

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

6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800
Facsimile: (520)529-4262

J. William Brammer, Jr. (State Bar No. 002079)
wbrammer@rllaz.com

Michael J. Rusing (State Bar No. 006617)
mrusing@rllaz.com

Patricia V. Waterkotte (State Bar No. 029231)
pvictory@rllaz.com

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

v.

United States of America,

Plaintiff-Intervenor,

v.

Anita Lohr, et al.,

Defendants,

and

Sidney L. Sutton, et al.,

Defendants-Intervenors,

Maria Mendoza, et al.

Plaintiffs,

United States of America,

Plaintiff-Intervenor,

v.

Tucson Unified School District No. One, et al.

Defendants.

CV 74-90 TUC DCB
(Lead Case)

**OBJECTION TO REPORT AND
RECOMMENDATION ON
BOUNDARY REVIEW PROCESS
(ECF 1601)**

Oral Argument Requested

CV 74-204 TUC DCB
(Consolidated Case)

1 **I. INTRODUCTION**

2 Tucson Unified School District, No. 1 (“TUSD”) objects to the Special Master’s
3 Report and Recommendation (“R&R”) regarding the Boundary Review Process (“BRP”).¹
4 This objection is made on the grounds that the BRP complies with the letter and spirit of the
5 Unitary Status Plan (“USP”) and the Constitution and, accordingly, should not be
6 disturbed.² This objection is supported by the Declaration of J. William Brammer, Jr. and
7 Bryant Nodine and the materials attached thereto.

8 The Special Master’s R&R, brought at the request of the Fisher Plaintiffs, addresses
9 four issues: (1) whether the BRP, which already requires and has a racially-diverse
10 boundary review committee (“BRC”), should have mandated racial quotas even though the
11 USP does not require it and no Plaintiff has requested it; (2) whether TUSD is allowed to
12 consider criteria in addition to the criteria in the USP when reviewing potential boundary
13 changes; (3) whether the websites, update meetings, thousands of pages of materials and
14 data, and the participation of six of Plaintiffs’ representatives on the BRC enables the Fisher
15 Plaintiffs to participate meaningfully in the BRP; and (4) whether the BRP must be revised
16 due to the Fisher Plaintiffs’ disagreement with TUSD’s Special Master-endorsed policy
17 allowing students previously affected by school closure to remain in their new school if a
18 boundary change would result in their assignment to a third school. Neither the Mendoza
19 Plaintiffs nor the Department of Justice (“DOJ”) share the Fisher Plaintiffs’ objections, nor
20 have they requested an R&R on these or any other BRP-related matter. *See* ECF 1601.
21
22

23 ¹ This objection is permitted by the Appointment Order (ECF 1350) and Fed. R. Civ. P. 53
24 which each permit objections to a Special Master’s report and recommendation within 30
25 days and 21 days of the report and recommendation (respectively). The Court subsequently
26 truncated objection period significantly by reducing the objection period to 7 days from
service of the R&R (*see* ECF 1529 at 9) and accordingly, this objection is filed in
accordance with ECF 1529.

27 ² As described in the Declaration of TUSD’s Acting Director of Planning and Student
28 Assignment, Bryant Nodine, (“Decl. Nodine”) filed concurrently herewith, the BRP is well
under way. The Boundary Review Committee held its first meeting on March 26, 2014.

II. STANDARD OF REVIEW OF OBJECTIONS TO THE BRP R&R

This Court must conduct a *de novo* review of TUSD’s objections to the Special Master’s BRP R&R. *See* Fed. R. Civ. P. 53(f)(3) and (f)(4). In a *de novo* review, TUSD’s BRP must be upheld if it “conforms to the consent decree entered into by the parties and . . . is compatible with the Constitution of the United States”. *United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1360 (N.D. Ind. 1981). *See also* Fisher Plaintiffs’ Objection, ECF 1601 at 47 (“School policies must yield to the Constitution [only] where they stand to impede or otherwise limit the implementation of the USP”); BRP R&R at p. 7 (the Court should “allow local policy to stand when it believes the local policy is in the interest of the students involved and facilitates the implementation of the USP over time”).

Neither the Special Master nor any Plaintiff has suggested that TUSD’s BRP is unconstitutional. The *de novo* review therefore must focus on whether the BRP conforms to the USP. The USP requires no specific BRP. Instead, the USP requires that TUSD “review its current attendance boundaries and feeder patterns and, as appropriate, amend such boundaries and patterns and/or provide for the pairing and/or clustering of schools to promote integration of the affected schools.” *See* ECF 1450 at 9, USP § II.D.3. The USP further requires that, in drawing attendance boundaries, TUSD consider six criteria: (i) current and projected enrollment; (ii) capacity; (iii) compactness of the attendance area; (iv) physical barriers; (v) demographics (*i.e.*, race, ethnicity, growth projections, socioeconomic status); and (vi) effects on school integration. *See* ECF 1450 at 9, USP § II.D.2. Finally, in applying these criteria, the USP requires TUSD to propose and evaluate various scenarios with, at minimum, the Plaintiffs and the Special Master, in an effort to increase the integration of its schools. *Id.*

To the extent the BRP includes policies or criteria beyond what the USP expressly requires, and that a Plaintiff alleges may obstruct the USP, the Court must review this policy/criteria to determine if it “would inescapably operate to obstruct the remedies granted by the District Court”. *See North Carolina State Bd. Of Ed. v. Swann*, 402 U.S. 43,

1 45 (1971). *See also United States v. Scotland Neck City Bd. of Education*, 407 U.S. 484,
2 491 (1972) (racially-motivated state law creating new school district as refuge for white
3 students unconstitutional as it would “impede and defeat” desegregation plan or preclude
4 meaningful desegregation). Indeed, it is inappropriate to summarily invalidate a school
5 policy which is not a “flat” or “absolute” impediment to the USP’s goals. *See Brown v.*
6 *Califano*, 455 F. Supp. 837, 841 (D.D.C. 1978) (Upholding statute limiting means available
7 to federal government to check racial discrimination in federally-supported schools
8 because, “contrary to the situation presented in *Swann*, the [challenged] statutes . . . do not
9 qualify as ‘flat’ or ‘absolute prohibitions’ against [necessary desegregation efforts]”).

10 A final touchstone in a *de novo* review is this Court’s recognition that, where there is
11 no USP or Constitutional violation, “its discretion is limited pursuant to *Fisher v. Tucson*
12 *Unified School District*, 652 F.3d1131 (9th Cir. 2011) and the USP. The Court is not here to
13 act as a ‘super school board’ and is mindful of its role; the Court does not intend to micro-
14 manage programmatic decisions by the District and will defer to reasonable proposals by
15 the District”) (citations omitted). *See* ECF 1477. *See also Anderson v. Canton Mun.*
16 *Separate School District*, 232 F.3d 450, 454 (5th. Cir. 2000) (courts must be “cognizant of
17 the deference that must be accorded to school boards in their decisions”); *Morgan v.*
18 *McDonough*, 689 F.2d 265, 276 (1st Cir. 1982) (“courts must narrowly tailor their remedial
19 orders to the unconstitutional conditions which gave rise to the need for court intervention”
20 and “in so doing, courts should defer whenever possible to the reasonable proposals of the
21 local officials charged with administering the school system”); *United States v. South Bend*
22 *Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981) (“This Court is not here to act
23 as a super school board nor is it here to decide what the best or most desirable plan of
24 desegregation may be. Rather, this Court’s duty is only to determine whether the plan
25 submitted conforms to the consent decree entered into by the parties and whether it is
26 compatible with the Constitution of the United States”); *Richmond Welfare Rights Org. v.*
27 *Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975) (“Except as last-resort refuges for the
28 protection of constitutional rights, courts should not attempt to function as super school

boards”).

III. THE SPECIAL MASTER’S REQUEST TO IMPOSE RACE FORMULAS ON THE BOUNDARY REVIEW COMMITTEE SHOULD BE REJECTED

A. The BRC’s Membership Complies With The USP

The BRC was developed by TUSD to solicit fresh ideas on how to amend TUSD boundaries to promote integration. *See* Decl. Nodine ¶ 4. It is a racially-diverse group comprised of 5 African American members, 12 Latino members, 8 White members, 1 Asian and 4 Native Americans. *Id.* ¶ 7. Although the USP neither requires nor mentions a Boundary Committee, the BRC’s *raison d’être* is to implement the USP’s goals. It is no surprise, therefore, that the DOJ has no concerns about or objection to the BRC or its composition. *See* Declaration of J. William Brammer, Jr. (“Decl. Brammer”) ¶ 4, Ex. 3; 4/15/14 Email from DOJ (“The United States has no express concerns here because the committee is racially diverse and the precise racial composition of this Committee has not been prescribed nor is governed by the USP.”). Accordingly, the BRC clearly complies with the USP and helps facilitate its implementation.

B. The Existing BRP Requires The BRC To Be Racially Diverse

The BRP requires that BRC members “represent a reasonable mix of the diversity and ethnicity of the affected communities”. *See* ECF 1601 at 25. And, as the DOJ approvingly has noted, the BRC is in fact “racially diverse.” *See* Decl. Brammer ¶ 4, Ex. 3; 4/15/14. Email from DOJ. Although TUSD cannot completely control the racial and ethnic makeup of the BRC, as it is comprised of volunteer applicants, TUSD actively recruited racially-diverse committee members. *See* Decl. Nodine ¶ 6. TUSD also included four representatives of the Fisher Plaintiffs’ class and two representatives of the Mendoza Plaintiffs’ class on the BRC. *See Id.* Plaintiffs’ appointed representatives alone comprise 20% of the BRC.

C. No Plaintiff Requested an R&R on BRC Membership

The USP and this Court’s Process Order require that any R&R be made upon a Plaintiff’s request for judicial review and include an explanation of the disagreement

1 between the parties along with the Special Master's recommendation for resolution. *See*
 2 USP I.D.I, ECF 1510 at 8, lines 4-12, 1529 at 7-10. However, the BRP R&R includes no
 3 Plaintiff complaint or request regarding the composition of the BRC. Indeed, the DOJ
 4 expressly stated it has no opposition to its composition. *See* Decl. Brammer ¶ 4, Ex. 3,
 5 4/15/14, Email from DOJ. Accordingly, the Special Master's R&R on the BRC's
 6 composition is authorized by neither the USP nor the Process Order (ECF 1510) and should
 7 be denied on this basis alone.

8 **D. The BRP R&R Contradicts The Special Master's Prior**
 9 **Recommendation To TUSD that Race Formulas Should Not be Used**

10 The Special Master's R&R requests that the Court mandate a race-based formula for
 11 the BRC's membership. *See* ECF 1601 at 3 ("the District plan should be amended to
 12 require that the boundary committee should be comprised of between 15-25 members³
 13 whose racial composition generally reflects the racial composition of the population living
 14 in TUSD."). The Special Master also proposes to restrict the ability of TUSD employees
 15 (including teachers) to participate on the BRC. *See* ECF 1601 at 3-4 ("Employees of the
 16 District should not comprise more than a third of Committee members").

17 These recommendations, which are not based on any USP mandate or on any request
 18 by a Plaintiff for judicial review, also should be rejected because they are contrary to the
 19 recommendations the Special Master provided to TUSD before filing the R&R. On April
 20 15, 2014, the Special Master recommended to TUSD that it should not reserve a certain
 21 number of spots on the BRC by race. *See* Decl. Brammer ¶ 3, Ex. 2, 4/15/14, 2:10 p.m.,
 22 Email from Special Master ("I don't believe there should be racial spots on the
 23 committee....") The Special Master further advised TUSD that although "race matters", he
 24 would oppose the use of any specific formulas or guidelines based upon race. *See* Decl.

25
 26
 27 ³ The current boundary review committee has 30 members. No explanation is provided for
 28 why the Special Master now suggests reducing the number of committee members, nor is
 TUSD aware of any request made by the Plaintiffs to do so.

1 Brammer ¶ 5, Ex. 4, 4/15/14, 1:38 p.m. Email from Special Master (“I would oppose
2 specific formulas or guidelines but race matters”).

3 **IV. TUSD’S USE OF ADDITIONAL CRITERIA TO EVALUATE BOUNDARIES**
4 **CONFORMS TO THE USP**

5 **A. The BRP Incorporates All of the USP Criteria**

6 The BRP includes verbatim all of the USP criteria relating to proposed boundary
7 changes. *See* ECF 1601 at 10 and 23. The USP criteria first were presented to the BRC at
8 their March 21, 2014 orientation meeting with a slide show presentation available in both
9 electronic and hard copy to all BRC members (and the public). *See* Decl. Nodine ¶ 8, Ex.
10 2A. The USP criteria were presented again to the BRC at all subsequent meetings. *See,*
11 *e.g.,* Decl. Nodine ¶ 8, Exs 3C, 4A & 6-B1.⁴ The “Frequently Asked Questions” resource
12 available to BRC members also states that proposed boundary changes will be reviewed
13 using USP criteria. *See* <http://tusd1.org/contents/distinfo/boundaryreview/faq.asp>. *See Id.*
14 Additionally, the forms BRC members utilize to analyze boundary options include all USP
15 criteria. *See, e.g.,* Decl. Nodine ¶ 8, Ex. 6-A2.

16 **B. Additional Criteria In The BRP Do Not Impede Or Limit The**
17 **Implementation Of The USP**

18 The board-adopted policy (“JC-R”) referred to in the BRP also incorporates the USP
19 criteria. *See* ECF 1601 at 23. In addition to the six USP criteria, the JC-R also includes the
20 following five additional criteria: targeted operating capacities, student transportation,
21 feeder patterns, recent boundary changes affecting the area, and fiscal impacts. *See* ECF 23
22 at 70 (criteria b & g-j). The Special Master concedes that the USP does not prohibit the
23 District from considering additional criteria so long as they do not “undermine decisions
24 based on the criteria in the USP.” *See* ECF 1601 at 8.

25 The additional criteria in the BRP reflect important and appropriate policy
26 considerations (including facilitating compliance with other areas of the USP). Neither the
27

28 ⁴ All of the slide show presentations made to the BRC also are available publically on
TUSD’s website: <http://tusd1.org/contents/distinfo/boundaryreview/index.asp>.

1 Plaintiffs nor the Special Master has suggested which of the additional criteria, if any,
2 violates the Constitution, in any way impedes or defeats implementation of the USP, or
3 otherwise precludes meaningful desegregation, nor is there any reason for such a concern.
4 *Cf. Swann*, 402 U.S. 43; *Scotland Neck City Bd. of Education*, 407 U.S. 484 (school policy
5 should not be disturbed where it does not inescapably operate to obstruct the remedies
6 granted by the District Court). Indeed, the Special Master expressly supports the use of the
7 additional criterion relating to not moving any student twice previously moved because of
8 prior school closures in a new boundary change. *See* ECF 1601.

9 The BRP incorporates all USP-required criteria relating to proposed boundary
10 changes. More generally, the BRP presents a comprehensive and workable framework to
11 facilitate USP implementation. There is no reason to interfere with or obstruct TUSD's
12 ability to account for important nonracial educational, logistical and financial criteria in
13 addition to those identified in the USP. *See United States v. Unified Sch. Dist. No. 500*, 974
14 F. Supp. 1367, 1384 (D. Kan. 1997) (“the Constitution does not require that all neutral,
15 nonracial, educational, geographical, and political considerations -- which so vitally affect
16 the nature and quality of public school systems -- give way to overzealous pursuit of the
17 single goal of desegregation”).

18 The Special Master's suggested course of action – that the parties confer (resulting in
19 additional attorneys' fees and costs for plaintiffs' counsel at the expense of the District) or
20 that he be commissioned to revise the BRP's language – is both unnecessary and
21 inappropriate. The BRP as written conforms perfectly to the letter and spirit of the USP.
22 Furthermore, the scope of the Special Master's authority and expertise does not include
23 interfering with nonracial policy criteria that neither obstruct the goals of the USP nor are
24 mandated by it. The Special Master has no legal authority to act as a “super school board”
25 by imposing on TUSD his policy preferences on nonracial matters when TUSD is
26 complying with all aspects of the USP. *See, e.g., Anderson v. Canton Mun. Separate School*
27 *District*, 232 F.3d 450, 454 (5th. Cir. 2000)

1 **V. TUSD HAS PROVIDED TIMELY INFORMATION ON BOUNDARY**
2 **REVIEW TO THE FISHER PLAINTIFFS**

3 The Special Master's R&R refers to the Fisher Plaintiffs' contention "that their
4 ability to contribute to the development of a boundary plan is impeded by the district's
5 incomplete or delayed provision of information needed to play an informed role in the
6 process." See ECF 1601 at 6. It is unclear from the R&R whether the Special Master
7 agrees with this contention (and, if so, why and to what extent). In any event, the Fisher
8 Plaintiffs' contention of incomplete or delayed information is bewildering in light of the
9 mountain of information provided to their representatives and counsel, the significant extent
10 of TUSD's responses to their requests, and the close communication with and participation
11 by the Fisher Plaintiffs (and all Plaintiffs and the Special Master) in this process.

12 For example, TUSD created a BRC website, available to BRC members (including
13 the four Fisher Plaintiffs' class members), that is updated timely and periodically with
14 information, including agendas, slide show presentations, data and minutes of the meetings.
15 See Decl. Nodine ¶ 9, Exs. 1-14.

16 TUSD also created a BRP website available to Plaintiffs' counsel and the Special
17 Master that also is updated periodically with information, including all materials provided
18 to the BRC at the BRC meetings See Decl. Nodine ¶ 10, Exs. 15, 17-18, 20-23) as well as
19 all materials provided during TUSD's meetings with the Plaintiffs' counsel and Special
20 Master to keep them updated and answer questions on the boundary review process (*Id.*,
21 Exs. 16 & 19). The Fisher Plaintiffs also had "real time" updates on the boundary review
22 process at each of the seven BRC meetings, by virtue of their four class representatives
23 attending them.⁵

24 TUSD also arranged several meetings between TUSD, Plaintiffs' counsel, and the
25 Special Master to provide updates and address any specific comments or questions
26 regarding the BRP. See Decl. Nodine ¶ 10. These meetings lasted for several hours each
27

28 ⁵ The Fisher Plaintiffs class representatives attended BRC meetings on March 26, April 2,
9, 16, and 30, and May 14 and 28. See Decl. Nodine ¶ 8.

1 and occurred on March 28, 2014, April 16, 2014 and May 20, 2014. *See Id.* In addition, on
 2 April 23, 2014, TUSD provided the Fisher Plaintiffs with responses addressing nearly thirty
 3 comments they had made.⁶ *See* Decl. Brammer ¶ 6, Ex. 5, 4/23/14 Responses to Fisher
 4 Plaintiffs' Request for Information. TUSD also responded to requests for information and
 5 comments directly from the Fisher Plaintiffs' representatives in their capacity as BRC
 6 members. *See* Decl. Nodine ¶ 11. In sum, TUSD unquestionably has provided the Fisher
 7 Plaintiffs with extensive information on an ongoing basis and unprecedented access to the
 8 entire BRP process.

9 **VI. TUSD'S POLICY THAT STUDENTS PREVIOUSLY AFFECTED BY**
 10 **SCHOOL CLOSURES SHOULD NOT BE REQUIRED TO MOVE AGAIN**
 11 **CONFORMS TO THE USP**

12 The Special Master agrees that TUSD should be able to consider additional nonracial
 13 criteria in addition to those in the USP. *See* ECF 1601 at 8. The scope and content of these
 14 additional criteria is not within the Special Master's jurisdiction unless they in some way
 15 obstruct or undermine the USP. Nonetheless, the Special Master also agrees that the
 16 additional criterion considering previous school closures is appropriate and should not be
 17 disturbed. *See* ECF 1601 at 9 ("This Court should not change the district's boundary plan
 18 insofar as it allows students previously affected by school closure to remain in their new
 19 school if a boundary change would result in their assignment to a third school").

20 The Fisher Plaintiffs nevertheless attempt to attack this reasonable policy
 21 consideration by seizing upon this Court's previous citation to *North Carolina State Bd. Of*
 22 *Ed. v. Swann*, 402 U.S. 43, 46 (1971). Plaintiffs' reliance on *Swann* is misplaced. The
 23 Supreme Court in *Swann* struck down a patently discriminatory anti-busing state law
 24

25 ⁶ The BRP R&R's inclusion of the Fisher Plaintiffs' comments/objections without attaching
 26 TUSD's responses is a violation of this Court's prior orders requiring inclusion of all
 27 submissions made to the Special Master with respect to the items at issue. This also creates
 28 a procedurally unfair and one-sided presentation in the BRP R&R of the issues at hand. *See*
 ECF 1529 ("The Special Master's report shall include as attachments all submissions made
 to him by the Parties with respect to the item(s) in issue.")

1 because it would “inescapably operate to obstruct the remedies granted by the District
2 Court....” 402 U.S. at 45. *Swann* affirms that a state legislature may not impede or
3 otherwise limit implementation of a court-ordered desegregation plan. But there is no
4 suggestion that any TUSD policy or action relating to the BRP obstructs the USP and/or
5 meaningful desegregation in any way. As discussed above, the BRP conforms to the USP
6 and facilitates its implementation in every respect.

7 The Special Master agrees that TUSD’s desire to protect students from a third school
8 transfer was motivated by the best interests of all TUSD students and the District as a
9 whole. *See* ECF 1601 at 7 (Special Master recommends that the Court uphold the District’s
10 policy barring transfer to a third school where “it is in the best interest of the students
11 involved and facilitates the implementation of the USP over time.”). The Fisher Plaintiffs
12 have not charged TUSD with any improper motive to obstruct or undermine the USP and
13 no such motive exists.

14 **VII. CONCLUSION**

15 Based on the foregoing, TUSD respectfully requests that the Special Master’s R&R
16 on the BRP be denied in part and granted in part, as outlined above.

17 DATED this 6th day of June, 2014.

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

19 s/ J. William Brammer, Jr.
20 J. William Brammer, Jr.
21 Michael J. Rusing
22 Patricia V. Waterkotte
23 Attorneys for Tucson Unified School District No.
24 One, et al.
25
26
27
28

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

1 **ORIGINAL** of the foregoing filed via the CM/ECF
2 Electronic Notification System and transmittal of a
3 Notice of Electronic Filing provided to all parties
4 that have filed a notice of appearance in the District
5 Court Case, as listed below.

6 LOIS D. THOMPSON CSBN 093245
7 JENNIFER L. ROCHE CSBN 254538
8 Attorneys for Mendoza Plaintiffs
9 Proskauer Rose LLP
10 2049 Century Park East, Suite 3200
11 Los Angeles, California 90067
12 (310) 557-2900
13 lthompson@proskauer.com
14 jroche@proskauer.com

15 NANCY A. RAMIREZ CSBN 152629
16 Attorney for Mendoza Plaintiffs
17 Mexican American LDEF
18 634 S. Spring St. 11th Floor
19 Los Angeles, CA 90014
20 (213) 629-2512
21 nramirez@maldef.org

22 RUBIN SALTER, JR. ASBN 001710
23 KRISTIAN H. SALTER ASBN 026810
24 Attorney for Fisher, et al., Plaintiffs
25 177 North Church Avenue, Suite 903
26 Tucson, Arizona 85701-1119
27 rsjr2@aol.com

28 ANURIMA BHARGAVA
29 ZOE M. ZAVITSKY CAN 281616
30 Attorneys for Plaintiff-Intervenor
31 Educational Opportunities Section
32 Civil Rights Division
33 U.S. Department of Justice
34 950 Pennsylvania Avenue, SW
35 Patrick Henry Building, Suite 4300
36 Washington, DC 20530
37 (202) 305-3223
38 anurima.bhargava@usdoj.gov
39 zoe.savitsky@usdoj.gov

40 JULIE TOLLESON ASBN 012913
41 Tucson Unified School District
42 Legal Department
43 1010 E 10th St
44 Tucson, AZ 85719
45 520-225-6040
46 Julie.Tolleson@tusd1.org

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

1 **COPY** of the foregoing served via email
this 6th day of June, 2014 to:

2 **WILLIS D. HAWLEY**
3 Special Master
4 2138 Tawes Building
5 College of Education
6 University of Maryland
College Park, MD 20742
(301) 405-3592
wdh@umd.edu

7 s/ Jason Linaman

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21
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24
25
26
27
28

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800