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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ARIZONA**

10 ROY and JOSIE FISHER, et al., )  
11 Plaintiffs, )

12 UNITED STATES OF AMERICA, )  
13 Plaintiff-Intervenor, )

14 vs. )

15 ANITA LOHR, et al., )  
16 Defendants, )

17 and )

18 SIDNEY L. SUTTON, et al., )  
19 Defendants-Intervenors. )

No. CIV 74-90 TUC DCB  
(lead case)

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MARIA MENDOZA, et al., )  
21 Plaintiffs, )

**PLAINTIFF-INTERVENOR’S**  
**RESPONSE TO DEFENDANTS’**  
**MOTION FOR PARTIAL**  
**UNITARY STATUS**

22 UNITED STATES OF AMERICA, )  
23 Plaintiff-Intervenor, )

24 vs. )

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

No. CIV 74-204 (TUC) (DCB)  
(consolidated case)

Plaintiff-Intervenor the United States submits this memorandum in response to Defendant Tucson Unified School District No. 1’s (“TUSD” or the “District”) Motion for Partial Unitary

1 Status. ECF No. 2005. For the reasons discussed below, the United States does not oppose the  
2 District's motion for unitary status as to extracurricular activities, facilities, and technology, but  
3 opposes as premature the District's motion for unitary status as to transportation, family and  
4 community engagement, and the Evidence-Based Accountability System ("EBAS").

#### 5 **I. BACKGROUND**

6 On February 20, 2013, this Court approved the Unitary Status Plan ("USP") negotiated  
7 by the parties. ECF No. 1450. The Court had ordered the parties, with the assistance of Special  
8 Master Willis Hawley ("the Special Master"), to develop a USP "containing specific substantive  
9 programs and provisions to be implemented by TUSD to address all outstanding *Green* factors  
10 and all other ancillary factors." *Id.* § I.B.3 (internal quotations omitted). The USP requires the  
11 District to institute remedial measures to address the *Green* factors of student assignment  
12 (including discipline), assignment of administrators and certified staff, quality of education,  
13 transportation, extracurricular activities, facilities (including technology), and the ancillary  
14 factors of family and community engagement, and accountability and transparency (of which the  
15 EBAS is one component).

16 The USP provides that "[a] motion for the determination of complete unitary status shall  
17 not be filed prior to the 2016-2017 school year." *Id.* § XI.A.2. The USP also provides, however,  
18 that the parties "may move, separately or jointly, for a declaration of partial unitary status at any  
19 time." *Id.* On March 20, 2017, the District moved for partial unitary status as to:

20 (1) transportation, (2) extracurricular activities, (3) family and community engagement,  
21 (4) facilities, (5) technology, and (6) the EBAS. The District has not yet moved for unitary status  
22 as to student assignment, administrative and certified staff, quality of education, discipline, and  
23 the non-EBAS-related requirements of accountability and transparency.  
24

1 Pursuant to the USP, the District has filed annual reports regarding its compliance with  
2 the provisions of the USP not later than October 1st each year the USP has been in effect.

3 *Id.* § I.D.5. The annual reports provide a narrative describing the status of the District’s  
4 compliance efforts in each area covered by the USP, and attach relevant supporting documents.

5 The Court charged the Special Master with overseeing implementation of the USP, and  
6 “making recommendations to the Court as to whether the District has complied in good faith  
7 with the USP and attained unitary status.” Order Appointing Special Master at 3, ECF No. 1350.  
8 To fulfill this responsibility, the USP requires the Special Master to file an annual report  
9 analyzing the District’s compliance with the USP. USP § X.E.4.

10 On March 22, 2017, the Special Master provided the parties with the sections of his most  
11 recent annual report that relate to the six areas of the USP for which the District is now seeking  
12 unitary status. *Sections of the Special Master’s Annual Report*, attached hereto as Exhibit 1. In  
13 his report, the Special Master made no findings of non-compliance in the six areas of the USP  
14 that are the subject of the District’s motion.

15 The Special Master also found that where disparities in the District’s provision of  
16 relevant services existed, those disparities were not correlated with race. For example, on family  
17 and community engagement, the Special Master found that “[w]hile differences in the vitality of  
18 family engagement do vary by school, it does not appear that the racial composition of the  
19 schools where family engagement is more robust is significantly different than the racial  
20 composition of schools with less assertive family involvement.” *Id.* Similarly, the Special  
21 Master found with regard to facilities that “[w]hile many schools require improvements . . . it  
22 does not appear that the quality of school facilities varies significantly by the proportion of  
23 students of different races in a school.” *Id.* Additionally, regarding technology, the Special  
24

1 Master found that District investments in new hardware and software during the 2015-16 school  
2 year “have largely eliminated differences among schools with respect to access students have to  
3 technology.” *Id.*

4 The Special Master did, however, identify concerns about the District’s motion given the  
5 links between some of the areas in which the District is moving for partial unitary status and  
6 other USP requirements that have yet to be satisfied and, therefore, are not part of the District’s  
7 motion. For example, because the requirement to provide transportation is so intertwined with  
8 the District’s ongoing efforts to desegregate the student body at its schools, the Special Master  
9 found that even if the District’s motion was granted as to transportation, the District should  
10 remain “obligated to implement those elements of the action plans dealing with the full range of  
11 commitments the [D]istrict has made.” *Id.* Similarly, the Special Master stated that the true test  
12 of the EBAS, which is still in the implementation phase, would be how the District uses “the  
13 extraordinary capabilities of this system in decision-making from the classroom to the Governing  
14 Board throughout the year,” including to preform required functions under the USP such as to  
15 “facilitate the effective use of information on student behavior and academic performance.” *Id.*

16 On April 17th and 18th of this year, the United States conducted a site visit of TUSD to  
17 supplement its review of the District’s annual report and its previous compliance monitoring  
18 efforts in the areas for which the District is seeking unitary status. During the site visit, the  
19 United States received a demonstration of the EBAS, met with District officials regarding its  
20 family and community engagement efforts, and conducted walk-throughs of four of the District’s  
21 five family and community engagement facilities.

## II. LEGAL STANDARD

The standard established by the Supreme Court for determining whether a school district has achieved unitary status thereby warranting termination of judicial supervision is whether it has: (1) fully and satisfactorily complied with the Court's desegregation decree(s) for a reasonable period of time, (2) demonstrated a good-faith commitment to the whole of the Court's decrees and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance, and (3) demonstrated that the vestiges of the prior *de jure* segregation have been eliminated to the extent practicable. *See Freeman v. Pitts*, 503 U.S. 467, 491-92, 498 (1992); *see also Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1134-35 (9th Cir. 2011); USP § I.C.1.

“The Supreme Court has underscored that the first showing, regarding good faith, is central to a district court's decision to declare a school system unitary and withdraw its supervision.” *Fisher*, 652 F.3d at 1135. With regard to whether the vestiges of the prior *de jure* segregation have been eliminated to the extent practicable, district courts are charged with looking at every facet of school operations, including student assignment, faculty, staff, facilities, extracurricular activities, and transportation. *See id.* at 1135-36. These factors are known collectively as the “*Green*” factors. *See Green v. Cty. Sch. Bd.*, 391 U.S. 430, 435 (1968).

A district court nonetheless “retains ‘the discretion to order an incremental or partial withdrawal of its supervision and control.’” *Fisher*, 652 F.3d at 1144 (quoting *Freeman*, 503 U.S. at 489). Thus, “upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved.” *Freeman*, 503 U.S. at 491. *See also Fisher*, 652 F.3d at 1144.

1           Nevertheless, the Supreme Court has “long recognized that the *Green* factors may be  
2 related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their  
3 relation.” *Freeman*, 503 U.S. at 497. In such a case, a district court may retain supervision over  
4 one *Green* factor to aid its oversight of compliance with another. *See Jenkins by Jenkins v.*  
5 *Missouri*, 122 F.3d 588, 600 (8th Cir. 1997) (“Where the district court has reason to retain  
6 supervision over an area to aid its jurisdiction over unfinished business, *Freeman* certainly does  
7 not require the court to declare partial unitariness”).

### 8           **III. ARGUMENT**

9           Upon consideration of the District’s annual reports, the Special Master’s annual reports,  
10 party conferences and exchanges of information, and its most recent site visit and interviews, the  
11 United States does not oppose TUSD’s motion for partial unitary status as to extracurricular  
12 activities, facilities, and technology. The United States opposes as premature the District’s  
13 motion for partial unitary status as to transportation, family and community engagement, and the  
14 EBAS.

#### 15           **A. The United States Does Not Object to the Court Declaring the District 16 Unitary as to Extracurricular Activities, Facilities, and Technology**

17           The United States does not oppose the District’s motion for unitary status as to  
18 extracurricular activities, facilities, and technology. The District has set forth evidence that it has  
19 complied in good faith with the requirements of these portions of the USP. The Special Master  
20 has not identified any non-compliance with the USP in these areas, and the United States’  
21 compliance monitoring efforts have not uncovered any evidence to the contrary. Moreover,  
22 there is no evidence of ongoing discrimination in these areas. Finally, these areas are not so  
23 intertwined with other aspects of the USP that they cannot be dismissed without negatively  
24 impacting its full implementation.

1                   **B.       Declaring the District Unitary as to Transportation, Family and Community**  
2                   **Engagement, and the EBAS is Premature**

3                   The United States opposes as premature the District's motion for unitary status as to  
4                   transportation, family and community engagement, and the EBAS, because these areas are  
5                   inextricably intertwined with *Green* factors as to which the District has not yet demonstrated  
6                   compliance or moved for unitary status. *See Freeman*, 503 U.S. at 498. Alternatively, if the  
7                   Court does grant the District's motion in these areas, the Court should order the District to  
8                   continue its efforts in these areas to the extent required to comply with other provisions of the  
9                   USP, as recommended by the Special Master.

10                  The Court should not yet grant unitary status as to transportation because the District's  
11                  ability to address student assignment and quality of education is directly related to the  
12                  availability of student transportation provided by the District. *See Jenkins*, 122 F.3d at 599  
13                  (upholding district court determination that "the transportation factor was so closely bound to  
14                  student assignment that the uncertainty affecting the student assignment vestige also prevented a  
15                  finding of unitariness as to transportation"). Moreover, the USP's transportation section  
16                  explicitly requires that "[t]he District shall utilize transportation services as a critical component  
17                  of the integration of its schools," USP § III.A.1, including to enable students to attend magnet  
18                  programs and to transfer to schools where their attendance would increase the "integration of the  
19                  receiving school," *id.* § III.A.3. Therefore, until the District has demonstrated compliance with  
20                  the student assignment portions of the USP, the transportation provisions should not be  
21                  dismissed.

22                  Similarly, the Court should not grant the District unitary status in family and community  
23                  engagement because its efforts in this area are still in process, and therefore are not yet fully  
24                  serving their central purpose: helping the District satisfy the USP requirements related to student

1 assignment and quality of education. The family and community engagement provisions of the  
2 USP are designed to “provid[e] information to families about the services, programs and courses  
3 of instruction available in the District,” as well as to learn “from families how best to meet the  
4 needs of their children.” *Id.* § VII.A.1. Family and community engagement is also crucial to the  
5 District’s successful implementation of efforts to desegregate by increasing parents’ knowledge  
6 of and access to school enrollment choices for their children. *Id.* § VII.C.1.a (requiring as part of  
7 the family engagement provisions that information be provided to families about enrollment  
8 options, as well as the District’s discipline policies and practices).

9 The District’s four Family Resource Centers, which are designed to play a crucial role in  
10 family and community engagement, are too new to yet achieve their intended results. While the  
11 United States applauds the District’s significant progress in staffing and opening its Family  
12 Resource Centers, the oldest of these centers has been open for only two years, and two of the  
13 centers are less than a year old. Consequently, the United States learned during its site visit that  
14 these centers, particularly the three newest centers, remain underutilized by the community,  
15 especially for programs directly related to the enrollment options and academic opportunities  
16 TUSD offers. The District believes utilization will increase as it does more to publicize the  
17 existence and offerings of the Centers, and more parents and community members learn of the  
18 Centers through “word-of-mouth.” But until the District undertakes these efforts to enhance  
19 their effectiveness, and the Centers have been given a chance to fulfill their purpose, a  
20 declaration of unitary status is premature.

21 Lastly, the EBAS system must be fully implemented before it can serve its intended  
22 purpose, which includes performing specific tasks required by the USP. The USP defines EBAS  
23 as “a system to review program effectiveness and ensure that, to the extent practicable, program  
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1 changes address racial segregation and improving the academic performance and quality of  
2 education for African American and Latino students.” *Id.* § X.A.1. Thus, the new EBAS  
3 procedures and computer platforms are integral to identifying and remedying racial disparities in  
4 student discipline, and for flagging students in need of academic and behavioral supports and  
5 interventions. The United States’ site visit confirmed the Special Master’s evaluation that the  
6 current EBAS system is still a work in progress<sup>1</sup> and “[t]he test will now be to use the  
7 extraordinary capabilities of this system in decision-making from the classroom to the Governing  
8 Board throughout the year.” Thus, while the District has now laid the foundation for using  
9 EBAS to address student discipline and quality of education, its motion for unitary status in this  
10 area is premature until the system is fully implemented and able to fulfill the other requirements  
11 of the USP.

#### 12 **IV. CONCLUSION**

13 For the foregoing reasons, the United States opposes as premature the District’s motion  
14 for unitary status as to transportation, family and community engagement, and the EBAS. If the  
15 Court does grant the District’s motion in these areas, the Court should order the District to  
16 continue its efforts in these areas to the extent required to comply with the remaining provisions  
17 of the USP. The United States does not oppose the District’s motion as to extracurricular  
18 activities, facilities, and technology.

19 Dated: April 28, 2017

20 Respectfully submitted,

21 T.E. WHEELER II  
22 Acting Assistant Attorney General  
23 Civil Rights Division

24 <sup>1</sup> For example, of TUSD’s 88 schools, fewer than 40 are currently participating in the District’s latest EBAS pilot program to track student interventions as a means of addressing disparities in quality of education and discipline.

/s/ James Eichner  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of April, 2017, I served copies of the foregoing pleading to counsel of record via the United States District Court for the District of Arizona's electronic filing system:

/s/ James Eichner  
JAMES EICHNER

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