

**SPECIAL MASTER AND PLAINTIFF COMMENTS ON THE THIRD DRAFT OF THE
STUDENT SUCCESS HANDBOOK SUBMITTED ON MAY 16, 2018**

May 22, 2018

SPECIAL MASTER [SUNDAY, MAY 20]

- 1. Calling this the Student Success Handbook may imply that the Student Success Department's are responsible for implementation Why change from Code of Conduct. People know what this means. I will have my comments to you tomorrow. Basically I agree with DOJ and the Mendoza's and am interested in some of the comments you would make in response to questions by the Fishers.**

DEPARTMENT OF JUSTICE [MONDAY, MAY 21]

- 2. [Page 10] The proposed offense "Mutual Combat (Fighting)" does not comply with the USP because it provides for exclusionary discipline for first offenses that do not threaten safety.**

The draft defines Mutual Combat (Fighting) as

a physical altercation in which both parties are willing participants, where a preponderance of the evidence notes that both parties had one or more opportunities to de-escalate the situation, leave the situation, or notify a school official of the potential fight prior to making the decision to participate in the physical altercation/fight.

The Action Level for Mutual Combat (Fighting) is "4*," which dictates that students who commit a first offense receive at least one day of exclusionary discipline (specifically, a three-day suspension with two days waived if the student participates in mediation).

This definition is broad enough to include non-serious physical altercations that the District properly recognizes are not immediately eligible for exclusionary discipline under the USP. In our review of the District's discipline incidents, we commonly see situations in which a verbal disagreement between students escalates into a low-level physical altercation but no one is hurt and the fight is quickly and safely broken up before it further escalates. Under the current GSRR, and consistent with the USP, these incidents are treated as the level 3 violation of "fighting;" thus, in the case of a first offense, these incidents are not eligible for exclusionary discipline. However, this common fact pattern fits the proposed definition of "Mutual Combat (Fighting)" and therefore would automatically lead to exclusionary discipline for a first offense, even in the absence of a safety threat.

We do not object to the District creating a new offense to capture threats to safety posed by fights that do not rise to the level of an “Assault.” One way to do this would be to create a new offense called “serious fight,” or something similar, and define it as “a physical altercation in which both parties are willing participants and the circumstances present a threat to safety because of the number of participants or the intensity and violence of the conduct.” This definition could be broadened to include other specific threats to safety that the District is concerned about. This offense would be a level 4* with the same consequences that are proposed for “Mutual Combat (Fighting)” in the current draft. To make clear the difference between this offense and “Assault,” Assault could be limited to non-mutual conduct in which one or more students acts against another student with the intent to cause physical injury. The current level 3 offense of “Fighting” could be retained to address the kind of low-level, non-serious incident described in the previous paragraph, or such incidents could be added to the existing definition of “Other Aggression,” also a level 3 offense.

3. [Page 10] We are concerned by the addition of the examples “running down a hallway” and “riding a bike on campus” to the description of the offense of “Endangerment.”

We do not see how these activities fit the definition of Endangerment (“recklessly putting self or another person at substantial risk of imminent death or serious physical injury”) and therefore believe they should be deleted. If these examples are to be maintained, it must be made clear that running down a hallway or riding a bike only constitutes endangerment in the very exceptional case in which it poses a threat of serious physical injury.

4. [Page 2] We suggest deleting the word “shall” from the statement on page 2 that “None of these principles shall prevent school personnel from protecting campus safety as appropriate.”

One of the principles referenced in the draft code is “Ensuring that consequences are non-discriminatory, fair and age-appropriate.” The word “shall” is unnecessary because ensuring that consequences are non-discriminatory never interferes with safety, and inclusion of the word “shall” improperly suggests there is some trade-off between non-discrimination and safety. Similarly, none of the other principles (e.g., creating safe, supportive learning environments or applying the rules consistently) are in tension with protecting safety.

MENDOZA PLAINTIFFS [MONDAY, MAY 21]

On May 16, 2018, the District provided the Plaintiffs and Special Master with Draft 3 of its proposed code of conduct for the 2018-19 school year (“Draft Code 3”). Draft Code 3 follows the District’s first draft of its code of conduct for 2018-19, and Mendoza Plaintiffs’ May 7, 2018 comments to it. As detailed below, while Draft Code 3 revisions have addressed some of the issues Mendoza Plaintiffs’ identified, they continue to have significant concerns, including with respect to “Mutual Combat.”

5. [Pages 8 and 10] Physical Altercations/“Mutual Combat” Disciplinary Infraction

In Draft Code 3, the District revised language relating to the progressive discipline applicable to “Mutual Combat” (and “Possession or Use of Drugs or Alcohol”). Specifically, for a second offense, the District modified language requiring a “six to nine day suspension with three days waived if student participates in mediation” to language stating that a second offense will result in an “eleven day suspension with eight days held in abeyance if a student participates in mediation.” (Draft Code 3 at 8.) While Mendoza Plaintiffs believe the shorter term of suspension (and longer term of abeyance) under the revised language of Draft Code 3 is preferable as it would, for students choosing to participate in mediation, result in less exclusionary discipline, it does not address the larger issues raised by the District’s approach.

As was true with the approach reflected in the District’s first draft of the code of conduct, under Draft Code 3’s “Mutual Combat” provisions, it appears that all mutual participation in aggressive acts between two students (regardless of whether the behavior is ongoing or escalating or whether a threat to students’ safety exists) would be treated as “mutual combat,” and be categorized as a level 4 offense requiring a mandatory suspension. (Draft Code 3 at 8.) Thus, as Mendoza Plaintiffs stated in their comments on the first draft of the code, the approach would result in a “great expansion of exclusionary discipline with respect to misbehavior that does not now warrant such discipline and effectively return the District to the [zero-tolerance] approach that was so problematic in the 2016 GSRR FAQ. Further, by making all ‘mutual combat’ a level 4 infraction requiring at least some suspension days, the Draft Code conflicts with USP Section VI, B, 2, a, requiring that exclusionary discipline be limited to ‘ongoing and escalating’ misbehavior imposed after appropriate interventions have been attempted and documented (unless there exists an ongoing threat to student safety).” Thus, Mendoza Plaintiffs object to the District’s approach to “Mutual Combat” (and “Possession or Use of Drugs or Alcohol”) as noncompliant with USP Section VI, B, 2, a.

Further, Mendoza Plaintiffs continue to think that the definition of “mutual fighting” is likely to prove unworkable were Draft Code 3 to be adopted as it is fact intensive and does not seem to contemplate the often quick-escalating nature of fights, among other things. Moreover, they believe that what is likely to be a difficult-to-implement definition could potentially result in improper coding of physical altercations as “mutual fighting” as was the case with respect to “Aggression-Assault” following distribution of the October 20, 2016 Principals’ Letter (as described in greater detail in Mendoza Plaintiffs’ Comments on TUSD’s Draft 1 of the revised 2018-19 Code of Conduct). The Mendoza Plaintiffs therefore urge the District to rethink its

approach as its current approach conflicts with the USP, is unlikely to be workable, and may result in the improper coding of discipline that unnecessarily subjects students to exclusionary discipline.

6. [Pages 8 and 10] Mutual Combat: Waiver of Suspension Days for Second Offense

Without waiving their objections above, Mendoza Plaintiffs note inconsistencies in what the District states will be required for a waiver of suspension days with respect to a student's second instance of participating in "mutual combat." Page 8 states that a second instance of "mutual combat" will result in an "eleven day suspension with eight days held in abeyance if the student participates in mediation." Page 9, however, makes reference to "an automatic waiver of long-term consequences for the first and second offense." Page 10, on the other hand, makes reference to "administrators [being] granted an automatic waiver of the mandatory long term suspension" for a second offense, suggesting the possibility that an administrator must first request and obtain approval for a waiver before a long-term suspension will be shortened.

Again, Mendoza Plaintiffs urge the District to revise the approach to "mutual combat" in Draft Code 3 to comply with USP Section VI, B, 2, a (as detailed in the section above). However, to the extent it does so by, for example, revising it to apply only to "ongoing and escalating" instances of "mutual combat", it should also ensure that the above quoted language is made consistent.

7. [Page 9] Elevation of Disciplinary Consequences

The Mendoza Plaintiffs appreciate the District's explanation for seeking elevation of disciplinary consequences (by up to two levels under Draft Code 3) that it provides for "progressive discipline" where, for example, a "student [] commit[s] a violation 5, 10, or 15 times" without responding to interventions, and its explanation of how use of such elevations will be monitored. (Response to RFIs# 2020-2021.) However, related revisions reflected in Draft Code 3 appear to conflict with the apparent issues the District attempts to address.

The first draft of the District's draft code allowed for up to two elevations based on (three or six) repeat infractions within a nine-week period. Draft Code 3, on the other hand, allows for elevations based on the same number of repeat infractions within a semester (Draft Code 3 at 9; Response to RFI # 2020), or approximately twice as long as the period referenced in the first draft Code. Mendoza Plaintiffs believe that by expanding the time within which repeat infractions would make a student's disciplinary consequences eligible for elevation, the District moves away from what it describes as a "rare" option that would be employed where interventions have failed to address significant repeat infractions, to elevation of consequences of a seemingly more punitive nature. For example, Mendoza Plaintiffs do not understand the fact that a student has repeated an infraction three times within a semester – by way of example, three instances of an infraction about one month and a half apart- to be inconsistent with interventions working with a student. They further believe that the extraordinary step of elevating disciplinary consequences by one or two levels so as to make exclusionary discipline available should be

limited to instances where it is plain that interventions are not working. Mendoza Plaintiffs therefore think that the possibility of exclusionary discipline being unnecessarily administered under these revised provisions far outweigh the possibility that they would be employed where they actually may be necessary following ineffective interventions.

Accordingly, Mendoza Plaintiffs urge the District, to the extent it truly believes elevation of disciplinary consequences by one to two levels is necessary, to revert to the “nine-week period” language reflected in the first draft of the code. They also highlight that, if the District pursues the use of consequence elevation provisions, it will be particularly important that the Discipline Review Team who will approve elevations carefully monitor such elevations for disproportionate use on students of different racial/ethnic groups within and across schools.

FISHER PLAINTIFFS [MONDAY, MAY 21]

NOTE: FISHER PLAINTIFFS SUBMITTED REQUESTS FOR INFORMATION AND COMMENTS. THE COMMENTS ARE INCLUDED BELOW. THE REQUESTS FOR INFORMATION, AND THE DISTRICT'S RESPONSES TO THOSE REQUESTS, ARE ATTACHED AS A SEPARATE RFI DOCUMENT, BELOW.

8. **[Page 6]** It says that, "The principal gives the notice of suspension to the student and sends a copy to the parent on the 1st day of suspension". It does not say that the principal must contact the parent by phone on the first day.

9. **[Page 6]** It says that "The Assistant Sup't or designee must review the decision within 3 school days". If the suspension is for three days, the decision could come after the student has already served the suspension.

10. **[Page 7]** The first section about Student Rights is not reader friendly. The bullets are not clearly stated for all parents to understand. The second two sections are in sentences rather than bullets and they are clearer.

11. **[Page 9]** Number 9 says that " Attempted violations may require Actions". This is too general. It allows administrators too much discretion. There needs to be some kind of definition of "attempted violations".

12. **[Page 10]** The definition of "Other Aggression" does not clearly delineate what constitutes "other aggression.

13. **[Page 11]** The description of drug violation includes "cultivation" and "manufacture". These are not acts that probably will be done on campus, on the bus, at school events or too and from school, so what authority does the District have over them?

14. **[Page 12]** Swearing at a staff member is listed under Defiance, which is a level 2 offense. This type of violation should be at a higher level.

15. **[Page 13]** The description of "Arson" talks about "A building or place with sides and a floor used for lodging, business, transportation, recreation or storage". Again, these do not appear to be structures over which the school has authority unless the act is committed while on a school sponsored event.

16. **[Page 16]** Under Burglary or Breaking and entering, the guidelines refer to a “residential structure”. Our question here is the same as the previous statement. These do not appear to be structures over which the school has authority unless the act is committed while on a school sponsored event.

17. **[Page 16]** The guidelines talk about “residential structure or yard or in a fenced commercial”. Again, these do not appear to be beyond the the authority of the District unless the act is committed while on a school sponsored event.

18. **[Page 19]** Manifestation hearings should be held before a student is suspended or at least by the next day. Parents can participate by phone and/or Skype.

19. **[All]** Finally, the entire document needs to be edited to correct grammar and usage errors.

TUSD RFI #(s): 2052-2062
Estimated TUSD Staff Time: 2 hours
Attachment(s):

-----Information above this line is to be completed by District Staff -----

TUSD Request for Information Form

RFI Instructions

1. TUSD will assign each request its TUSD RFI number.
2. Provide the topic of the request (e.g., Corrective Action Plans)
3. Present the RFI in the form of one or more specific questions.
4. Optional: For every question/request on the form, ` indicate include the reason(s) why the information being requested is needed.
5. Indicate the relevant section of the USP, court order, district report or other document (i.e., reference) that relates to RFI. Page numbers may be more appropriate in some instances).
6. Use a separate form for each specific topic about which information is being requested unless the answers to the questions posed are interdependent or relate to the same section of the document you are referencing (e.g., the USP).
7. Copy the TUSD email group “Deseg.”

Request for Information

Submitted by:	Fisher Plaintiffs
Submission Date:	05/21/2018
Subject:	Draft #3 Student Success Handbook (formerly GSRR)
USP or Reference	

RFI #2052: [Page 4] The last paragraph talks about “fair due process”. We don’t understand the difference between “fair due process” and “due process”.

Response: The word “fair” is used here to describe that the process will be fair.

RFI #2053: [Page 4] The last paragraph says “School Safety personnel will not participate in discipline decisions occurring after an incident”. Our question is what kind of discipline can school safety personnel administer?

Response: None. Under the proposed plan, school safety cannot “administer” discipline. The USP prohibits School Safety from being involved in low-level student discipline (the Draft Handbook defines low-level discipline as levels 1-3). The Draft Handbook prohibits School Safety from participating in discipline decisions after an incident occurs, but does not prohibit

School Safety involvement in discipline at levels 4 and 5, or to protect student, staff, or visitor safety.

RFI #2054: [Page 5] Positive Intervention Centers (PICs) – It reads as if teachers have the authority to send students to PIC when they decided it is necessary. If all teachers can send students, how is the number of students in PIC controlled so that it does not become a “where house”, rather than a supportive environment?

Response: Teachers can send students to the PIC as needed, however, various protocols are in place to ensure it is done in a controlled manner. These details are a part of the site training for PIC use rather than explained in detail in this document. However, for clarity they are:

- Teachers may send no more than three students out in a period.
- Teachers may not send students in the first 15 minutes of class or at the end of class.
- Teachers may not send students until after they have attempted interventions.
- Teachers may not send the same student more than three times before sending them to an administrator for review.

Additionally, when students arrive in the PIC, the person in that room documents their name and where they were sent from. This information is reviewed weekly at the school discipline meeting to ensure appropriate use of PIC and to determine if the student needs additional interventions provided.

RFI #2055: [Page 5] What is the difference between ISI and ISS? In both situations, the students are out of class in an environment where they can do assignments?

Response: Yes, in both cases the students are out of their assigned class in an environment where they can do assignments. ISI is available at most middle schools, high schools, and large K-8 schools. In ISI, students continue receiving instruction from content-certified teachers and interventions related to the behavior. In ISS, students continue to receive their core curriculum and may be supervised by a highly qualified teacher and may receive interventions related to the behavior. Students assigned to ISS may also be sent to the office to work with an administrator or sent to another classroom instead of being sent to a specialized classroom.

RFI #2056: [Page 6] This section is titled “Basic Due Process”. Are there different levels of due process? Isn’t due process standard?

Response: Yes, there are different levels of due process and due process is standard. Basic due process occurs during an investigation into any disciplinary situation where a student could face suspension or expulsion. Formal due process occurs after an investigation once a determination has been made to impose a long-term suspension or expulsion and a long-term or expulsion hearing is scheduled.

RFI #2057: [Page 7] Under student rights it says that the student has “Reasonable access to non-privileged evidence”. Doesn’t due process require that students have access to all evidence to be used against them? Names should be redacted, but the accused students should be able to see all evidence against them.

Response: Yes, students have rights to all evidence to be used against them, except for “non-privileged evidence” which includes information that has been redacted to protect student identifiable information.

RFI #2058: [Page 7] Under Level 4, it says that a second mutual combat offense will result in “eleven day suspension with eight days held in abeyance if student participates in mediation”. Since this is more than 10 days, isn’t a long term hearing required?

Response: No, long-term hearings are not used in cases where all parties agree to an abeyance contract. If they do not agree to the abeyance, the long-term hearing will be held.

RFI #2059: [Page 8] What kind of training or directions will hearing officers receive regarding suspension over 30 days, so that students are not automatically suspended for the maximum number of days?

Response: Hearing officers are trained at the start of every year on any changes to the GSRR and long-term suspension processes.

RFI #2060: [Page 9] It says that “Principals and assistant principals must communicate with the Discipline Review Team immediately to jointly review suspension”. Does this mean that suspensions are on hold until the Discipline Review Team has been contacted?

Response: The Team must be contacted immediately before an administrator makes a decision to formally suspend. However, an administrator may send a student home for safety reasons or to cool off prior to contacting the Discipline Review Team.

RFI #2061: [Page 11] The description of drug violation includes “cultivation” and “manufacture”. These are not acts that probably will be done on campus, on the bus, at school events or too and from school, so what authority does the District have over them?

Response: Under the Draft Handbook, the District has authority over actions that occur off-campus that result “in a harmful effect on students or the educational process.”

RFI #2062: [Page 12] Why are “substances represented as illicit drugs” treated the same as illicit drugs?

Response: The risks inherent in drug use, drug sharing, and drug dealing remain prevalent regardless of whether a substance is determined later to be an actual illicit drug or represented as an actual illicit drug. Also, while it is at the same level, that does not mean the length of the suspensions are always the same. Hearing officers may use fewer days or be more liberal with the use of an abeyance contract for substances represented as illicit drugs depending on the facts of the case.