd.edu

/s/ Juan Rodriguez
Juan Rodriguez

Dated: October 31, 2017