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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,

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
 OUTREACH, RECRUITMENT
 AND RETENTION PLAN (ECF
 1612)**

(Oral argument requested)

CV 74-204 TUC DCB
 (Consolidated Case)

I. INTRODUCTION

Tucson Unified School District, No. 1 (“TUSD”) objects to the Special Master’s Report and Recommendation (“R&R”) regarding TUSD’s Outreach, Recruitment & Retention Plan (“ORR Plan”).¹ TUSD objects because its ORR Plan complies with the letter and spirit of the Unitary Status Plan (“USP”) and the Constitution and, accordingly, should not be disturbed. This objection is supported by the Declarations of J. William Brammer, Jr., Samuel Brown (TUSD’s Director of Desegregation), Maree F. Sneed, and Dr. Mary Baker, an expert with extensive experience in statistical workforce analysis.

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

This Court must review this objection *de novo*, *see* Fed. R. Civ. P. 53, and must uphold it if it “conforms to the consent decree entered into by the parties and . . . is compatible with the Constitution”. *United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1360 (N.D. Ind. 1981). Neither the Special Master nor any Plaintiff has challenged the ORR Plan as constitutionally infirm. The *de novo* review therefore must focus on whether the ORR conforms to the USP.² This Court has recognized that, where there is no USP or Constitutional violation, “its discretion is limited . . . and the . . . Court is not here to act as a ‘super school board’ and is mindful of its role; the Court does not intend to micro-manage programmatic decisions by the District and will defer to reasonable proposals by the District.” *See* ECF 1477. *See also* *Anderson v. Canton Mun. Separate School District*, 232 F.3d 450, 454 (5th Cir. 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *United States v. South Bend Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981); *Richmond Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th

¹ The Appointment Order (ECF 1350) and Fed. R. Civ. P. 53 both permit objections to a Special Master’s R&R within 30 and 21 days, respectively, of the report and recommendation. The Court later truncated the objection period significantly by reducing it to 7 days from service of the R&R (ECF 1529). This objection complies with ECF 1529.

² The Court also inquire as to whether challenged provisions “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, 45 (1971).

1 Cir. 1975). As demonstrated below, most of the issues raised exemplify the “in-the-weeds”
2 enmeshment prohibited by these cases and that run counter to the Special Master’s role.³

3 In addition, the R&R submitted here fails procedurally. R&Rs must be made upon a
4 Plaintiff’s request for judicial review and include an explanation of the parties’
5 disagreement along with the Special Master’s recommendation for resolution. *See* ECF
6 1450 at 6, USP § I.D.I (“If any disagreements cannot be resolved within (30) days from the
7 date Plaintiffs provide their comments to the district, the Special Master shall report such
8 disagreements to the Court together with his recommendation concerning how the
9 disagreement(s) should be resolved”), ECF 1510 at 8, lines 4-12, ECF 1510 at 8, lines 14-
10 17, ECF 1529 at 5-10 (same). Accordingly, a *request by the Plaintiffs* for an R&R and an
11 *unresolved disputed issue* are both prerequisites for an R&R. As described herein, failure
12 to meet this basic USP threshold for bringing an R&R is dispositive of many of the issues in
13 the R&R, as they should not have been raised to the Court in the first place.

14 **III. THE LABOR MARKET STUDY IS USP COMPLIANT**

15 The R&R raises two Labor Market Study issues (bias and substantive adequacy),
16 however, he reports a new Labor Market Study is not warranted. TUSD agrees but must
17 clarify unsubstantiated statements made in the R&R about the Labor Market Study.

18 **A. The Alleged Bias Is Not Based in Fact or Evidence**

19 The R&R reports that the Special Master believes it “likely” TUSD selected a
20 contractor that would deliver data supporting its position (although that “position” is
21 unspecified). The only “evidence” identified for this serious accusation is his generalization
22 that “organizations often select consultants who they believe will provide evidence that
23 supports positions they want to pursue or believe they have attained.”⁴ *See* ECF 1612 at 3.
24

25 ³ *See* ECF 1350 (“Special Master does not engage in actual implementation activates.”)

26 ⁴ TUSD objects to this Special Master “expert opinion” as not based on any facts or data –
27 as would be required of any expert witness under the Federal Rules of Evidence. *See* Rule
28 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or
education may testify in the form of an opinion or otherwise if: . . . (b) the testimony is

TUSD did not select ERS Group based upon any preconceived result. Instead, ERS Group was selected because it is well-respected and could provide independent labor market expertise to inform TUSD's ORR Plan. *See* Declaration of Samuel Brown ("Decl. Brown"), TUSD's Desegregation Director (who selected the ERS Group and is African American) at ¶¶ 4-6. Indeed, the Special Master approved TUSD's use of ERS Group before ERS was retained. *See* Declaration of Maree F. Sneed ("Decl. Sneed") ¶ 6, Ex. C. TUSD asked the Special Master to suggest a consultant to perform the labor market study – he had none. *See* Decl. Sneed. ¶ 6, Exs. B & C. Dr. Mary Baker of the ERS Group, a well-respected expert in the field, states she would have refused the engagement had TUSD attempted to influence her findings or conclusions. *See* Declaration of Dr. Mary Baker ("Decl. Dr. Baker") ¶ 3-6. The Special Master's unfounded accusation is likewise unwarranted under the USP because no Plaintiff raised requested an R&R on this issue.

B. The Labor Market Study Complies With the USP

The Special Master suggests the Labor Market Study is undermined in four ways involving criticisms of the data source. *See* ECF 1612 at 4. The data source is TUSD's EE0-5 (as well as EE0-5's from other states).⁵ *See* Decl. Dr. Baker ¶ 8; ECF 1612-3 at 28.

based on sufficient facts or data"); *see also* Rule 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.").

⁵ As part of its mandate under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission ("EEOC") requires periodic reports from all public elementary and secondary school districts of their work forces by gender and by race/ethnic category. EEOC collects this data from all public elementary and secondary school districts with 100 or more employees in each state and District of Columbia. The reports contain information as of October 1 of the survey year on their employment totals, employees' job category and sex and race/ethnic groups. The EEO5 survey is conducted biennially in every even-numbered year. *See* <http://www.eeoc.gov/employers/eeo5survey/>. The EEOC defines all positions – including administrators – so that they are consistently applied by all districts. *See* <https://egov.eeoc.gov/eeo5/pdf/IntruccionBookletPrior.pdf>. The Special Master's reference to inconsistency in position definitions and data dates appears to relate to the analysis conducted before the EE0-5 data became available. At the time of the revised September 2013 report, the 2010 data was the most current and recently available data and, accordingly, was used for the September 2013 Labor Market Analysis. *See* ECF 1612-3. *See* ECF 1612-3 at 28-45.

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The EEO-5 data is the most appropriate and reliable data source available to measure African Americans and Hispanics for relevant TUSD jobs because those already employed in the relevant teacher and administrator categories demonstrate their interest in and qualification for these occupations. The Arizona data is particularly informative because those already working in Arizona have indicated their willingness to accept employment in this geographic area. *See* Decl. Dr. Baker ¶¶ 10-11. Indeed, the Special Master has no suggestion for a better data source and concedes there may be no better data available. *See* ECF 1612 at 4-5 (“These limitations are, for the most part, not the result of failures by the consultant but rest in the characteristics of the data available...”). The Special Master suggests as “problematic” the jurisdictions used for comparison in the Labor Market Study, but offers no explanation why they are problematic nor contends their use violates the USP. The USP requires an analysis within the “State of Arizona, in a four-state region, a six-state region and the United States.” *See* ECF 1450 at 18, USP § IV.C.2 There is no dispute that TUSD did this – and no explanation for what is problematic.

Next, the R&R identifies three examples of how the Labor Market Study’s scope purportedly could have been expanded. *See* ECF 1612 at 5. However, the Special Master did not recommend those measures be taken and acknowledged they would not be feasible. *See* ECF 1612 at 5 (measures would be “very expensive and require continual updating”); *see also* Decl. Dr. Baker ¶ 12 (expanding Labor Market Study not feasible).

IV. TUSD’S RETENTION REVIEW IS USP COMPLIANT

The Special Master recommended in his R&R that TUSD remove the phrase “a retention plan is not required by the USP” from the Executive Summary of the Plan. *See* ECF 1612 at 10-11. This R&R is made despite the fact that (a) TUSD did, in fact, include a retention plan within the ORR Plan (ECF 1612-1 at 10), and (b) TUSD nevertheless has

1 already revised its Plan to remove this phrase pursuant to the Fisher and Mendoza
2 Plaintiffs' request.⁶ Compare ECF 1612-1 at 3 to ECF 1612-2 at 4.

3 A retention plan is not required by the USP. Where a plan is required by the USP,
4 the USP clearly says so.⁷ In contrast, the section of the USP regarding retention of African
5 American and Latino administrators states that "[t]he District shall adopt measures to
6 increase the retention of African American and Latino administrators and certificated
7 staff[.]" See ECF 1450 at § IV.F.1. "Adopting measures" is not "develop[ing] a plan." The
8 Court should not permit either the Plaintiffs or the Special Master to unilaterally alter the
9 express terms of the USP by implying or inferring one to honor the "spirit of the USP."

10 **V. TUSD'S SUPPORT FOR NONCERTIFICATED STAFF IS USP COMPLIANT**

11 **A. No Plaintiff Requested an R&R**

12 The R&R identifies only the DOJ as requesting an R&R on this issue. See ECF
13 1612 at 1. This is false. The DOJ filed an objection with the Court to correct this
14 misstatement and confirm it has not requested an R&R on any aspect of the ORR Plan. See
15 ECF 1621. Accordingly, because no plaintiff has requested it, the Special Master's R&R
16 on TUSD's certification support plan is unauthorized under either the USP or the Process
17 Order (ECF 1510), and should be denied on this basis.

18 **B. TUSD's Plan to Support Noncertificated Staff Complies with the USP**

19 TUSD supports the Special Master's conclusion that TUSD's ORR Plan complies
20 with the USP and that the Court should not disturb this plan, but objects to the conclusory
21

22 ⁶ The R&R regarding the retention plan language was brought at the request of the Fisher
23 Plaintiffs only (see ECF 1612 at 2), who simply renewed their prior objection following
24 receipt of the revised ORR Plan without explaining why any issue still remained or why a
25 report and recommendation was still requested. See Declaration of J. William Brammer, Jr.
26 ("Decl. Brammer") at ¶ 3, Ex. B.

27 ⁷ See, e.g., ECF 1450 at § II.E.3 ("shall develop...a Magnet School Plan"); § IV.G ("the
28 District shall develop a plan [regarding Reduction in Force]"); § V.A.2.c ("shall develop the
ALE Access and Recruitment Plan"); § V.E.2.b ("shall develop a plan [regarding Dropout
Prevention and Retention]"); § IX.A.3 ("shall develop a multi-year plan for facilities repairs
and improvements"); § IX.B.3 ("the District shall develop a multi-year Technology Plan").

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statements preceding that recommendation. The USP requires that TUSD “[e]ncourage and provide support for African American and Latino non-certificated staff (e.g., paraprofessionals) who are interested in pursuing certification.” *See* ECF 1450 at 19, USP § IV.C.3.a.v. TUSD has complied with this USP provision by developing a comprehensive plan to encourage and support African-American and Latino non-certificated staff interested in pursuing certification by surveying current non-certificated staff to identify those interested in pursuing certification and pairing them with a mentor who has the certification, and direct mailings to those identified as interested in pursuing certifications and . *See* ECF 1612 at 14. TUSD also is working with the University of Arizona to explore TUSD-specific coursework toward obtaining an Arizona administrative certificate.⁸ Accordingly, not only has TUSD complied with the USP, but there is no evidence provided to support the Special Master’s conclusory statement that TUSD’s planned support for noncertificated staff is “minimal.” Indeed, no specific strategy is identified as missing from the plan nor does the Special Master suggest any additions to this area of TUSD’s ORR Plan. TUSD also objects to the characterization of USP compliance as “minimal” when the USP is the benchmark of what the Plaintiffs/Special Master agreed is TUSD’s road map for unitary status.

VI. TUSD’S PLAN FOR NATIONWIDE RECRUITING IS USP COMPLIANT

TUSD’s three-part nationwide recruiting strategy focuses on advertising, in-person recruiting and financial incentives. *See* ECF 1612-11 at 9-12. The R&R addresses the Special Master’s concern with the financial incentives strategy only. *See* ECF 1612 at 8-9.

A. No Plaintiff Requested an R&R on Financial Incentives

The R&R identifies the Mendoza Plaintiffs and the DOJ as requesting an R&R on this issue. *See* ECF 1612 at 1. This is false – neither the DOJ nor the Plaintiffs have requested a report and recommendation on financial incentives. *See* Decl. Brammer ¶ 2, Ex. A, 5/27/14 Mendoza Plaintiffs’ R&R Request (no request on this issue); *See* ECF 1621 (DOJ’s objection to correct this misstatement and confirm it has not requested an R&R on

⁸ Full text of plan for support to noncertificated staff available at ECF 1612-11 at 14.

any aspect of the ORR Plan). The issue is moot, as TUSD addressed the Mendoza Plaintiffs' prior request that TUSD amend its plan to clarify that financial incentives are directed specifically towards African Americans and Latinos. *See* ECF 1612-11 at 11 ("certain financial incentives will be promoted as part of the nationwide recruitment strategy to attract qualified candidates, targeting African-American and Latino candidates....") Accordingly, the R&R on TUSD's certification support plan is unauthorized under the USP or the Court's orders and should be denied on this basis.⁹

B. Financial Incentives for Recruitment Complies with the USP

TUSD's plan to promote certain financial incentives as part of its nationwide recruitment strategy to attract qualified candidates, targeting African-American and Latino candidates, complies with the USP. *See* ECF 1450, USP § IV.C.3.a.i. Plaintiffs and the Special Master do not dispute this. *See* ECF 1612 at 11 (no Special Master claim of non-USP compliance), Decl. Brammer ¶ 2, Ex. A, Mendoza Plaintiffs' R&R Request (no R&R request on this issue); ECF 1612-5 at 2-9 (no Fisher Plaintiffs' R&R request on this issue). Accordingly, TUSD's strategy should not be disturbed.

VII. TUSD'S NONDISCRIMINATION STATEMENTS ARE USP COMPLIANT

In the first draft of TUSD's ORR Plan in June, 2013, TUSD included the following statement of the Plan's focus: "Ensuring TUSD conducts recruitment for all employment

⁹ The Mendoza Plaintiffs did, however, request an R&R on the advertising strategy of TUSD's three-part nationwide recruiting plan. *See* Decl. Brammer ¶ 2, Ex. A. The Special Master declined to include this issue, and accordingly, this objection is not before the Court for decision. *See* ECF 1612. TUSD briefly addresses the Mendoza Plaintiffs' request herein in an abundance of caution for the sole purpose of showing TUSD's advertising strategy (*see* ECF 1612-11 at 9; 1612-2 at 19-20) complies with the USP. The Mendoza Plaintiffs requested an R&R to require advertising through "national newspapers, education publications and periodicals targeting African American and Latino communities." *See* ECF 1450, USP § IV.C.3.a.i. This already has been done. *See* ECF 1612-11 at 9; ECF 1612-2 at 19-20. In addition, TUSD solicited the Mendoza Plaintiffs to suggest further publications on March 24, 2014, a request also made of the Fisher Plaintiffs and Special Master, further offering to modify the plan as such. *See* ECF 1612-3 at 2 & 10-11. TUSD received no further suggestions from any plaintiff or the Special Master.

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vacancies on a nondiscriminatory basis.” *See* ECF 1612-1 at 3. TUSD also included in that Plan draft a section entitled “Measures to Ensure Nondiscriminatory Recruitment of All Employment Vacancies,” addressing TUSD’s commitment to providing an inclusive and welcoming environment for all its staff members. *See* ECF 1612-1 at 4. Plaintiffs, apparently dissatisfied, requested the following additional language, which TUSD already has added to its most recent draft of the ORR Plan: “The district shall conduct recruitment for all employment vacancies on nondiscriminatory basis.” *See* ECF 1612-11 at 7. TUSD is puzzled that the Special Master would file an R&R criticizing TUSD on this resolved issue (failing to mention nondiscriminatory language already included by TUSD in its original plan) when the USP and this Court’s orders do not permit him to do so. There is no USP violation here. Plaintiffs do not dispute this. *See* Decl. Brammer ¶ 2, Ex. A, Mendoza Plaintiffs’ R&R Request (no R&R request on this issue); ECF 1612-5 at 2-9 (no Fisher Plaintiffs R&R request on this issue); *See* ECF 1621 (no DOJ R&R request).

Without any request by Plaintiffs for an R&R on this issue, the Special Master suggests the Court issue an order prescribing non-USP mandated language on all job announcements. *See* ECF 1612 at 11. As the Special Master reports, TUSD already has the following statement prominently placed on the first page of its “hiring process” website:

Tucson Unified School District is committed to a policy of nondiscrimination based on disability, race, color, religion/religious beliefs, sex, sexual orientation, gender identity or expression, age, or national origin. This policy will prevail in all matters concerning Governing Board, District employees, students, the public, educational programs and services, and individuals with whom the Board does business.

See <http://www.tusd1.org/contents/employment/hire.html>.¹⁰ Absent a specific USP directive, the Special Master and the Court have no authority to approve/disapprove TUSD’s job announcements and/or draft the language of the job announcements for TUSD.

¹⁰ The nondiscriminatory statement is also located in many other prominent locations of TUSD’s website. *See also* <http://www.tusd1.org/contents/employment/eo.html> and <http://www.tusd1.org/contents/nondisc.html>.

VIII. RECRUITMENT & RETENTION ADVISORY GROUP IS USP COMPLIANT

The USP requires TUSD to develop its ORR Plan with “the input of a racially and ethnically diverse recruitment team comprised of school-level and district-level administrators, certificated staff and human resources personnel.” *See* ECF 1450 at 17, §IV.C.3. TUSD has addressed all of the Mendoza and Fisher Plaintiffs’ concerns regarding the make-up of the Committee.¹¹ Accordingly, the Mendoza Plaintiffs did not renew their request for an R&R on this issue. *See* Decl. Brammer ¶ 2, Ex. A. The Fisher Plaintiffs, however, did not withdraw their “joinder” to the Mendoza Plaintiffs objection to the recruitment team, and failed to articulate any reason why they perceived a remaining disputed issue. *See* Decl. Brammer ¶ 3, Ex. B.

Despite that no disputed issue appears to exist, the Special Master recommends that the Court “require the district to align the membership of the recruitment and retention committee with the provisions and intent of its own recruitment and retention plan and clarify if the newly identified committee members will influence the selections of 2014 recruitment and retention efforts.” *See* ECF 1612 at 11. This is puzzling because, as demonstrated above, all the Plaintiffs’ concerns have been addressed. The Special Master lists several concerns about the 2013-14 Committee (that it does include any representatives of community organizations or corporations, that the majority of the Committee members are African-American, and that the Committee has no Latino TUSD employees), but the District cannot go back in time and change the Committee’s composition. The District took

¹¹ The Mendoza Plaintiffs objected to the composition of the 2013-14 Recruitment/Retention Advisory Committee on three bases: (1) it included only one Latino member; (2) it failed to include a Mexican American Studies Department representative; and (3) the committee did not include a Latino community member. *See* ECF 1612-8 at 3. The Fisher Plaintiffs “joined” this objection. *See* ECF 1612-5 at 3. Following these comments, the District addressed all three concerns by (1) adding six more Latino members to the 2014-15 Committee, for a total of seven, (2) including on the Committee Maria Figueroa, the director of Mexican American Student Services, and (3) including Leslie Leon on the Committee, the director of the Hispanic Chamber of Commerce. *See* ECF 1612-10 at 4 11.

1 all of the Mendoza Plaintiffs' comments and suggestions into account in selecting the 2014-
 2 15 Committee. *See* Decl. Brown ¶ 8. The Special Master states that the 2013-14 Committee
 3 is "presumably shaping recruitment and hiring policies and practices for the 2014-15 school
 4 year[.]" The newly selected Committee members will influence recruitment and retention
 5 efforts for SY2014-15. *See* Decl. Brown ¶ 8.

6 **IX. DIVERSITY DEFINITION IS USP COMPLIANT**

7 The Special Master notes in his R&R that no Court action is needed on the issue of
 8 the definition of "diversity" in the Plan. *See* ECF 1612 at 10. TUSD revised its Plan to
 9 include the modifiers "racial and ethnic" to the word "diversity" as requested by the Fisher
 10 Plaintiffs.¹² *See* ECF 1612-1 at 2. The R&R on diversity language was brought at the
 11 request of the Fisher Plaintiffs only. *See* ECF 1612 at 2. However, the Fisher Plaintiffs'
 12 renewed R&R request did not explain what disputed issue still remained in light of TUSD's
 13 revision. *See* Decl. Brammer at ¶ 3, Ex. B.

14 **X. CONCLUSION**

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

17 DATED this 16th day of June, 2014.

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

19 s/ J. William Brammer, Jr.

20 J. William Brammer, Jr.

Attorneys for Tucson Unified School District

21 ¹² Although the Fisher Plaintiffs objected to the Plan's previous omission of the words
 22 "racial and ethnic," the Plan's focus from its inception always has been to increase racial
 23 and ethnic diversity, including attracting and retaining qualified African-American and
 24 Latino candidates for administrator and certificated staff positions. *See, e.g.* ECF 1612-1 at
 25 6 (listing strategies to attract African-American and Latino candidates). This is evidenced
 26 by the substance of the entire Plan (*see, e.g.* ECF 1612-1 at 7 (recruitment trips to
 27 historically black colleges and universities and to colleges belonging to the Hispanic
 28 Association of Colleges/Universities); ECF 1612-1 at 9 (announcement of open positions to
 list of retired African-American and Latino administrators and certificated staff) and is not
 altered by the omission or addition of the words "racial and ethnic." Accordingly, the Plan,
 both before and after this revision, complied with the USP.

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