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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Roy and Josie Fisher, et al.,

Plaintiffs

v.

United States of America,

Plaintiff-Intervenor,

v.

Anita Lohr, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

CV 74-90 TUC DCB
(Lead Case)

**RESPONSE AND PROPOSED
MODIFICATIONS TO SPECIAL
MASTER REPORT AND
RECOMMENDATION
REGARDING THE
APPOINTMENT OF THE
DIRECTOR FOR CULTURALLY
RESPONSIVE PEDAGOGY AND
INSTRUCTION**

CV 74-204 TUC DCB
(Consolidated Case)

Maria Mendoza, et al.

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District No. One, et al.

Defendants.

1 **I. INTRODUCTION**

2 Tucson Unified School District, No. One, (“TUSD” or “District”) files this Response
3 and Proposed Modification to the Special Master’s Report and Recommendation Regarding
4 the Appointment of the Director for Culturally Responsive Pedagogy and Instruction filed
5 on April 29, 2014 (“CRPI R&R”).¹ *See* ECF 1579.

6 The Special Master filed his CRPI R&R regarding TUSD’s appointment of Mr.
7 Salvador A. Gabaldón, M.A. (“Mr. Gabaldón”),² following an agreement reached between
8 him and TUSD to resolve Plaintiffs’ collective concerns regarding TUSD’s appointment of
9 Mr. Gabaldón. TUSD files this response, however, to address certain critical, and we
10 assume unintentional, misstatements in the CRPI R&R about TUSD’s compliance with the
11 USP and the additional proposals for the CRPI Director hiring process (contained in the
12 first and last paragraph of the “Recommendations” section) previously neither provided to
13 nor seen by TUSD until he filed his CRPI R&R on April 29, 2014.

14 **II. BACKGROUND**

15 The Mendoza Plaintiffs and the Fisher Plaintiffs each requested R&Rs regarding Mr.
16 Gabaldón’s appointment. *See* ECF 1571 at 5-7. On April 18, 2014, TUSD responded to the
17 R&R requests as well as the previous proposals (not the subject of this CRPI R&R) by the
18 Special Master and Mendoza Plaintiffs. These complaints involved completion of TUSD’s
19 compromised hiring process that it had abandoned due to a confidentiality breach that had
20 occurred during the hiring process and threatened the integrity of any potential hiring
21

22 ¹ TUSD is unclear on whether the 30 day deadline to object set forth in § V(4)(a) of the
23 Appointment Order applies to this R&R, which in this instance would fall on May 29. *See*
24 ECF 1350. This Court set a reduced deadline to object to R&R’s specifically in connection
25 with “Action Plans” subject to USP § I.D.1 for 7 days from service of an R&R (which in
26 this instance falls on May 8 to account for the 3 days added for electronic service under
27 Fed. R. Civ. P. 6(d)). *See* ECF 1529 at p.8. However, the appointment of Mr. Gabaldón
28 was not subject to the procedures under USP § I.D.1 and this Court has clarified that “[a]ll
other R&Rs remain governed by the 30 day provisions in the Order Appointing Special
Master, § V(4)(a).” *See* ECF 1565, at p.3. Under either objection period, this response is
timely.

² The CRPI R&R incorrectly refers to “Galbadon”. The correct spelling is “Gabaldón”.

1 decision (“TUSD’s April 18 Response re: Plaintiffs CRPI R&R Request”).³ See ECF No.
 2 1579-1 at 1-50. Plaintiffs have abandoned those prior proposals, and TUSD addresses the
 3 new proposal as currently set forth in the CRPI R&R herein.

4 **III. PROPOSED MODIFICATIONS**

5 **1.** The “**Introduction**” to the CRPI R&R states that objections have been made
 6 by **both** the Fisher and Mendoza Plaintiffs to Mr. Gabaldón’s qualifications. See ECF 1579
 7 at 1 (emphasis added). Not so. To date, TUSD is unaware of the Mendoza Plaintiffs
 8 having made any objections to Mr. Gabaldón’s qualifications. Indeed, the Mendoza
 9 Plaintiffs’ R&R request attached to the CRPI R&R does not take issue with Mr. Gabaldón’s
 10 qualifications. See ECF 1579 at 6-7. Only the Fisher Plaintiffs raise an objection to Mr.
 11 Gabaldón’s qualifications, and this solely because they do not believe Mr. Gabaldón has the
 12 requisite experience in developing culturally relevant curriculum for African American
 13 students. See ECF 1579 at 5.

14 As TUSD explained in its April 18 Response re: Plaintiffs CRPI R&R Request, the
 15 Fisher Plaintiffs’ sole complaint about Mr. Gabaldón’s qualifications does not state a
 16 violation of the USP. See ECF 1579-1, p.7. The operative USP provision requires the CRPI
 17 Director to “have experience developing and teaching curriculum focused on the African
 18 American and/or Latino social, cultural and historical experience....” See ECF 1450, USP
 19 § V.E.4.c. (emphasis added). As TUSD already has explained to the Plaintiffs and Special
 20 Master, Mr. Gabaldón has experience in the latter focus, rather than the former — something
 21 the USP specifically permits by using the word “or”. See ECF 1579-1, p.7 (explaining the
 22 “and/or” provision of the USP to the Plaintiffs and Special Master). TUSD has received no
 23 response on this issue.

24
 25
 26 ³ The CRPI R&R attaches materials TUSD had provided to the Plaintiffs and Special
 27 Master in hopes of resolving the Plaintiffs’ requests for R&R on this issue. However,
 28 TUSD never intended for those materials containing candidate rankings and evaluations to
 be made public, and therefore requests those documents be refiled in a redacted form,
 replacing the current pages containing that information. See ECF No. 1579-1 at 18-21.

1 2. The CRPI R&R’s “**Background**” section discusses the 2013 advertisement of
2 the CRPI Director position in connection with the aborted search to fill that position. *See*
3 ECF 1579 at 1. The substance of the advertising in 2013 was not raised in either the
4 Fisher’s or the Mendoza’s R&R request and is irrelevant and extraneous to the CRPI R&R.
5 Accordingly, TUSD objects to its discussion in the CRPI R&R, and requests that the first
6 paragraph of the “Background” section be stricken from the CRPI R&R, or, at minimum,
7 not be incorporated into any order the court may issue pursuant to the CRPI R&R. In any
8 event, TUSD previously provided a memorandum to the parties and Special Master on
9 September 30, 2013, explaining how its prior advertising for the CRPI Director complied
10 with the USP (*see* ECF No. 1579-1 at p. 27), and has heard nothing further on this irrelevant
11 matter.

12 3. The “**Procedural Concerns**” section of the CRPI R&R reaches a conclusion
13 that the “procedures used to appoint Mr. Gabaldón do not meet the requirements for
14 personnel appointments specified in the USP.” *See* ECF 1579, p.2. The basis for this
15 conclusion is not explained — indeed, the conclusion is incorrect. This section also
16 contains the inaccurate statement that “[t]he District does not dispute this.” *Id.* TUSD’s
17 appointment of Mr. Gabaldón expressly complied with USP § V.e.4.c. which provides the
18 option for TUSD to either hire a new individual or designate an individual as CRPI
19 Director. *See* ECF No. 1579-1 at 3-7. This has been TUSD’s consistently stated position
20 throughout the current discussion of this matter among the parties and Special Master.

21 TUSD’s first choice to fill the CRPI Director position was to conduct a national
22 search and hire a new individual. *Id.* at 3. However, when the hiring process was
23 compromised by a confidentiality breach (and TUSD could not continue with a search that
24 no longer could be perceived as fair and impartial because the candidates became known
25 publicly) TUSD utilized the other option available to it under the USP which was to
26 designate someone to fill the position. *Id.* at 5-6. This was explained in detail to the
27 Plaintiffs and Special Master in TUSD’s April 18 Response re: Plaintiffs CRPI R&R
28 Request. *See* ECF 1579-1 at 3-7.

1 **4.** The “**Recommendation**” section of the R&R contains mostly new proposals
2 for the hiring process for the CRPI Director never seen by the District before the CRPI
3 R&R was filed.⁴ The Special Master confirmed what the District agreed to do in light of the
4 R&R requests made by the Plaintiffs in an email dated April 24, 2014 (the day after the
5 Special Master and TUSD met to discuss this issue):

6 The District will designate Sal Galbadon [sic] as Acting Director and
7 initiate a national search to select a permanent Director to be appointed
8 by the end this [sic] calendar year. I will ask the plaintiffs to withdraw
9 their requests for an R&R and do what I can to encourage candidates to
10 apply.

11 *See* Declaration of J. William Brammer, Jr., Ex. A, 4/24/14 email.

12 Accordingly, the majority of the Special Master’s hiring process proposal (contained
13 in the first and last paragraphs of the “Recommendation” section), is neither a part of a prior
14 agreement with TUSD nor had it been proposed previously to TUSD for consideration.
15 This is the reason TUSD has not commented previously on the hiring process. *See* ECF
16 1579 at 3 (“The District supports this recommendation, although it has not commented on
17 the requirement that information about the position and procedures for the appointment be
18 shared.”)

19 The hiring process for the CRPI Director position is set forth already in the USP, and
20 TUSD sees no reason to modify it. *See* ECF 1450, USP § IV.D.1 and § IV.D.3. Nothing
21 within it requires the District to “submit to the plaintiffs and Special Master detailed
22 descriptions of the position announcement and the procedures for searching and appointing
23 the candidates” for the position “within 15 days of the issuance of this court[’s] order.”
24

25 ⁴ This runs contrary to the court’s suggestion that R&R’s should not propose a means for
26 resolution that the parties have not yet seen. *See* ECF 1529 at 6 (“[the] proposed means for
27 resolution of the objection are not new to them.”) It is for this reason the parties have
28 reached an interim stipulation on procedures prior to the filing of an R&R that requires the
Special Master to share the proposed R&R with the parties ten days prior to submission to
the court for filing. *See* ECF 1581 at p.4. That did not occur here.

1 Although the stated purpose for the submission is “to facilitate contributions to the search
2 by the plaintiffs and Special Master,” the District already is soliciting those contributions.
3 The plaintiffs and Special Master are free to recommend any candidate to the District and
4 those persons will be solicited to apply for the position.

5 Further, subjecting these “descriptions and procedures” “to review and comment [by
6 plaintiffs and the Special Master] only to the extent that they are inconsistent with the
7 specific provisions of the USP” is not something the USP requires. Nothing within the USP
8 requires or permits either the plaintiffs or the Special Master to determine who the District
9 should hire for any particular position or how it should go about doing it. All the USP
10 requires is that the District fill certain positions – something it has every intention of doing
11 in compliance with the USP. Accordingly, TUSD requests the court allow it to proceed as it
12 has agreed and, pursuant to the USP’s hiring process for this position, hire the CRPI
13 Director by the end of this calendar year.

14 TUSD welcomes feedback/input/suggestions/recommendations from the Plaintiffs
15 and Special Master on where to target its national search and, as stated in the Special
16 Master’s confirming email, the names and contact information of any candidates the
17 District should encourage to apply. Unfortunately, the proposed timing of providing
18 proposed detailed descriptions of the position announcement and advertising for the
19 position during May is problematic. Not only is it the closing month of the current school
20 semester, with all the attendant needs and issues of that particular time, it also is unknown
21 when a final resolution of the CRPI R&R will occur. Nonetheless, TUSD intends to begin
22 advertising for the CRPI Director position in June, permitting a several month process
23 within which to solicit candidate applications, and receive whatever information on other
24 candidates the parties and Special master may provide the District, engage in the selection
25 process, and appoint a Director by the end of 2014.

26 **5.** Also in the “**Recommendation**” section of the CRPI R&R, the Special
27 Master requests that the Court “approve the appointment of Mr. Galbadon [sic] as Acting
28 Director of CRPI (he is now the director) and the initiation of a new search for the CRPI

1 director.” See ECF 1579 at 3. Although it may be a matter of semantics, the USP neither
2 requires nor permits court approval of the CRPI Director’s appointment or hiring. TUSD
3 requests any order on the CRPI R&R not disturb Mr. Gabaldón’s current appointment, and
4 approve the agreement between TUSD and the Special Master (as set forth in the Special
5 Master’s 4/24 email above) so TUSD may begin a new hiring process for a permanent
6 CRPI Director to be completed by the end of the calendar year.

7 TUSD further requests that the court approve the agreement between TUSD and the
8 Special Master set forth in the attached declaration and email.

9
10
11 DATED this 6th day of May, 2014.

12
13 RUSING LOPEZ & LIZARDI, P.L.L.C.

14
15 s/ J. William Brammer, Jr.
16 J. William Brammer, Jr.
17 Michael J. Rusing
18 Patricia V. Waterkotte
19 Attorneys for Tucson Unified School District No.
20 One, et al.

21 **ORIGINAL** of the foregoing filed May 6, 2014, via the CM/ECF
22 Electronic Notification System and transmittal of a
23 Notice of Electronic Filing provided to all parties
24 that have filed a notice of appearance in the District
25 Court Case, as listed below.

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19
20
21 **COPY** of the foregoing served via email
This 6th day of May, 2014 to:

22 WILLIS D. HAWLEY
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College of Education
24 University of Maryland
College Park, MD 20742
25 (301) 405-3592
wdh@umd.edu
26

27 s/ Sam Denney
28

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Attorneys for Tucson Unified School District No. One, et al.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,

Plaintiffs

CV 74-90 TUC DCB
(Lead Case)

v.

United States of America,

Plaintiff-Intervenor,

**DECLARATION OF J. WILLIAM
BRAMMER, JR. RE: RESPONSE
AND PROPOSED
MODIFICATIONS TO SPECIAL
MASTER REPORT AND
RECOMMENDATION
REGARDING THE
APPOINTMENT OF THE
DIRECTOR FOR CULTURALLY
RESPONSIVE PEDAGOGY AND
INSTRUCTION**

v.

Anita Lohr, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

CV 74-204 TUC DCB
(Consolidated Case)

Maria Mendoza, et al.

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District No. One, et al.

Defendants.

1 4. Special Master Hawley sent counsel for all parties an email on April 24, 2014,
2 a copy of which is attached hereto as Exhibit "A" (redacted to obscure reference to other
3 items within the email not germane to the CRPI issue), summarizing his understanding of
4 the status of the matters we all had discussed the previous day. Among the items he
5 summarized was the replacement of Mr. Gabaldón as CRPI director. His email summary of
6 the status of the CRPI matter is the same as my own clear recollection of the agreement we
7 reached.

8 I declare under penalty of perjury under the laws of the United States of America
9 that the foregoing is true and correct.

10 DATED this 6th day of May, 2014.

RUSING LOPEZ & LIZARDI, P.L.L.C.



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Attorney for Tucson Unified School District No.
One, et al.

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EXHIBIT A

From: Willis D. Hawley [<mailto:wdh@umd.edu>]

Sent: Thursday, April 24, 2014 8:46 AM

To: Rubin Salter, Jr.; Nancy Ramirez- MALDEF; Thompson, Lois; Anurima.Bhargava@usdoj.gov; Savitsky, Zoe (CRT); Brown, Samuel; Julie.Tolleson@tusd1.org; William Brammer

Cc: Willis D. Hawley

Subject:

I hope that you share my feeling that, overall, the meeting yesterday was productive. I would like to clarify some of the things I took away from the meeting. If I am wrong, I apologize. Please set me straight.

■ [REDACTED]

2. The District will designate Sal Galbadon as Acting CRPI Director and initiate a national search to select a permanent Director to be appointed by the end this calendar year. I will ask the plaintiffs to withdraw their requests for an R&R and do what I can to encourage promising candidates to apply.

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

