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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

ANITA LOHR, et al.,

Defendants,

and

SIDNEY L. SUTTON, et al.,

Defendants-Intervenors.

NO. CIV 74-090 TUC DCB

LEGAL MEMORANDUM OF OBJECTIONS TO JOINT PROPOSED UNITARY STATUS PLAN NOTING AREAS OF DISAGREEMENT

(Assigned to: Honorable David C. Bury)

MARIA MENDOZA, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. ONE, et al.,

Defendants.

No. CIV 74-204 TUC DCB

The Tucson Unified School District No. 1 (the "District"), by and through counsel undersigned, hereby submits its objections to the Joint Proposed Unitary Status Plan Noting Areas of Disagreement (the "Draft USP") filed contemporaneously herewith. The Draft USP is a document that was negotiated by all Parties. The District has agreed to most of the obligations and provisions of the Draft USP, but does not acknowledge or admit that vestiges of the segregated system remain in the District. Furthermore, the District does not acknowledge or agree that the obligations it is undertaking pursuant to the Draft USP are necessary or required to achieve unitary status.

The Draft USP includes comments indicating specific objections to language or provisions of the USP, and in some cases suggests additional or different language that should be included. The purpose of this Memorandum is to elaborate on the factual and legal basis for those objections, and to set forth certain additional objections that are not related to the specific language of the Draft USP, but rather to the legal underpinnings of this case and the legal basis for including certain provisions in the USP.

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I. INTRODUCTION AND PROCEDURAL HISTORY

The purpose of a desegregation case is to restore a segregated school system to unitary status and to return control of the district to its elected officials. *Freeman v. Pitts*, 503 U.S. 467, 489, 112 S. Ct. 1430, 1445 (1992). In order to be declared unitary, a school district must demonstrate that it has eliminated the vestiges of the segregated system, that it has complied in good faith with any court orders of desegregation and that it has demonstrated its good faith commitment to the operation of a non-discriminatory school system. *Id.* at 492, 112 S.Ct. at 1446, *citing Bd. of Educ. Of Oklahoma City v. Dowell*, 498 U.S. 237, 249-250, 111 S.Ct. 630, 637-638 (1991).

From August 31, 1978 through December 19, 2009, Tucson Unified School District (the "District") operated pursuant to a Stipulation of Settlement that was agreed to by the Fisher Plaintiffs, the Mendoza Plaintiffs, the United States Department of Justice and the District (collectively, the "Parties"), and approved by the Court on August 31, 1978. In December 2009, the United States District Court declared the District unitary and dismissed this lawsuit. The Fisher and Mendoza Plaintiffs appealed that ruling, and on July 19, 2011, the Ninth Circuit reversed the District Court and remanded this case for further proceedings. The Ninth Circuit ruled that the District must demonstrate that it had eliminated the vestiges of segregation as to each of the *Green*[1] factors (student assignment, faculty assignment, facilities, extracurricular activities and transportation) and that it had demonstrated its good faith intent to the operation of a desegregated school system. Citing *Freeman, supra*, the Ninth Circuit acknowledged that the District Court could find that

[1] *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968)

withdrawal of judicial supervision was appropriate now or in the future as to specific *Green* factors, if the vestiges of segregation had been eliminated in those areas.

Pursuant to this Court's Order dated January 6, 2012, the Special Master was required to prepare, within six months of his appointment, an Initial Report that would include, among other things, findings of fact and recommended conclusions of law concerning the District's compliance with the Post Unitary Status Plan, whether withdrawal of judicial supervision was appropriate with regard to any *Green* or ancillary factor, and a proposed unitary status plan. "In formulating the USP, the Special Master is to consider the parties' briefs regarding (1) the adequacy of the PUSP, including their identification of the areas in the PUSP which should be incorporated, omitted, supplemented, and/or improved in the USP; (2) any Green factors with respect to which the Parties believe partial withdrawal of judicial oversight is appropriate; and (3) the parties' submissions on the status of implementation of the PUSP." January 6 Order at p. 5, lines 6 – 10. The Special Master did not make any findings with regard to the parties' briefs, and the parties themselves ultimately negotiated the language of the Joint Proposed Unitary Status Plan Noting Areas of Disagreement (the "Draft USP") filed contemporaneously herewith.

Because there were no findings of fact, the parties' efforts in negotiating the Draft USP were completely uninformed by any findings related to activities already underway or fully implemented in the District. Further, the Special Master apparently did not consider whether, as a factual or legal matter, the District was entitled to partial withdrawal of judicial oversight as to any aspect of this case. Although the District has agreed to nearly all of the substantive provisions and language in the Draft USP, specific objections were

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noted in the Draft USP. These objections will be further briefed in this Memorandum, and additional objections are raised herein to protect the record and to clarify the District's legal position with regard to unitary status. This is particularly critical as the Draft USP may change as a result of the public input process, further negotiation of the Parties and briefing that may be submitted by the State of Arizona.

Pursuant to the District Court's Order dated January 6, 2012, the District submitted briefing to the Court and the Special Master arguing that withdrawal of judicial supervision was appropriate with regard to faculty assignment, facilities and extracurricular activities. Each of these areas will be addressed below, in connection with the discussion of the applicable provisions in the Draft USP. Generally, however, it is undisputed that any proposed remedy in a desegregation case must relate to the Constitutional violation that was found. Freeman, supra at 487, *citing Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-1276 (1971). Furthermore, the purpose of any remedy must be "'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Jenkins v. Missouri*, 515 U.S. 70, 88, 115 S.Ct. 2038, 2049 (1995), quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 2757 (1977). Procedurally, this case stands on unusual footing. The only findings of any constitutional violation are in the Findings of Fact and Conclusions of Law adopted by the District Court by Order dated June 4, 1978 (the "Findings and Conclusions"). Although these Findings and Conclusions were later superseded by the Stipulation of Settlement approved by the Court on August 31, 1978 (the "Stipulation"), there were no findings of fact or conclusions of law in the Stipulation or in the Order approving the Stipulation.

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Thus, the parties and the Court must look to the original Findings and Conclusions and to the specific remedies that were agreed upon in the Stipulation to determine what the constitutional violations were and to thereby define the limited scope of any remedial order to be entered.

The District acknowledges that over the thirty-four years since the Findings and Conclusions were adopted, the scope of the remedy changed and arguably expanded, as student assignment plans were changed, schools were opened, money was spent and other programs and activities were implemented under the auspices of and with the authority of this Court. That does not change the fact, however, that no further Constitutional violations have been found, and that any new remedies that are ordered must be based on and intended to remedy a Constitutional violation. Furthermore, even as the Ninth Circuit found that the unitary status determination was improper, in light of the findings of lack of good faith, it allowed for the possibility that the vestiges of discrimination had in fact been eliminated to the maximum extent practicable and that partial withdrawal of judicial control might be appropriate as to some of the *Green* factors. *Fisher v. Tucson Unified School District*, 652 F.3d 1131, 1144-1145 (9th Cir. 2011). The primary focus of both the District Court and the Ninth Circuit in finding that the District was not unitary was its failure to monitor its activities, report on them and evaluate the effectiveness of those activities. *Id.* at 1143 ("The District has produced no evidence to rebut the lower court's finding that the District failed to collect and analyze the data that would reveal whether its desegregation efforts were working.") That failure is addressed by the Evidence-based Accountability System ("EBAS") which is included as a part of the Draft USP.

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The arguments with regard to each section of the Draft USP will be set forth below, in the order in which they appear in the Draft USP and numbered as they are in the Draft USP.

II. STUDENT ASSIGNMENT

The District objects to only one aspect of the provisions on student assignment, a requirement in Section II.G.2.a of the Draft USP that magnet schools allow only 50% of their seats to be filled by students from the school's attendance or preferred admission zone. This objection is discussed in more detail below. However, because the Parties have agreed to definitions and strategies for student assignment that vary significantly from other desegregation plans and past practices in the District, a discussion of these provisions follows.

The Parties have agreed to very ambitious definitions of "Racially Concentrated" schools and "Integrated Schools" in an effort to encourage students to take advantage of opportunities to attend schools that reflect the racial and ethnic enrollment of the District as a whole. A "Racially Concentrated" school is defined as a school that has a single racial or ethnic group representing more than 70% of a school's enrollment. An "Integrated School" is one in which no single racial ethnic group deviates from the District average for that grade level (elementary school, middle school, K-8 and high school) by more than 15%, *and* in which no single racial or ethnic group exceeds 70% of the school's enrollment. As of the 40th day of the 2012-13 school year, the District's Latino enrollment was 64.1% at the elementary school level, 64.6% at the middle school level and 56.4% at the high school level. As a result, in order for a school to be an Integrated School, or to not be a Racially

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Concentrated school, it must have a Latino enrollment that is less than 6% above the District average for elementary and middle schools, and less than 14% above the District average for high schools. In desegregation cases, it is typical for student assignment plans to have as their goal schools that are within +/-15% of the District average for each racial or ethnic group. *See, Belk v. Charlotte-Mecklenburg Bd. of Education*, 269 F.3d 305, 319 (4th Cir. 2001). The District has agreed to these definitions because of the way in which they are used in the student assignment plans included in the Draft USP. It is important to note, however that the definitions represent a significant compromise from what would typically be required in a desegregation case, and an even more significant compromise given the history of student assignment plans in this case.

The District Court in 1978 found that the "the segregative acts by the District and the existence of racial imbalance in the schools are insufficient for a finding that a Mexican-American/Anglo dual school system has ever been operated by the defendants." Findings and Conclusions at p. 221, ¶49. In spite of this, the Court found that many Mexican-American and African-American students were "subjected to discrimination by being sent to schools which were heavily minority, partially as a result of intentional segregative acts." Findings and Conclusions at p. 221, ¶51. The Court further held that, even by 1978, demographics had played a significant role in altering the District's student assignment. Although it found that the District had "acted with segregative intent" at several schools in at least one year between 1951 and 1976, the Court noted that "[e]ven without any intentional segregative acts by the District, certain schools would not have a racial or ethnic balance noticeably different from that which they have at present: Davis, Safford

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Elementary, Menlo Park, Mission View, Richey, Borton, Hughes, Carrillo, Hollinger, Blenman, Lynn, Pueblo Gardens, Holladay, Cavett, Myers, White, Mansfeld and Utterback." Findings and Conclusions at p. 221, ¶53 and p. 222, ¶58.

Even in 1978, the goal of the student assignment plans was to maintain, to the extent possible, the District's neighborhood school system. Remedies were implemented immediately to address the vestiges of segregation that had been found by the Court in only nine of the District's schools. In the Stipulation, the District agreed to adopt additional student assignment plans to address alleged vestiges in certain of the District's other schools, but did not agree that any vestiges were in fact present in those schools. The Court, in its order dated August 11, 1978, approved the student assignment plans proposed by the District for the first nine schools. Discussing Brichta, Tully and Manzo, the Court noted that "the school attendance areas for Manzo and Tully remain unchanged. Although, the composition of Manzo school students would remain very heavily minority, the Court finds that the improvement is as much as would have existed at Manzo absent constitutionally objectionable School Board actions in previous years. The same is true with respect to Tully." August 11 Order at p. 5. The Court noted that the "limited effects" of past segregation would be remedied by the proposed plan. *Id.*

In other parts of the August 11 Order, the Court focused on the distances that various students would be required to travel once their schools were closed. For instance, the Court noted that "those students west of Euclid will be bussed to Davidson, and there may be some disruption of parental involvement and after school activity." August 11 Order at p. 9. "Spring parents object to losing their neighborhood junior high school; however, all

children live within approximately four miles of their new junior high, and this distance is not at all excessive when compared to other children around the district." *Id.* at p. 10. It was clearly a primary concern of the parties and the Court that students be kept, to the greatest extent possible, in schools near to their places of residence.

For Davis, Drachman and Carrillo Elementary Schools, the student assignment plan approved by the Court called for virtually no change to their attendance areas – instead, Davis students remained in the Davis attendance area, and Drachman and Carrillo were given a combined attendance area with students allowed to attend either school, with transportation provided if a student was outside the "walk zone." Stipulation dated September 5, 1980, approved by Court Order dated September 9, 1980.

The Ninth Circuit, when it remanded this case, did not find that the District had failed to comply with the Stipulation of Settlement, or even that it had failed to eliminate the vestiges of segregation in student assignment. Rather, it held that the District Court could not grant unitary status after entering findings of fact, which were supported by the record, that the District had "failed to act in good faith in its ongoing operation . . . under the Settlement Agreement." *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d at 1142. The Ninth Circuit did not order the District Court to devise a new or additional remedy and did not make any findings as to whether vestiges of segregation still exist in the District, with regard to student assignment or any other *Green* factor.

The Parties have agreed to a student assignment plan that utilizes four basic strategies to encourage students to take advantage of the opportunity to attend integrated schools – attendance zones, pairing and clustering, magnet schools and open enrollment.

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The District does not object to the strategies or the definitions in this section. The District's only objection is the requirement in Section II.G.2.a of the Draft USP that magnet schools allow only 50% of their seats to be filled by students from the school's attendance or preferred admission zone. While this may work at some magnet schools, and some magnet schools may even have no attendance zone or preferred admission zone, the District believes that the 50% restriction is too limiting and could hamper the District's flexibility in creating and implementing the Magnet School Plan required by the Draft USP. Some schools, particularly the District's high schools, may have magnet programs but also serve a large geographic area in which there are no other alternatives for students who do not wish to be transported long distances. This is the District's only objection to the student assignment provisions in the Draft USP. The District believes that the strategies set forth in the Draft USP, used in conjunction with the definitions set forth in the Draft USP, will increase the number of schools in the District that reflect District-wide racial and ethnic enrollment and will increase the number of students who have the opportunity to attend such schools.

III. TRANSPORTATION

The District has no objections to the transportation provisions in the Draft USP.

IV. ADMINISTRATORS AND CERTIFICATED STAFF

The Draft USP contains numerous provisions with regard to the hiring and retention; assignment; evaluation; and professional development of administrators and certificated staff. The District objects to only three provisions – Section IV(I)(3) which requires the District to provide financial support for a "grow your own" program to develop

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administrative leaders; Section IV(I)(4) which requires the District to complete training under Section IV by July 1, 2012 and Section IV(J)(2), which requires the District to hire or designate staff for professional development by April 1, 2012 instead of June 1, 2012 as the District proposed.

A. "Grow Your Own"

Section IV(I)(3) of the Draft USP requires the District to "develop and implement a plan for the identification and development of prospective administrative leaders, specifically designed to increase the number of African American and Latino principals, assistant principals, and District Office administrators." The District has no objection to the development and implementation of such a plan. The Draft USP includes as part of this plan, however, the adoption of a "grow your own" program through which the District would be required to provide financial support to enable current Latino and African American employees to secure the required certifications to become administrators. Based on the limited findings in this case, the very narrow requirements of the Stipulation with regard to faculty and staff and the results of a Labor Market Study (see Exhibit A), the District opposes this requirement.

The Stipulation imposed two obligations with regard to faculty and staff – an obligation to adopt a non-discrimination in hiring statement and an obligation to reassign African American teachers so that they were not concentrated in any District school. Assignment of Mexican-American faculty and staff was not addressed in any way in the Stipulation (and in fact the only count in the Complaint related to this issue was dismissed in the Order adopting the Findings and Conclusions). See June 5, 1978 Order, at ¶9. The

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Labor Market Study shows that by virtually every possible measure, the District has more Latino administrators and certificated staff than would be expected based on a variety of possible labor markets. The District has the expected number of African American administrators and certificated staff based on the Arizona labor market. This data, combined with the lack of a finding of a constitutional violation and the limited obligations imposed by the Stipulation, does not support a remedy of financial support for Latino and African American employees to secure additional degrees or certifications.[2]

B. Professional Development Deadlines

The Draft USP includes numerous professional development obligations in order to ensure its effective implementation. The District does not oppose any of the professional development requirements. However, some of the dates that have been proposed by Plaintiffs and included in the Draft USP are unrealistic in light of the District's contractual relationships with its employees, its obligations to provide professional development in a variety of areas unrelated to the Draft USP, its school calendar and its existing schedule for professional development. To accommodate these factors, the District objects to the requirement that all District principals be trained in creating Professional Learning Communities by July 1, 2013, and instead proposes that this date be moved to October 1,

[2] "With regard to faculty and staff assignments, it is important to emphasize that the 'proper comparison [is] between the racial composition of [the District's] teaching staff and the racial composition of the qualified public school teacher population in the relevant market.' . . . The School District acknowledges as much, although admits that it has never made this inquiry." *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1144 n.29, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (citation omitted). The District has now made this inquiry and the results support the District's arguments in this regard.

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2013. This will allow the District to utilize regularly-scheduled professional development time during the first quarter of the 2012-13 school year to provide the required training, and will ensure that the training is completed in time for principals to implement professional learning communities during the 2012-13 school year. Many elementary school principals are not on contract during the summer and the July 1 date would require that this training happen during the current school year, for which most professional development has already been scheduled and planned. Given the scope of the obligations in the Draft USP, it is unreasonable for the Plaintiffs to dictate the District's professional development schedule and to oppose the modest three-month extension that has been requested.

C. Hiring or Designation of Trainers

Section IV(J)(2) of the Draft USP requires that the District "designate, hire, or contract for appropriate trainers for all certificated staff, administrators and paraprofessionals to provide the professional development necessary to effectively implement the pertinent terms of this Order." The District proposes extending this deadline to July 1, 2013. Pursuant to Section IV(J)(1) of the Draft USP, the District is required, by April 1, 2013, "to develop a plan to ensure that all administrators and certificated staff are provided with copies of this Order and trained on its elements and requirements prior to the commencement of the 2013-14 school year." It would be premature to designate or hire trainers prior to the development of the plan that must be created pursuant to subsection (1). Accordingly, the April 1 deadline in subsection (2) should be extended to allow for trainers to be hired or designated pursuant to the plan that is developed by April 1. Furthermore, the Draft USP requires the District to hire or designate people for at least twenty-one positions

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(not including the multiple trainers that might be required pursuant to this Section). Virtually all of those individuals are to be hired or designated by April 1. Many of these are senior administrative staff positions, which will require either a thorough recruitment and interview process (for new hires) or a substantial reorganization of duties and obligations (for designating existing personnel). All of this requires the devotion of substantial District resources, including a significant amount of time to be spent by human resources officials, by the Superintendent and by other senior administrators in reorganization and/or hiring. It is unreasonable of the Plaintiffs to require, on top of this, that the District identify and hire or designate the entire professional development staff pursuant to this Draft USP by April 1.

D. Professional Development for Educators Working With ELL Students

Section IV)(J)(3)(b)(vii) requires the district to develop a "district-wide professional development plan for all educators working with ELL students." Such a requirement is not supported by any findings of constitutional violations in this case or any prior obligations imposed by any order or stipulation in this case. The Stipulation contained only one obligation with respect to "bilingual" education, and that was the obligation to get parent consent before placing a student in a bilingual class. A district-wide professional development plan is not in any way related to such an obligation. The District has a Language Acquisition Department that is charged with complying with various statutory obligations as well as certain OCR agreements related to the District's provision of services to ELL students. There is a separate federal court case (*Flores v. Horne*) dealing with ELL students in Arizona. Professional development to assist teachers in working with ELL

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students is appropriately handled by the Language Acquisition Department outside the auspices of this case.

V. QUALITY OF EDUCATION

The District has only two objections to Section V of the Draft USP. Some elements of Section V flow from obligations in the Stipulation, including the continuation of the African American Student Support Services Department, which originated in the Stipulation as the "Programmatic Recommendations to assist in the Quality Education of Black Students in Tucson." Other elements in this Section V flow from the Post Unitary Status Plan, which was a plan for a unitary district and not subject to court supervision and oversight. Other provisions in Section V are new, and are not based on specific findings of constitutional violation or the existence of racial or ethnic disparities as a vestige of segregation. The simple existence of disparities between the achievement of Anglo students and the achievement of Latino and African American students is not an indication that such disparities are a vestige of segregation. "Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, . . . so too will numerous external factors beyond the control of the [District] . . . affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." *Jenkins v. Missouri*, 515 U.S. 70, 102, 115 S.Ct. 2038, 2056 (1995), *citations omitted*. The District's agreement to many of the provisions of Section V reflects the District's commitment to providing equal opportunity to its African American and Latino students to fully access all aspects of the District's curriculum.

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A. UHS Admissions Criteria

The District has proposed additional language in Section V(A)(5)(a) to provide for the adoption by the District's Governing Board of the revised University High School ("UHS") admissions criteria. Decisions of this nature are typically made at the Governing Board level, and the District seeks to document in the Draft USP itself that the Governing Board will ultimately be responsible for adopting the admissions criteria for UHS.

B. Culturally Relevant Courses of Instruction

The District next objects to the requirement in Section V(C)(6)(a)(ii) that the District "develop and implement culturally relevant courses of instruction designed to reflect the history, experiences, and culture of African American and Latino communities." It is unprecedented in a desegregation case, particularly one in which there were no findings of constitutional violation related to the curriculum, to mandate specific courses or curriculum in the way that this provision does. The Mendoza Plaintiffs dismissed the only count of their Complaint related to curriculum in a stipulation filed on January 7, 1977. As noted in that stipulation, the Mendoza Plaintiffs dismissed several claims, including "the third count (concerning the provision of inferior curricula and physical facilities to Mexican-American students)." January 7, 1977 Order. There were no provisions in the Stipulation related to curricular offerings for Latino students. Mexican American Studies classes were included in the PUSP, but that was a plan for a unitary school district and was not subject to court oversight or monitoring.

Many desegregation cases have addressed the issue of curriculum, but in very different ways. Some have outright rejected any requirements related to curriculum in a

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desegregation decree. The Tenth Circuit in *Keyes v. School Dist. No. 1, Denver, Colorado*, 521 F.2d 465 (10th Cir. 1975), held that a district could not be required to provide particular curricular offerings to or for its minority students. The district court in that case ordered the implementation, on a pilot basis, of a plan "for the bicultural-bilingual education of minority children" known as the "Cardenas Plan." *Id.* at 480. The Plan included "the inclusion of specific courses in the curriculum." *Id.* at 481. The plaintiffs in that case argued that schools "must be forced not only to end the separation of races but also to establish a receptive scholastic environment for minority students" and that the plan corrected the school board's "failure to provide an equal educational opportunity for minority children." *Id.* at 481. In rejecting these arguments, the court held that "[t]he clear implication of arguments in support of the court's adoption of the Cardenas Plan is that minority students are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not." *Id.* at 482.

Other courts have acknowledged that curriculum may play a part in desegregation cases, but have not extended this to requiring certain courses or types of courses. The district court in *U.S. v. Board of School Comm'rs of City of Indianapolis, Ind.*, 506 F.Supp. 657 (S.D. Indiana 1979), *vacated on other grounds, U.S. v. Board of School Comm'rs of Indianapolis, Ind.*, 637 F.2d 1101 (7th Cir. 1980), acknowledged that curriculum should be free from cultural bias, but further noted that this did not mean that "various school corporations will lose local control with respect to testing and curriculum development, but simply that they will conduct ongoing, systematic evaluations of the same." *Id.* at 672. The

Second Circuit, in *U.S. v. City of Yonkers*, 197 F.3d 41 (2nd Cir. 1999) noted that "curriculum is a sensitive matter, drawing subjective inputs from education policy, local politics and parental preference. Absent some extraordinary showing, we will not conclude that the Constitution requires a local school board to adopt one curriculum over another, or that children of differing ethnicity and race require separate curricula or teaching techniques." *Id.* at 52.

In *Coalition to Save Our Children v. State Bd. Of Educ. Of State of Del.*, 90 F.3d 752 (3rd Cir. 1996), the original desegregation order required the school district to "provide curriculum offerings and programs which emphasize and reflect the cultural pluralism of the students, and all instructional materials, texts and other curriculum aids shall be free of racial bias." *Id.* at 769. Notably, this did not require that certain courses to be offered at particular grade levels. In finding that the state and the school districts had complied with the provision, the Third Circuit noted that the Delaware Department of Education had established text selection guidelines to "ensure racially unbiased texts and instructional materials," that one school district had included a black history curriculum in its elementary schools and that another district had integrated "cultural pluralism into the social studies, English language arts, art education and music curriculum guidelines." *Id.* at 772-773. The curriculum requirements of the original order in this case were some of the most rigorous of any reported desegregation cases, but even here compliance did not require that every defendant district have a comprehensive program and did not require that any district offer specific courses or classes.

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There is no legal or factual basis in this case for requiring the District to offer specific classes or courses. Even a requirement for the District to incorporate multiculturalism into its general social studies curriculum is not supported legally in this case. However, the District does not object to that provision and is already in the process of revising its social studies curriculum to include multicultural perspectives.

VIII. Extracurricular Activities

The District has no objection to the provisions of Section VIII of the Draft USP. However, the District has asserted in previous briefing to this Court that it is unitary with respect to this *Green* factor, and by agreeing to these provisions in the USP the District is not waiving any rights it may have in the future to assert that it has achieved unitary status with respect to extracurricular activities.

IX. Facilities and Technology

The District has no objection to the provisions of Section VIII of the Draft USP. However, the District has asserted in previous briefing to this Court that it is unitary with respect to this *Green* factor, and by agreeing to these provisions in the USP the District is not waiving any rights it may have in the future to assert that it has achieved unitary status with respect to facilities and technology.

X. Accountability and Transparency

A. Budget Process and Timelines

The District does not object to the processes and provisions that have been established for the desegregation budget process. The District objects only to the time lines established for the budgeting process in Section X(B). The Parties have agreed to a two-

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step process for creation of the budget to fund the Draft USP. The first step will be the creation of a Desegregation Funds Expenditure Plan, which will set forth the process for allocating funds to be raised pursuant to A.R.S. §15-910(G) and funds necessary to implement the Draft USP. The District has proposed that it will prepare this document and provide it to the Plaintiffs and the Special Master 30 days before it is to be utilized in connection with the actual budgeting process, with comments due 20 days later. The Plaintiffs argue that they need the document 45 days before it is used, with comments due in 30 days. The second step of the Plan involves the actual creation of a USP budget, showing all anticipated sources and uses of funding to implement the Draft USP. The District proposes that this budget be submitted to the Plaintiffs 30 days before it is submitted to the Governing Board, and that comments/objections be provided 20 days later. The Draft USP provides for the Plaintiffs to receive these documents 45 days before they are utilized or approved, and gives the Plaintiffs 30 days to provide their comments and objections. The time lines in the Draft USP do not allow for the District to do the work that must be done in creating a budget and still meet statutory deadlines for Governing Board approval.

The District typically begins its budgeting process for the next fiscal year during the late fall of the current school year. At this level, the process involves establishing formulas and processes for the allocation of funds. This happens not only for the desegregation budget for the District's entire budget. After the formulas and processes are approved, the District's budget personnel begin a process of meeting with central District administrators and with school site administrators to make projections for the following year. Budgets

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must be determined for departments and individual schools. Numerous factors impact the budgets for each department and each school. The Superintendent and Chief Financial Officer must engage in "back and forth" with each department and school site to accurately assess the needs of the department and the school. The District must factor into this process specific federal and state grant funds, other grant funds, and desegregation funding. Assuming that the Draft USP, as it may be modified or amended, is adopted by this Court on or about January 15, 2013, the District will not know for certain what its obligations are under the USP until that time. The final District budget must be approved by the Governing Board and submitted to the State of Arizona by July 15. This is not, however, the real deadline for completing the budget. The District must give notices to administrators and teachers if they are not going to be renewed for the following year, and engage in significant planning for the following school year. These decisions cannot be made until the budget is complete, and so the District makes every effort to have the budget finalized, but for Governing Board approval, by the end of May.

There are approximately 180 days between January 15, 2013 and July 15, 2013. Even if the District is able to complete the Desegregation Funds Expenditure Plan by the time the Order is approved (which is unlikely, given the efforts that must be put into the public comment process and completing the Draft USP between now and then), the Plaintiffs would then have it, with no further action being taken on the budget, until the end of February. If the District spent 45 days (which is not nearly the amount of time that is typically spent) working with schools and departments to create the USP budget, it would be April 15. The Plaintiffs would then have the budget until the end of May. By then,

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school will be out and the District will have been unable to provide notice to teachers and administrators who no longer have jobs and will have been unable to engage in planning for the next school year. At that point, the District will have only 45 days for possible revisions and for the Governing Board to review and approve the budget. It is unrealistic for the Plaintiffs to expect that they should have control of the District's entire budgetary process for 90 out of the possible 180 days that the District has to work on its budget. The District therefore proposes that its timelines be approved for the budget process.

The District also requests that this Court reconsider any aspects of its October 26, 2012 Order that are inconsistent with the process agreed to by the Parties in the Draft USP for the creation, review and adoption of the USP Budget. Except for the issue of timing, the Parties have agreed on this process to provide the transparency and accountability desired by the Court. This is a process that keeps the responsibility for creating a budget within the District, where such authority and responsibility belongs, but provides the Plaintiffs and the Special Master with ample opportunity to review both the process and the actual budget allocations, provides transparency to the community, and includes audits of actual spending on the provisions of the USP.

B. Advisory Panel

The Draft USP includes a provision, Section X(E)(2), that allows the Special Master to appoint a committee of 3 experts, of his choosing, to assist him in "monitoring and overseeing implementation" of the Order. The January 6, 2012 Order Appointing Special Master (the "January 6 Order") allows the Special Master to request extraordinary assistance if he deems it necessary. The January 6 Order provides for a process for the

Special Master to request this assistance and for the Parties to object if they deem it appropriate to do so. If the Special Master determines that extraordinary assistance is required in monitoring and overseeing implementation of the USP, he can follow the process in the January 6 Order. There is no need to provide for the appointment of such a committee at this time, when the Order has not yet been approved and it is impossible to judge what assistance might be needed, in what areas expert assistance would be helpful, or what funds will be available for such assistance. The District therefore objects to this provision.

XIII. Attorneys' Fees

The District does not object to the inclusion of Section XIII, but reiterates the language of that Section that follows: "submission of plaintiffs' fee and expense requests directly to the District under this provision, does not waive any legal claims or defenses that the parties may have, and all such legal claims or defenses can be raised with the Court in the event no agreement on fees and expenses can be reached." The District is not acknowledging, by not objecting to this Section, that any fees are due to Plaintiffs, or that it will not object to any such fee applications either in part or in their entirety.

CONCLUSION

The Draft USP reflects the diligent efforts of the Parties to reach agreement on a plan to address the *Green* factors in the context of this litigation. It does not constitute an admission by the District that there are vestiges of segregation that remain in the District or that the obligations set forth herein are required to eliminate any such vestiges that may exist. Similarly, it is not an acknowledgment by any of the Plaintiffs that there is not more

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they believe the District should do. Instead it represents an agreement that, if the District implements the Draft USP for the period of time set forth therein, it will have eliminated any vestiges that may exist and that it will achieve unitary status at the end of that time period.

DATED this 9th day of November, 2012.

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CERTIFICATE OF SERVICE

X I hereby certify that on November 9, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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