IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al., Plaintiffs and United States of America, Plaintiff-Intervenor, v. Tucson Unified School District, et al., Defendants,	No. CV-74-00090-TUC-DCB (Lead Case)
Maria Mendoza, et al., Plaintiffs, and United States of America, Plaintiff-Intervenor, v. Tucson Unified School District, et al. Defendants.	No. CV-74-0204-TUC-DCB (Consolidated Case) **ORDER**

Post Unitary Status Reporting and Accountability Plan (PUSRAP), including Performance Impact Analysis (PIA) Form: Approved and Judgment Entered for Defendants.

On May 24, 2022, the Court found the District has attained unitary status in all parts, except for the Unitary Status Plan (USP) § X, Transparency and Accountability, pending final revisions to the Post Unitary Status Reporting and Accountability Plan (PUSRAP) and the Performance Impact Analysis (PIA). (Order (Doc. 2643) (citing Order (Doc. 2637)). The Court found these revisions were not expressly required under any substantive provision of the USP § X but were necessary to attain unitary status because they ensure "that to the extent practicable the PUSRAP serves to direct the public to the various sources and resources they may need to review, assess, and comment on the District's operations going forward post-unitary status." *Id.* at 3. In summary, the Court asked the District to revise the PUSRAP to make it more user-friendly to better serve the USP § X goals of transparency and accountability and to correct typographical errors.

On June 3, 2022, the District filed a Notice of Compliance (Doc. 2644), reporting its completion of all remaining tasks related to attaining unitary status pursuant to § X of the USP, including the PUSRAP revisions which were the subject of the Court's May 24, 2022, Order. *See* (PUSRAP (Doc. 2644-2) at 1-7.) The District also filed a Motion for Entry of Judgment. The Mendoza Plaintiffs filed Objections to both. The Fisher Plaintiffs joined in those Objections and filed a further Objection. All matters being fully briefed, the Court finds unitary status has been attained and grants Judgment for Defendants.

PUSRAP Revisions

In its last Order, the Court directed the District to make revisions to the PUSRAP as requested by the Mendoza Plaintiffs, as follows: 1) add a separate section for "Public Notice & Public Hearing," 2) add the Budget Consultant Form and the school improvement plans, including Magnet School Plans to the list of supporting budget documents, and 3) include in the "Annual Report" section of the PUSRAP a directive that the District's Annual Report (DAR) narrative sections identify ongoing initiatives and their costs. The Mendoza Plaintiffs also noted a reference to "draft" budgets which should be eliminated because the public will not be privy to draft budgets and will instead see only the final proposed budget released for review and comment before the public hearing is held by the

Governing Board for its adoption. *Sua sponte*, the Court clarified that a prior directive was not intended to mandate that the Governing Board adopt the 910G budget in June. (Order (Doc. 2643) at 2.)

The Mendoza Plaintiffs point out a typographical error remains in the newly added § II.A, Public Notices and Public Hearings, because it refers to a later PUSRAP § D, District Website, but with the addition of § A, the District Website is now § E. The budget form exemplars attached to the PUSRAP are missing a copy of the student support form. According to the Mendoza Plaintiffs, at least one of the school-improvement plans on the District's website, Bonillas Elementary Magnet School, is not the most updated version of the plan.

Not an alleged error, the Mendoza Plaintiffs note that the Desegregation Page for the District's website includes the Public Notice tab at the top, where PIA and DIAs will be posted, and that the District has also included a crosslink on the Budget Page to PIA and DIAs. The Mendoza Plaintiffs suggest a similar crosslink would be helpful at the bottom of the Desegregation Page where the Desegregation Plans and Initiatives are located.

In its Reply, the District reports that it has made corrections responsive to the Mendoza Plaintiff's notations of error and explains that the school plans for SY 2022-23 are in the process of being finalized and will be posted before the start of classes for this coming year. The Court leaves it to the District's discretion as to whether to add the PIA/DIA crosslink at the bottom of the Desegregation Page where Plans and Initiatives are posted. The Court finds that the District has complied with all the Court's directives for amending the PUSRAP.

PIA Revisions and DAEP PIAs

There are no objections to the PIA form, but the Mendoza Plaintiffs note that the measures of performance pulled directly from the USP/Annual Report Appendices trail the school years by almost a whole year, [1] which creates the potential for a PIA to not include the most recent available data. The data is collected on an ongoing basis, and there is no

[1]For example, the DAR for SY 2021-22 is published in November of SY 2022-23.

reason why data presented in a PIA or DIA should not be the most recent data when updated data is relevant to an analysis. Nothing in the PIA precludes the use of updated data, and this has been done in the DIAs. The Court finds no reason to believe PIAs will not use updated data when relevant. *See* (Reply (Doc. 16) (explaining that sometimes there may be good educational or external reasons not to use particular data, such as data from pandemic-impacted years).

The DAEP PIAs serve as a prototype for testing the PIA form's ability to provide sufficient transparency to ensure public accountability for future changes to USP programs. The Court concurrently addresses the PIA form (Ex. B (Doc. 2644-1) at 10-23), the DAEP PIA for Relocation of DAEP Classrooms (Ex. F, Attach. 8 (Doc. 2644-8) at 1-28), and the DAEP PIA for Flexible Assignments of Certified Staff (Ex. F. Attach. 9 (Doc. 2644-9) at 1-12).

The DAEP PIAs reflect data for long-term suspensions and DAEP enrollment ending with SY 2019-20. The Court accepts the omission of data for SY 2020-21 in this instance as an anomaly because TUSD was operating under COVID-19 protocols that included on-line schooling outside brick-and-mortar classrooms. The Court notes that omitting the SY 2020-21 data also eliminated the need to explain the District's strong reliance on Abeyance Contracts in that year, which was one reason the Court asked the District to prepare the DAEP PIA. *See* (Order (Doc. 2634) at 6-8 (rejecting District's proposal to promote "even less exclusionary" disciplinary measure, Abeyance Contracts, instead of DAEP enrollment because the two are not interchangeable and ordered a PIA to assess performance/efficacy factors for both disciplinary alternatives).

The DAEP PIAs for new proposed classroom locations and staffing flexibility reflect the District has abandoned the notion to return students with level 4 and 5 violations, subject to long term expulsions, to their regular classrooms pursuant to Abeyance Contracts instead of referring these at-risk students to DAEP. *See* (Reply (Doc. 2649) at 17 (explaining the DAEP PIA used SY 2018-19 for baseline comparisons in response to Court's directive that it return to pre-COVID DAEP operations). The DAEP PIAs reliance

on pre-COVID DAEP enrollment for assessing classroom sizes and staffing is reasonable but it also enabled the District to sidestep its previous questionable argument. The District, however, may not have completely abandoned the idea of using Abeyance Contracts in place of DAEP. The District notes that it has not "observed" any "'performance factors' suggesting students who are subject to classroom suspension for level 4 and 5 violations and return to the regular classrooms without receiving supports offered through DAEP, exhibit poorer classroom performance" or that this would pose any safety risks or risks of academic disruption for other students and faculty. (DAEP PIA Re: Classrooms (Doc. 2644-8) at 13.) The District's "observations" create a slippery slope to an illogical conclusion that DAEP does not serve the very purposes of its design or that there is no need to remove these at-risk students from their classrooms in the first place.

It is important that the PIA not confuse observations with data or research. The District's observations are not data sources and not appropriately included in the PIA in § V.C, Data Sources. The Court notes that the observations also directly conflict with information relied on in the PIA § V.A, Impact on Effectiveness of Program, from the District's SY 2018-19 comprehensive evaluation of the efficacy of DAEP, reported in the DAR as Appendix VI-17 and attached to the PIA as Ex. A. (DAEP PIA Re: Classrooms (Doc. 2644-8) at 8.)

Without explanation, the District's observations also conflict with the express purposes and principles for adopting DAEP as a critical component for attaining unitary status pursuant to USP § VI, Discipline, to reduce the exclusionary impact which flows from disciplinary measures that require removing a student from his or her classroom. DAEP was adopted as a best practices approach for addressing the disproportionate impacts faced by Plaintiffs, especially African American students, from exclusionary disciplinary measures. Moving students back to their classrooms without DAEP simply ignores student-safety and student-behavioral problems DAEP is designed to address. The Court notes that the PIA for DAEP, § V.E, Research Based Sources, fails to include any reference to any research source reflecting DAEP as a best practice or to reference the

2018-19 evaluation of DAEP efficacy. The District did, however, rely on the SY 2018-19 comprehensive evaluation of the efficacy of DAEP[2] and attached the report to the PIA.

Based on its review of the completed DAEP PIA, the Court concludes that the PIA form must be amended for § V.E, Research Based Sources, to reflect that it includes "research-based sources supporting [both existing] and proposed action, assumptions, and any proposed mitigations." Reliable Research Based Sources should exclude observations and include reports prepared by the District based on studies, including research into best practices. As done in the DAEP PIA, such reports should be attached if not easily found in the record available on the District's website. It must be clear that the PIA is based on best practices for comparison of existing and proposed actions, and assumptions and any proposed mitigations. Consequently, the PIA form, § V.D, Assumptions, must also be amended.

The bigger issue, argued by both the Mendoza and Fisher Plaintiffs, is that the DAEP PIAs have been completed in a way that reflects the District's total disregard for the USP and lack of any good faith commitment to future operations under the USP. The Mendoza Plaintiffs press this point beginning with the District's failure to properly complete the PIA form with the name of who prepared it and reviewed and approved it.

The Mendoza Plaintiffs point out that the PIAs were left blank where there should have been information provided as to the date the PIA was prepared, who prepared it, and who reviewed and approved it. *See examples*: PIA (Doc. 2644-8) at 14; PIA (Doc. 2644-9) at10. The Mendoza Plaintiffs are correct that the DAEP PIAs need to include this information.

[2] The Court did not order the District to conduct a study of DAEP efficacy as asserted by the Plaintiffs. The Court directed the District to "undertake a study of the effectiveness of DAEP, pursuant to a PIA . . .." (Order (Doc. 2634) at 14.) The Court enjoined any changes to DAEP until it conducted the PIA.

The Court also notes that the DAEP PIAs, which use the PIA template, do not establish when the District proposes to implement the proposed DAEP changes. It appears the District intends the proposed changes to be implemented this school year 2022-23. The PIA form, § 1, Proposed Action, needs to be amended to add: "(Include Proposed Implementation Date)."

The Fisher Plaintiffs extrapolate further and conclude that the District intends to abandon USP programs, especially DAEP, the heart of the comprehensive graduated Discipline Plan developed pursuant to USP § VI, Discipline, aimed at reducing the most damaging disciplinary consequences, long-term suspensions, that fall disproportionately on African American students.

The Plaintiffs support their assertions that the District is not acting in good faith by pointing to omissions in the PIAs of issues expressly raised by the court when it last considered the District's ongoing DAEP operations. On March 24, 2022, the Court issued an Order that the District return to pre-pandemic DAEP operations until it completes a PIA. Specifically, the Court enjoined the District from the following: 1) combining DAEP operations for middle and high school students in the same classroom or at the same facilities, unless the two groups of DAEP students can be physically separated both in and outside the DAEP classroom; 2) using Abeyance Contracts in place of DAEP assignments, and 3) reducing DAEP staffing below having classroom teams of two, one certified DAEP teacher and one Behavioral Intervention Monitors (BIMs), with separate staffing for the Exceptional Education DAEP teacher and Orientation/Transition DAEP Coordinator.

As noted above, the District appears to have abandoned the notion that Abeyance Contracts are interchangeable with DAEP. The PIAs for DAEP rely on baseline services as provided in SY 2018-19, which was well before it allegedly considered using Abeyance Contracts to reduce the number of students enrolled in DAEP.

The District reaffirms its commitment to no changes in staffing levels for DAEP from those that existed in SY 2018-19. The Mendoza Plaintiffs note, however, that in the past the District asserted it has been hard to retain the four BIMs that are needed to operate

DAEP because once trained BIM staff are stolen away by offers of better pay by other school districts. The Mendoza Plaintiffs criticize the PIA for failing to reflect any plan for addressing recruiting and retaining these essential staff. *See* (Response (Doc. 2646) at 12-13) (citing (Order (Doc. 3/24) at 12). In reply, the District asserts the PIA does not include such analysis because it continues, as it has done since SY 2018-19, to classify BIM staff as an "essential position" for a hiring priority that includes monetary incentives to recruit and retain BIMS. The hourly wage offered by the District is higher than surrounding school districts offer for the same position. According to the District, staffing problems were in part due to COVID-19, and it does not anticipate difficulty filling these staff positions for this coming year. In reflection, last year BIM staffing levels were not affected by salary disparities between TUSD and other school districts. (Reply (Doc. 2649) at 24-25.)

According to the PIA for DAEP Re: Classrooms the Court ordered the District "to move one of the two DAEP classrooms at the Southwest Educational Center to a different location." (PIA (Doc. 2644-8) at 2 (citing Order dated March 24, 2022 (Doc. 2634)). This is not true. The Court instructed that until a PIA was completed, the District was precluded from placing middle and high school DAEP classrooms in the same local unless they can be physically separated both in and outside the DAEP classroom. Going forward, the District proposes for only a middle school DAEP classroom to be located at the Southwest Educational Center. It will move the high school DAEP program from there to Menlo Park. This moots the need to discern best practices for mixing grade levels in DAEP programs, and such analysis is omitted from the PIA. The District, however, also proposes to move the middle school DAEP classrooms located at Doolan and Magee middle schools to Sabino High School. The District's proposal places the DAEP classroom in a building west of the main high school building.

The District explains that the middle school DAEP program is being placed in a building that is separate and detached from the main high school facility, and there will be no high school DAEP students anywhere near the middle school DAEP classrooms. "Moreover, the other programs using classroom space near the DAEP classroom do not

instruct high school students. The other programs operating in the vicinity include Mexican American Student Services Department, Dropout Prevention and Graduation, a Family Resource Center, and Asian Pacific/Refugee Department. As such, the DAEP classroom will be surrounded by alternative District programming and its faculty." (Reply (Doc. 2649) at 20).

The Court assumes that high school students will visit these "other programs" operating in the building where the middle school DAEP classroom is being relocated. Therefore, the question remains, albeit, somewhat changed: whether there are any "best practices" issues raised by bringing at-risk middle school students into close proximity with high school students, generally. The Court realizes that there is a distinction between the new proposal and mixing middle and high school DAEP students together or placing them in close proximity to each other. Either way, the PIA fails to address best practices for locating middle school at-risk DAEP students at sites where they may come in contact with older students. The DAEP PIAs need to be amended to add this information and analysis.

Other questions asked by the Mendoza Plaintiffs, which are not answered in the PIAs, include whether at-risk middle school DAEP students should be using public transportation to access DAEP centers or if it would be better to provide school transportation to DAEP middle school students. Again, the PIA needs to be amended to include a best practices analysis for middle school at-risk students. The Plaintiffs ask whether round sectional desks are a good choice for at-risk students, who often have special needs? They question the logistical choice to consolidate the two middle-school DAEP programs currently located at Magee and Dollen Middle Schools at Catalina High School instead of keeping middle school DAEP at one of the two existing middle school sites.

The Mendoza Plaintiffs, joined by the Fisher Plaintiffs, suggest these deficiencies in the PIAs reflect intentional omissions by the District of important information which is needed to assess the program integrity of the District's DAEP proposals. They argue that the Court must retain jurisdiction over this case until the District demonstrates its capacity to implement the USP, including implementing the PUSRAP accountability and

transparency provisions. The Court does not agree. The questions raised by the Plaintiffs reflect that the DAEP PIAs provide the transparency necessary to hold the District accountable. These Plaintiffs' questions need to be presented to the District's Governing Board.

This brings the Court to further amendment of the PUSRAP to address an issue not recognized by the Court prior to reviewing the DAEP PIA prototype. The District reports that it has posted the two DAEP PIAs on the website and sent copies to the Governing Board members, but the website does not reflect when these notices were posted or whether any Governing Board member has called for a hearing on the proposed changes to DAEP or if and when a public hearing will be held. The PUSRAP did not require the District's website to track this information and reflect when a public hearing is set for a PIA/DIA. The PUSRAP needs to be amended accordingly. The website needs to be updated to reflect a public hearing by the Governing Board for the DAEP PIAs so the Plaintiffs may tender their questions, accordingly.

Once the District attains unitary status the Governing Board is the appropriate entity, not the Court, for providing further oversight for the District's DAEP program. It is the Court's concern, only, that the PUSRAP, including the PIA format, facilitate transparency and accountability to the extent practicable. The Court is confident that the Governing Board, based on the DAEP PIAs, revised in accordance with the amended PIA format and directives herein, provides for effective program oversight, including any changes in DAEP, by the Governing Board without further involvement from the Court.

Judgment for Defendants

The Court rejects the Plaintiffs' arguments that the District's conduct during the drafting of the PUSRAP, including development of the PIA template and use of the template to prepare the DAEP PIAs, reflects a lack of good faith or an inability to continue to operate the District pursuant to the various USP programs. The District is correct. Once the Court finds the District has attained unitary status, judicial oversight must end in its entirety. (Order: Conclusions of Law (Doc. 2572) § 2 (citing *DeKalb Cnty. Sch. Dist. V.*

Schrenko, 109 F.3d 680, 692 (11th Cir. 1997); *Pasadena v. Spangler*, 427 U.S. 424, 436-37 (1976); *Lee v. Talladega County Bd. Of Educ*., 963 F2d 1426, 1430 (11th Cir. 1992); *United States v. Overton*, 843 F.2d 1171, 1177 (5th Cir. 1987)).

At this point, the Court intended to simply enter Judgment for the Defendant and close the case. The District has, however, asked the Court to vacate the USP and all its orders and directives upon entering judgment because according to the District, the USP is an injunction, which "cannot have a life after unitary status—it is appropriate that it be dissolved." (Reply (Doc. 2649) at 12.) The Mendoza Plaintiffs argue that the "USP has an existence outside the confines of this litigation as the guidepost for the creation of future 910(G) budgets, Annual Reports, and PUSRAP-related reporting." (M. Resp. (Doc. 2647) at 5.) The Plaintiffs treat the USP like a Consent Decree. *Id.* n. 4.

In reply, the District objects to the USP being treated like a consent decree because there was not actual consent, and it preserved its right to appeal. "The Ninth Circuit has identified at least three circumstances under which an alleged "consent order" does not operate as such: "'(1) where there was no actual consent; (2) where the district court lacked subject matter jurisdiction to enter the judgment; and (3) where a party intended to preserve its right of appeal or specifically preserves its right to appeal.'" (Reply (Doc. 2649) at 9 (quoting *Hoa Hong Van v. Barnhart*, 483 F.3d 600, 610 n.5 (9th Cir. 2007) (simplified)). The District asserts that it explicitly objected to, and reserved its right to continue to object to, the substantive basis for the USP, the appropriateness of its being entered at all, and other specific portions of the plan. *Id.* The District references a Legal Memorandum of Objections filed concurrently with the USP, which it asserts made it clear that, even though it had participated in negotiating the language in the jointly submitted draft USP, "the District 'does not acknowledge or admit that vestiges of the segregated system remain in the District' and 'does not acknowledge or agree that the obligations it is undertaking pursuant to the Draft USP are necessary or required to achieve unitary status.'" *Id.* at 10 (quoting Memo (Doc. 1407) at 2:12-17). The Court does not agree that these objections necessarily preserved the position now asserted by the District that it did not agree to

resolve the longstanding desegregation case, pursuant to the USP. (USP (Doc. 1713) § 1.A (describing the USP as a consent Order to resolve the case)).

"Whether a party preserved, or intended to preserve, its right to appeal an alleged consent order is determined from the record." *Id.* at 9 (citing *see, e.g., U.A. Local 342 Apprenticeship & Training Tr. v. Babcock & Wilcox Constr. Co.*, 396 F.3d 1056, 1058 (9th Cir. 2005) (finding appellate jurisdiction "because it is clear that Babcock 'intended to preserve its right of appeal'")).

In 2011, on remand, the Court was directed to maintain jurisdiction over this case until satisfied that the District has demonstrated its good faith compliance with the Settlement Agreement over a reasonable period of time and the Court is convinced that the District has eliminated the vestiges of past discrimination to the extent practicable. *Fisher v. TUSD*, 652 F.3d 1131, 1143-44 (9th Cir. 2011). The appellate court did not disturb the Court's factual conclusion that the "ethnic and race ratios required under the [1978] Settlement Agreement desegregation plans were implemented and maintained for 5 years." *Id.* at 1139.

Subsequent to the remand, the District asked the Court to refer the case to a settlement judge or mediator because it believed it could draft a plan with goals to eliminate any vestiges of a segregated system and attain unitary status within a reasonable time period. Both Plaintiffs objected to the idea of the District, given its track record, being assigned to draft such a plan. The Fisher Plaintiffs suggested the Court appoint an expert. Instead, the Court appointed a Special Master, pursuant to Fed. R. Civ. P. 53. (Order (Doc. 1320)).

The Court asked the Parties to attempt to agree on the individual to be appointed and the scope of work for the Special Master. The Court outlined the parameters for the appointment based on its commission of error in its 2008 finding that unitary status was attained under the terms of the 1978 Settlement Agreement. *Id.* at 3-4. Then, the Court's efforts were frustrated by the District's failure to "'monitor, track, review and analyze the effectiveness of its programs and policies to demonstrate good faith adherence to the

Settlement Agreement or the constitutional principles that under lie it.'" *Fisher v. TUSD*, 652 F.3d 1131, 1140 (9th Cir. 2011) (quoting *Fisher v. TUSD*, 549 F.Supp.2d (Ariz. 2008)). The Court faced a scenario where the District satisfied one prong of the unitary status inquiry by showing that it implemented and maintained the requisite ethnic and race ratios required for five years, but failed to present any evidence to establish it acted in good faith over the next 25 years when it spent hundreds of thousands of 910G desegregation funds without creating any record reflecting such funded operations related to the vestiges of the segregated school system addressed in the Settlement Agreement, the constitutional principles underpinning the Settlement Agreement, or *Green* factors. *Id.* at 1039-40.

Informed by the remand, the Court instructed that the Special Master, after considering the positions of all parties, would be charged with preparing a report which would be a Plan for TUSD to attain unitary status. The Plan would include specific substantive programs and provisions to be implemented by TUSD and an implementation schedule for the initial completion of the Plan and schedules for implementing all proposed programs or provisions, review and revision deadlines, and a specified deadline for attaining full compliance with the Plan. The Court asked that the Plan include review and evaluation criteria for each program or provision and include recommendations, supported by findings of law and fact or stipulation of the parties, as to whether partial withdrawal of judicial oversight was warranted for any *Green* factors. The Parties were asked to prepare briefs outlining their positions regarding any *Green* factors which were not at issue in the case. (Order (Doc. 1320)).

Over the objection of the Mendoza Plaintiffs, the Court appointed Dr. Willis Hawley as Special Master, pursuant to the agreement of the District and the Fisher Plaintiffs. The District drafted and submitted the letter of appointment, which included the scope of work calling for the Special Master to formulate the USP based on new and existing findings of fact made in consultation with the Parties and the Court; to oversee implementation of the USP, make recommendations to the Court as to whether the District has complied in good faith with the USP and attained unitary status, and formulate a new post unitary status plan

to guide the District in maintaining constitutional compliance after judicial oversight ends. (Order (Doc. 1350) at 2-3.)

In the end, the Parties, working with the Special Master, drafted the USP, which was submitted to the Court and described as a consent Order. (USP (Doc. 1713) § I.A.) The USP expressly stated it was a "'plan containing 'specific substantive programs and provisions to be implemented by the TUSD to address all outstanding *Green* factors and all other ancillary factors.'" *Id.* § I.B.3. It provided for the "voluntary resolution of any disputes" by the Parties and Special Master prior to submittal to the Court for disposition. *Id.* § I.D. *See also* (Order Appointing Special Master (Doc. 1350) § II.2 (giving power to Court to adopt, modify or reject USP; § V.1 and 4.d (same for all findings of fact made by Special Master).

There were no substantive disputes as to the ten sections of the USP. Sticking points between the Parties related to program details, such as requiring standards for measuring program efficacy. On February 6, 2013, the Court ruled on a hand-full of objections, of which about half came from the District, and adopted the USP as so revised. (Order (Doc. 1436)). In that Order, the Court expressly referred to the USP as the "'new" consent decree." *Id.* at 5. The Court referred to the 1978 consent decree as the 1978 Stipulation. *Id.* at 2 n.1. The Court was simply distinguishing between the 1978 Stipulation of Settlement and the USP and not addressing the legal merit of treating the USP as a consent decree. *See also Fisher v. TUSD,* 588 Fed. Appx. 608, 609 (9th Cir. 2014) (finding USP can be characterized as a consent decree and applying 28 U.S.C. § 1292(a)(1) for determining appellate review of interlocutory order involving consent decree).

While the Court has referred to both the 1978 Stipulation of Settlement and the USP as consent decrees, it has never treated either as an injunction. The Court agrees with the District that it does not need to decide the question now.

What matters at this juncture is whether the District has acted in good faith to eliminate the vestiges of discrimination. The Court looks first to the 1978 Stipulation of Settlement (Settlement Agreement) and does not disturb its prior finding that the District

substantially complied with its express terms and provisions within approximately five years. Pursuant to ¶ 22, the 1978 Settlement Agreement provides: "After five full school years of operation under the terms of this agreement and the student assignment plans adopted pursuant to this stipulation, the Defendants may on or after July 1, 1983, move the Court to dissolve the Settlement Order and dismiss these actions, with prejudice, unless the Plaintiffs . . . object to the dissolution of the Settlement Order and the dismissal of these actions on the grounds that the Defendants' have failed to comply with the terms of this agreement, or other applicable orders entered by the Court herein." (Settlement Agreement (Doc. 393) at 9.)

The 1978 Settlement Agreement was primarily a bussing directive, which called for the development and implementation of student assignment plans to address specifically identified racially segregated schools in TUSD. *Id.* ¶¶ 4-7. Upon remand, this Court and the Parties were faced with a dilemma because the express terms and provisions of the 1978 Settlement Agreement had been long ago implemented and were undisputedly outdated. The USP updated ¶ 22, essentially requiring operation of TUSD under the terms of the USP in lieu of the 1978 student assignment plans, i.e., ¶¶ 4-7, a faculty assignment plan, i.e., ¶¶ 9-10, examination of testing instruments, i.e., ¶ 14, and a Spalding Method pilot program at Menlo Park School, i.e., ¶16.

Whatever else it may be, the USP is a plan, and as noted above it is a plan which was designed by the Parties and Special Master, adopted by the Court, to remedy any vestiges of *de jure* segregation that existed at one time in TUSD and address all the *Green* factors. The USP is "the Plan" to resolve this case. As provided for in the 1978 Settlement Agreement ¶ 22, the Plaintiffs have objected to dismissal of these actions on the grounds that the Defendant failed to comply in good faith with the terms of the USP, or other applicable orders entered by the Court. The Court has rejected those objections. From here, the District attains unitary status if it has acted in good faith.

Pursuant to the 1978 Stipulation of Settlement ¶ 25, any Order entered in conjunction with paragraph 22, shall be considered as fully and finally terminating these

cases, and resolving any and all disputes between the parties, including all class members, in the above captioned causes. The Court sees no more reason to dissolve the USP than to dissolve any of the other plans included in the 1978 Settlement Agreement, like the student assignment plans, i.e., ¶¶ 4-7, assignment of faculty, i.e., ¶¶ 9-10, examination of testing instruments, i.e., ¶ 14, or Spalding method pilot program at Menlo Park School, i.e., ¶16.

Neither the law nor the Parties by adopting the USP anticipated judicial oversight in perpetuity. The USP mirrors the law by requiring the Court to maintain jurisdiction until the District "complies in good faith with all of its obligations under this Order and all Orders of the Court entered in this matter and has eliminated the vestiges of its past segregation to the extent practicable." (USP (Doc. 1713) § XI.A. M1 and 2) (simplified).

As this Court has noted many times over, the USP proposed a finite term of operations under judicial supervision to end "not prior to the end of the 2016-17 school year." (USP (Doc. 1713) § XI.A.2), *see also* (Order Appointing Special Master ¶I.7 (Doc. 1350) at 6 (requiring USP to lead to unitary status after 3 full school years from adoption). The USP programs provide for ongoing review and revision based on best practices and efficacy assessments and for accountability and transparency provisions that would carry into the future. *See* (Order Appointing Special Master (Doc. 1350) (requiring a proposed unitary plan be developed to ensure future good faith operation of District in accordance with constitutional principles). The very structure of the USP reflects an intent that judicial oversight would ensure the development of the USP programs, initiation of these operations by the District and operation pursuant to the USP for approximately three years, with operations continuing under conditions ensuring public transparency and accountability post-unitary status.

Conclusion

The Court, incorporating by reference the findings of fact and conclusions of law as stated by the Court previously (Order (Doc. 2572), finds in favor of the District as follows: it has demonstrated a good faith commitment to eliminate the vestiges of past discrimination to the extent practicable by complying with the terms and provisions of the

1978 Stipulation of Settlement for at least five years and by developing and implementing the USP and its plans and programs to address such vestiges and the *Green* factors, and by operating the District pursuant to the USP from approximately 2013 to date. Recognizing that compliance with the USP was an ambitious undertaking and difficult going at times, the Court finds the District has substantially complied with the USP. The Court finds that the District has acted in good faith in these endeavors for approximately 11 years since the remand. This is a reasonable amount of time for the Court to conclude the District has demonstrated a commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution and guarantees that parents, students, and the public have assurance against further injuries or stigma. (Order: Conclusions of Law (Doc. 2572) ¶¶ 5-6.)

The Court finds the District has accepted the principle of racial equality; in fact, the District plans to continue USP operations post unitary status. Dissolving the USP seems incompatible with the District's post-unitary status plans, and the Court finds it unnecessary. While the USP has been referred to as a consent decree it is more accurately described as a plan developed pursuant to the operative consent decree, the 1978 Stipulation of Settlement. The Court dissolves it. The USP remains. The Court does not dissolve its Orders which have addressed various disputed provisions contained in the USP. The Court finds that the Orders speak for themselves and are not injunctive, with the exception of the Order precluding changes to DAEP pending completion of a PIA.

Accordingly,

IT IS ORDERED that within 14 days of the filing date of this Order, the District shall amend the PUSRAP and PIA form and revise the DAEP PIAs' accordingly. The Court finds that these amendments are not substantive and require no further briefings or review.

IT IS FURTHER ORDERED affirming this Court's prior directive precluding any proposed DAEP changes until a PIA is completed, (Order (Doc. 2634)), which shall be done pursuant to the amendments and revisions called for in this Order, including notice

and public hearing before the Governing Board. Thereafter, this injunction shall be automatically DISSOLVED without further directive from the Court.

IT IS FURTHER ORDERED that the District has attained and is operating in unitary status.

IT IS FURTHER ORDERED that the supervision, control, and authority over the District and its functions are hereby relinquished by this Court, and full control and authority are returned to the District and its duly elected Governing Board for operation under the applicable laws of the State of Arizona and the United States.

IT IS FURTHER ORDERED that the 1978 Stipulation of Settlement (Doc. 393) is DISSOLVED.

IT IS FURTHER ORDERED that the Motion for Entry of Judgment (Doc 2645) is GRANTED.

IT IS FURTHER ORDRED that the Clerk of the Court shall enter Judgment for Defendant and close these consolidated cases: CV 74-90 TUC DCB (lead) and CV 74-204 TUC DCB (consolidated).

IT IS FURTHER ORDERED that the District shall provide a copy of this Order to each Governing Board member.

Dated this 19th day of July, 2022.

Honorable David C. Bury
United States District Judge