



1 On May 8, 2013, the Defendants TUSD (the District) filed the Notice of Adoption  
2 of Desegregation Budget. The Plaintiffs, including the Plaintiff Intervenors, have all filed  
3 objections. The Special Master has filed an objection and recommends that three specific  
4 directives be ordered by the Court in its approval of the District's desegregation budget. The  
5 budget is a financial feasibility plan to implement the USP, (Order (Doc. 1436) at 39), and  
6 "[t]he goal at this stage is to identify the necessary funding levels, generally, for the  
7 successful implementation of the various components in the USP. This is not a task solely  
8 within the discretion of the District," (Order (Doc. 1402) at 3). As there are no substantive  
9 objections to the three recommendations made by the Special Master, and his  
10 recommendations do not reduce or increase the expenditures in the 2013-2014 budget, the  
11 Court adopts them and approves the TUSD's desegregation budget.

12 The Court incorporates the background to this case as set out previously in this  
13 Court's Order (Doc. 1436) issued on February 6, 2013, when the Court adopted the Unitary  
14 Status Plan for implementation in the TUSD to ensure that the District attains unitary status.  
15 (Order (Doc. 1436) at 2-11.) Again, the Court reminds the parties that this Court's oversight  
16 of the District's operations is the direct result of a remand order from the Ninth Circuit Court  
17 of Appeals in *Fisher v. Tucson Unified School District*, 652 F.3d 1131 (9<sup>th</sup> Cir. 2011). The  
18 Court repeats here:

19 The appellate court explained this Court erred as a matter of law [when it  
20 found the District had attained unitary status] because "Supreme Court  
21 precedent is clear: in making a declaration of unitary status and  
22 terminating federal jurisdiction, a district court must determine that the  
23 School District has 'complied in good faith with the desegregation  
24 decree since it was entered' and has eliminated 'the vestiges of past  
25 discrimination . . . to the extent practicable.'" *Id.* (quoting *Missouri v.*  
26 *Jenkins*, 515 U.S. 70, 89 (1995)); see *Freeman v. Pitts*, 503 U.S. 467, 492  
27 (1992); *Board of Education of Oklahoma City Public Schools v. Dowell*,  
498 U.S. 237, 249-50 (1991). The court reversed and remanded the case,  
directing this Court to retain jurisdiction "until it is satisfied that the  
School District has met its burden by *demonstrating*— not merely  
promising— its 'good-faith compliance . . . with the [Settlement  
Agreement] over a reasonable period of time.' [citation omitted] The  
court must also be convinced that the District has eliminated 'the  
vestiges of past discrimination . . . to the extent practicable' with regard

1 to all of the *Green* factors. [citation omitted]” *Id.* at 1144 (emphasis  
2 added). The *Green* factors direct the Court in regard to whether the  
3 District has eliminated the vestiges of past discrimination to the extent  
4 practicable. The District courts “look not only at student assignments, but  
5 ‘to every facet of school operations—faculty, staff, transportation, extra-  
6 curricular activities and facilities,’” *id.* at 1135-36; and other vital areas of  
7 concern such as the quality of education being offered to white and black  
8 student populations, *Freeman*, 503 U.S. at 473.

9 (Order (Doc. 1436) at 3 *Id.*

10 The Court has found that the USP addresses the *Green* factors relevant in this  
11 case. *Id.* at 7-11. When the District has, in good faith, implemented the USP to the  
12 extent practicable and has, accordingly, operated the District for a reasonable period of  
13 time, the Court will be able to find that the District has eliminated the vestiges of past  
14 discrimination.

15 The Court appointed the Special Master to assist in monitoring the ongoing  
16 efforts by the District to attain unitary status. The Court chose this path based on its long  
17 history with this case. Limiting oversight to simply judging whether unitary status has  
18 been attained after the District has had sufficient time to fully implement the USP would  
19 open the door to a repeat performance of the past. The history of this case reflects the  
20 folly of such an approach, and such an approach would not have warranted the  
21 appointment of the Special Master beyond preparing the USP. There is nothing in the  
22 record to suggest such a limited role for the Plaintiffs, the Special Master or this Court.

23 To the contrary, the record reflects this Court’s responsibility for ensuring, on an  
24 ongoing basis, that the provisions of the USP are implemented to the extent practicable.  
25 Anything less could jeopardize final resolution of this case at the end of the time period  
26 identified in the USP for attaining unitary status. This Court has appointed the Special  
27 Master and other experts in both education and desegregation of school districts<sup>1</sup> to assist  
28 the Court in overseeing the ongoing efforts undertaken by the Defendants to implement

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<sup>1</sup>The Court is aware that several experts are volunteering or have volunteered their services.

1 the USP for the duration of the case. The Court appointed Mr. E. Joseph Schneider to  
2 work with the Special Master “to assist in what may well be the most difficult aspect of  
3 the USP, which is to prepare a realistic budget for its successful implementation and the  
4 necessary budgetary reporting requirements.” (Order (Doc. 1402) at 3.) The Court is  
5 aware as noted by the Government, that mere implementation of the USP does not ensure  
6 the good faith of the Defendants, and this question can only be answered at the end of the  
7 time period proscribed in the USP.

8 In the same way it would make little sense to examine program efficacy without  
9 considering budgetary restraints, “it makes little sense to examine and make  
10 recommendations regarding provisions of a budget without examining the proposed  
11 expenditure and the demonstrated or likely efficacy of the activity or action to be  
12 implemented.” (Special Master’s Objection at 3.) The Special Master and the Plaintiffs’  
13 role in this case regarding the desegregation budget is more than “spectators shouting  
14 from the sidelines,” they are charged with offering advice regarding program efficacy  
15 relative to the USP.

16 The Court reminds the District that its discretion is limited pursuant to *Fisher v.*  
17 *Tucson Unified School District*, 652 F.3d 1131 (9<sup>th</sup> Cir. 2011) and the USP. The Court is  
18 not here to act as a “super school board” and is mindful of its role, (Reply (Doc.1474) at  
19 3-6) (citations omitted); the Court does not intend to micro-manage programmatic  
20 decisions by the District and will defer to reasonable proposals by the District, *id.* at 16 n.  
21 5 (citations omitted). The Plaintiffs and the Special Master by objections have challenged  
22 whether in specifically identified instances the District has made reasoned proposals. The  
23 Court does not need to wait two years as suggested by the Defendants, *id.* at 15, to  
24 conclude a proposal is not well reasoned where its efficacy is questioned or challenged  
25 with the specificity presented here. The Defendant offers no substantive support for  
26 efficacy. The Special Master’s recommendations only ask that the District propose to

1 spend desegregation money on programs where there is research based evidence of  
2 efficacy. To do otherwise could result in a waste of time and money. The programs  
3 called for in the USP were not adopted in a void. TUSD has been operating under a  
4 desegregation consent decree for well over 20 years and there are many other school  
5 districts with experiences from which the District may draw. The Special Master's  
6 recommendations merely assert that a reasoned proposal should be one which is research  
7 based.

8 For all the reasons stated in the Special Master's Objections to the District USP  
9 Budget for 2013-14 and Comments on TUSD's May 24, 2013 Reply,<sup>2</sup> the Court adopts  
10 the recommendations of the Special Master as follows:

- 11 1. The District, Plaintiffs, and Special Master shall work together to develop, by  
12 December 2013, criteria for determining when desegregation dollars may fund  
13 all or part of a program so as to facilitate the independent audit and program  
14 reviews and assessment required under the USP.
- 15 2. The District shall assess the reading support element of Mexican American  
16 Student Services provision of the USP pursuant to the criteria identified by the  
17 Special Master, or some other research or best practices evidence, and based  
18 on this assessment develop its MASS reading improvement plan. USP §§  
19 (V)(E)(2)(a)-(b).
- 20 3. The District shall develop research-based criteria and use it to assess student  
21 support programs, including the functions of Learning Support Coordinators,  
22 evidence for identifying target programs and activities and possible  
23 redundancy, the use of student outcome data, and research based  
24 criteria/design principles.

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27 <sup>2</sup>The Court attaches both here.

1 4. The Court shall approve the lump sum budget proposal for the District's  
2 Magnet Plan, contingent on agreed revisions, made during the May 14 meeting  
3 with Professor Gary Orfield, the Special Master and the District, which will  
4 affect the level<sup>3</sup> and purposes of expenditures for individual schools, and  
5 contingent on subsequent expedited review by the Plaintiffs with Board  
6 approval to follow of individual school level expenditures for the Magnet Plan  
7 to be made later this summer.

8 As noted by the Plaintiff Intervenor, the United States (the Government), the next  
9 bench mark in this case will be program assessment, when the parties will review and  
10 comment on whether the programs implemented by the District under the USP fulfill the  
11 requirements of the USP. Given the track record in this case for late and inadequate  
12 disclosures to the Plaintiffs and the Special Master by the District for such review and  
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16 <sup>3</sup> The District admits it was unable to meet the April 1, 2013, deadline for preparing  
17 the Comprehensive Magnet Plan, (Reply at 1474) at 20), even though a Comprehensive  
18 Magnet Program Review has been available since December 2011 (Mendoza Objection  
19 (Doc. 1470) at 5). Instead, the District prepared a preliminary magnet plan, which it used to  
20 submit a grant application for the Magnet School Assistance Program, and subsequently  
21 released it to the Plaintiffs on April 9, 2013. The Plaintiffs and the Special Master describe  
22 the preliminary Magnet Plan as “a plan to plan.” On May 14, 2013, the District met with the  
23 Special Master and expert Dr. Orfield “and reached agreement on significant modifications  
24 to the draft plan, with the Plaintiffs agreeing to expedited review for budget revisions to be  
25 made by the Board related to the Magnet Plan for 2013-14. (Reply at 21.) The District  
26 rationalizes that “the lack of a comprehensive Magnet Plan, which will implemented  
27 substantially only in the 2014-15 school year, is largely unrelated to approval of the USP  
28 Budget for 2013-14.” (Reply (Doc. 1474) at 21.) This rationalization may well be true, but  
misses the point. Again, the District has failed to provide time for Plaintiffs and the Special  
Master to review and provide input on a crucial component of the USP. As occurred in  
respect to the school closures and boundary changes, again, the Plaintiffs and the Court are  
asked to approve the 2013-14 desegregation budget without being provided complete  
information in a timely manner.

1 assessment, the Special Master's recommendations are warranted.<sup>4</sup> Further, the Court  
2 sees no reason why, when concerns and objections are made by the parties and Special  
3 Master regarding the efficacy of a program proposed and planned by the District to be  
4 funded from limited desegregation money, the Court should delay considering an  
5 objection until anticipated futility is realized. While the Government suggests the  
6 question of good faith is not yet ripe, it recognizes that the District's discretion is limited  
7 "where there is evidence that the programs they are choosing do not 'promise . . .  
8 realistically to work,' or that other 'more promising course[s] of action' are just as readily  
9 available and have been ignored." (Government's Objection (Doc. 1471) at 18-19)  
10 (quoting *Green v. County Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 439-440 (1968)).  
11 Both the Special Master and the Plaintiffs assert as much. The Special Master's  
12 recommendations for research-based decision making leaves ultimate program decisions  
13 in the hands of the Board. The Court finds the recommendations strike the proper  
14 constitutional balance.

15 **Accordingly,**

16 **IT IS ORDERED** that the Court conditionally approves the Desegregation  
17 Budget noticed by Defendants and approved by the Board on May 8, 2013.

18 **IT IS FURTHER ORDERED** that approval of the budget is conditioned as  
19 follows:

- 20 1. The District, Plaintiffs, and Special Master shall work together to develop, by  
21 December 2013, research based criteria for determining when desegregation  
22 dollars may fund all or part of a program to justify expenditures of

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24 <sup>4</sup>The Court notes that these recommendations, similar to Condition I included by the  
25 Court when it approved the school closings and boundary changes, are aimed at facilitating  
26 effective and efficient review and approval processes. Correspondingly, these  
27 recommendations should also reduce the Plaintiffs' legal fees and Special Master's costs  
28 incurred on these processes. All parties agree it is a worthy goal to reduce the amounts being  
budgeted for these expenditures from desegregation money.



1 filing date of this Order and provide time frames for Plaintiffs' review and comment and  
2 Defendant's revision, with finalization of the Comprehensive Magnet Plan to be no later  
3 than December 2013.

4 **IT IS FURTHER ORDERED** the Special Master shall track and report to this  
5 Court the satisfaction of these conditions.

6 DATED this 7<sup>th</sup> day of June, 2013.

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David C. Bury  
United States District Judge