

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

Oscar S. Lizardi (State Bar No. 016626)

olizardi@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 THIRD
AMENDED REPORT AND
RECOMMENDATION ON
TEACHER AND PRINCIPAL
EVALUATION PROCEDURES
(ECF 1666)**

Oral Argument Requested

CV 74-204 TUC DCB
(Consolidated Case)

1 **I. INTRODUCTION**

2 Defendant Tucson Unified School District No. One (“TUSD” or the “District”) objects to the Special Master’s Third Amended Report and Recommendation (“R&R”) on Teacher and Principal Evaluation (“TPE”) Procedures.¹ ECF 1666. No “action plan” on teacher and principal evaluation procedures is required by the Unitary Status Plan (“USP,” ECF 1450). TUSD has complied with all its USP obligations related to teacher and principal evaluation procedures.

3 TUSD, beginning in May 2013, repeatedly advised the Special Master it was in compliance with the USP regarding principal and teacher evaluations. ECF 1666-8 at 8, *Id.* at 10; ECF 1666-8 at 1-6. And, the Plaintiffs have known since July 2013. ECF 1666-10 at 1-3. TUSD also confirmed its compliance in its January 2014 Annual Report. ECF 1666-10 at 23; ECF 1666-10 at 25-173.²

4 As such, the R&R is both substantively and procedurally improper and should be denied. This Objection is supported by the declarations of TUSD’s Director of Desegregation, Samuel Brown (“Decl. Brown”) and Senior Director of Curriculum Deployment, Richard Foster (“Decl. Foster”).

5 **II. STANDARD OF REVIEW OF OBJECTIONS TO THE TPE R&R**

6 This Court reviews this objection *de novo* pursuant to 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 Plaintiff nor the Special Master has

7 ¹ The Third Amended R&R (ECF 1666) is erroneously titled “Second Amended”. See Original TPE R&R (ECF 1557), First Amended R&R (ECF 1558), Second Amended R&R (ECF 1559).

8 ² The Department of Justice and the Fisher Plaintiffs never claimed that plans are required for teacher and principal evaluations and did not request a report and recommendation on this issue. The Mendoza Plaintiffs raised this issue for the *first* time a year later on July 24, 2014 (ECF 1666-2 at 1) and only *after* direct urging from the Special Master. ECF 1666-13 at 1 (Special Master 7/10/14 Email: “If plaintiffs believe that teacher and principal evaluation is not important enough to warrant comment and review as provided for in the USP, they should so indicate.”)

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

1 raised any constitutional objection to TUSD’s TPE procedures, thus the Court’s review is
 2 confined to whether the District’s procedures conform to the USP. This is consistent with
 3 controlling case law, which dictates that the “Court is not here to act as a ‘super school
 4 board’ and is mindful of its role; the Court does not intend to micro-manage programmatic
 5 decisions by the District and will defer to reasonable proposals by the District.” *See* ECF
 6 1477; *see also Anderson v. Canton Mun. Separate School Dist.*, 232 F.3d 450, 454 (5th Cir.
 7 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *Richmond Welfare*
 8 *Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975) (“Except as last-resort refuges
 9 for the protection of constitutional rights, courts should not attempt to function as super
 10 school boards”); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 12 (1971),
 11 quoting *Brown v. Bd. of Ed., Brown II*, 349 U.S. 249, 299 (1955) (“School authorities have
 12 the primary responsibility for elucidating, assessing, and solving these problems; courts []
 13 have to consider whether the action of school authorities constitutes good faith
 14 implementation of the governing constitutional principles.”).

15 **III. THE USP REQUIRES NO TUSD ACTION PLAN ON TEACHER AND** 16 **PRINCIPAL EVALUATION PROCEDURES.**

17 **A. THE USP’S PLAIN LANGUAGE MAKES IT CLEAR THAT NO** 18 **TPE ACTION PLAN IS REQUIRED.**

19 The USP’s unambiguous language nowhere requires TUSD to develop a “plan,” as
 20 that word is used throughout the USP, for its teacher and principal evaluation procedures
 21 (let alone *two* plans as the Special Master’s R&R suggests). The USP section regarding
 22 TPE procedures, reads:

23 By July 1, 2013, the District shall review, amend as appropriate, and adopt
 24 teacher and principal evaluation instruments to ensure that such
 25 evaluations, in addition to requirements of State law and other measures the
 26 District deems appropriate, give adequate weight to: (i) an assessment of (I)
 27 teacher efforts to include, engage, and support students from diverse racial,
 28 ethnic, cultural, and linguistic backgrounds using culturally responsive
 pedagogy and (II) efforts by principals to create school conditions,
 processes, and practices that support learning for racially, ethnically,
 culturally and linguistically diverse students; (ii) teacher and principal use
 of classroom and school-level data to improve student outcomes, target
 interventions, and perform self-monitoring; and (iii) aggregated responses

1 from student and teacher surveys to be developed by the District, protecting
2 the anonymity of survey respondents. These elements shall be included in
3 any future teacher and principal evaluation instruments that may be
4 implemented. All teachers and principals shall be evaluated using the same
5 instruments, as appropriate to their position.

6 ECF 1450 at p. 22, USP § IV.H.1.

7 Nowhere in that section does the word “plan” appear. However, where a plan is
8 required by the USP, the USP clearly so states. *See, e.g.*, ECF 1450 at § II.E.3 (“shall
9 develop...a Magnet School **Plan**”); § IV.G (“the District shall develop a **plan** [regarding
10 Reductions in Force]”); § V.A.2.c (“shall develop the ALE Access and Recruitment **Plan**”);
11 V.E.2.b (“shall develop a **plan** [regarding Dropout Prevention and Retention]”); § IX.A.3
12 (“shall develop a multi-year **plan** for facilities repairs and improvements”); § IX.B.3 (“the
13 District shall develop a multi-year Technology **Plan**”) (emphasis added).

14 Clearly, if the parties when drafting the USP had intended to require a TPE plan
15 they would have so stated, as they did in so many other sections of the USP. But they did
16 not. In the context of statutory interpretation, a well-established rule of construction
17 dictates that “the same words repeated in different parts of the same statute have the same
18 meaning,” and different words have different meanings. *See, e.g., Envtl. Def. v. Duke*
19 *Energy Corp.*, 549 U.S. 561, 584, 127 S. Ct. 1423, 1438 (2007), citing *Atlantic Cleaners*
20 *and Dyers v. United States*, 286 U.S. 427, 52 S. Ct. 607 (1932). The same rationale applies
21 to the Court’s interpretation of the USP. If the parties had intended to require a plan, they
22 would have used the word “plan.” They used different words instead. Tellingly, the
23 Special Master in his R&R does not assert that the USP explicitly requires action plans on
24 TPE. Instead, the Special Master relies on a course of dealing between the parties to argue
25 that two action plans are required. As explained in Section III(C), below, the parties’
26 course of dealing actually demonstrates that no action plans are required.

27 The Special Master also asserts that the USP is “unambiguous in saying that all
28 major actions undertaken by the District are subject to review by the plaintiffs and special
master,” citing to USP § I.D.1. ECF 1666-1 at 4. The R&R also cites TUSD’s recognition

1 that teacher and principal evaluations are “very important actions” to show that § I.D.1-
2 level review should be required. *Id.* TUSD agrees that all its USP compliance efforts are
3 important. However, that TPE procedures are important does not mean the District must
4 develop an action plan not required by the USP’s plain language.

5 The interpretation of a consent decree “is governed by familiar principles of contract
6 law.” *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989); *Miller v. Fairchild Indus.*, 797
7 F.2d 727, 733 (9th Cir. 1986) (“An agreement to settle a legal dispute is a contract and its
8 enforceability is governed by familiar principles of contract law.”); *Vertex Distributing, Inc.*
9 *v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982) (“[Because] consent
10 decrees and orders have many of the attributes of ordinary contracts, they should be
11 construed basically as contracts.”). It is well established that “[t]he expression in a contract
12 of one or more things in a class implies the exclusion of all other things.” *Vinson v. Marton*
13 *and Associates*, 159 Ariz. 1, 8, 764 P.2d 736, 743 (1988), citing *Herman Chanen Constr.*
14 *Co. v. Guy Apple Masonry Contractors*, 9 Ariz. App. 445, 447, 453 P.2d 541, 543 (1969).
15 The USP requires TUSD to review, amend and adopt its TPE procedures and enumerates
16 specific criteria for evaluating those procedures. The USP does *not* state that TUSD must
17 develop an action plan on its TPE procedures.

18 The USP’s plain and unambiguous language makes clear that TUSD is not required
19 to develop an action plan on its TPE procedures. TUSD considers review and assessment
20 of teacher and principal evaluation instruments an important and ongoing activity, and will
21 continue to report on its efforts in its Annual Reports and other status reports as appropriate.
22 However, TUSD disagrees that additional non-USP-specified “action plans” are required
23 because a plain reading of the USP neither requires nor suggests a plan.

24 Where the USP requires a plan, the USP clearly says so and specifies the required
25 components of the plan. Indeed, it is neither practical nor wise to demand that TUSD
26 develop plans the USP does not require. Absent specific USP language requiring a plan and
27 specifying the plan’s required components, TUSD cannot know how to develop a USP-
28

1 compliant plan. Such language's absence also makes it impossible to know the appropriate
2 standard of review for the Special Master or the Court to use to analyze the plan's USP
3 compliance. The USP is TUSD's "roadmap" to unitary status; if TUSD cannot rely on the
4 USP's language to guide its actions, it cannot be used at a map at all.

5 **B. TUSD HAS COMPLIED WITH THE USP'S REQUIREMENTS**
6 **ON TEACHER AND PRINCIPAL EVALUATION**
7 **PROCEDURES.**

8 USP § IV.H.1 requires TUSD to "review, amend as appropriate, and adopt" TPE
9 instruments, ensuring the instruments comply with state law and the measures listed in §
10 IV.H.1. During March and April 2013, TUSD reviewed and assessed the items in § IV.H.1
11 and adopted new TPE procedures. *See* Decl. Brown, TUSD's Desegregation Director, at ¶
12 4, also ECF 1666-8 at 7-8. In May 2013, TUSD provided the Plaintiffs and Special Master
13 a detailed memorandum and information about the District's teacher evaluation process for
14 SY 2013-14, as well as the District's principal evaluation process. *Id.* at ¶¶ 5 and 6, ECF
15 1666-8 at 9-1; ECF 1666-8 at 12-200; ECF 1666-9 at 1-43. TUSD advised the Plaintiffs
16 and Special Master in October 2013 that it planned to revise the teacher and principal
17 evaluation instruments in 2014. *Id.* at ¶ 13; ECF 1666-9; ECF 1666-10 at 14-15. TUSD
18 specifically advised them that these revisions were difficult and time-consuming given the
19 number of measures to consider and stakeholders involved. *Id.* TUSD representatives then
20 met with the Special Master to discuss TPE procedures, among other things. *Id.* at ¶ 14;
21 Decl. Foster, TUSD's Senior Director of Curriculum Deployment, at ¶ 6.

22 In January 2014, a TUSD committee worked with a consultant from The Danielson
23 Group to analyze TUSD's TPE instruments. Decl. Brown at ¶ 18; Decl. Foster at ¶ 7 and
24 ECF 1666-5; ECF 1666-10 at 4-11. The Danielson Group consists of educational
25 consultants who provide public school districts assistance based on the latest research
26 findings and professional learning activities. *Id.* TUSD, together with The Danielson
27 Group, evaluated the instruments' Framework for Teaching to identify the Culturally
28 Relevant Pedagogy components embedded in the District's evaluation model and create

1 professional development around those elements. *Id.* The completed review was provided
2 to the Plaintiffs and Special Master on May 30, 2014. *Id.*

3 In January 2014, TUSD reported in its Annual Report (ECF 1549-1) regarding its
4 compliance with § IV.H.1, and that the USP-required review was complete:

5
6 During SY 2012-13, the District worked to revise the teacher and principal
7 evaluation instruments for compliance with recently enacted state law as
8 well as the USP. The District has performed an annual school quality
9 survey for a number of years. A summary of which is categorized by race
10 and ethnicity in Appendix 42 presents, in part, a summary of the survey
11 data for SY 2012-13 from students, broken down by ethnicity. This data
12 can be found in more detail at:
13 https://tusdstats.tusd1.org/paweb/Utility/SQS/SQS_Summary.aspx.

14 ECF 1549-1 at 36. As attachments to the Annual Report, and as required by USP §
15 IV.K.1.m (“Copies of teacher and principal evaluation instruments and summary data from
16 the student surveys contemplated in USP § IV(H)(1).”). TUSD provided copies of its
17 teacher and principal evaluation instruments, and summary data from the student surveys
18 contemplated by USP § IV.H.1. ECF 1552, Appendix 42. On March 3, 2014, the
19 Mendoza and Fisher Plaintiffs submitted requests for information and objections regarding
20 TUSD’s January 2014 Annual Report pursuant to USP § X.E.3. Decl. Brown at ¶ 20.
21 Neither Plaintiff group raised any objections or issues with respect to either the Teacher
22 Evaluation Process or the Principal Evaluation Process as described in the Annual Report.
23 *Id.* Nor did they disagree that TUSD’s compliance with USP § IV.H.1 was complete. *Id.*

24 TUSD has complied with all its obligations under USP § IV.H.1 and has shared all
25 relevant information regarding its TPE procedures.

26 **C. THE RELEVANT AND ADMISSIBLE EXTRINSIC EVIDENCE
27 CONFIRMS THAT A TPE PLAN IS NOT REQUIRED.**

28 As shown above, the clear and unambiguous language of the USP does not require
TUSD to develop a TPE plan. The Court’s analysis should end here by denying the R&R
and upholding TUSD’s objection. However, in an abundance of caution should the Court

1 find some portion of the USP's language ambiguous, TUSD urges the Court to review the
2 relevant and admissible parol evidence confirming the USP does not require TPE plans.

3 Under controlling Arizona law, when a document's ambiguity is apparent and the
4 parties to the document have differing views of its interpretation, a court will consider all of
5 the proffered parol evidence to determine if any is relevant to the parties' intent.
6 Then, it will apply the parol evidence rule to exclude from the fact-finder's consideration all
7 evidence that contradicts or varies the meaning of the agreement. *Taylor v. State Farm*
8 *Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993), citing 3 Arthur L.
9 Corbin, CORBIN ON CONTRACTS § 572, at 100-101 (1992 Supp.). Under this
10 framework, "the court can admit evidence for *interpretation* but must stop short of
11 *contradiction*." *Id.* (emphasis in original) (internal citations omitted).

12 The court conducts a two-step analytical process. First, "the court *considers* the
13 evidence that is alleged to ... illuminate the meaning of the contract language, or
14 demonstrate the parties' intent." *Taylor*, 175 Ariz. at 153, 854 P.2d at 1134. The court's
15 function at this stage is to eliminate the evidence that has no probative value in determining
16 the parties' intent. *Id.* In step two, the court then applies the parol evidence rule to
17 preclude admission of extrinsic evidence that would vary or contradict the meaning of the
18 written words. *Id.*

19 Fundamental to the Court's analysis is its obligation to ascertain and give effect to
20 the intention of the parties at the time the contract was made if at all possible. *Id.*; *see also*
21 *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975); *Darner Motor Sales, Inc. v.*
22 *Universal Underwriters Ins. Co.*, 140 Ariz. 383, 393, 682 P.2d 388, 398 (1984). Of course,
23 the Special Master was not a party to the USP and therefore has no basis on which to argue
24 that any part or term in the USP has a particular meaning. Further, what the nonparty
25 Special Master "believes" the USO requires is irrelevant.

26 The relevant and admissible extrinsic evidence confirms that the USP never was
27 intended to, and does not, require a TPE plan. Preliminarily, the R&R offers no evidence of
28 the parties' intent at the time the USP was made. All of the extrinsic evidence included in

1 the R&R relates to actions of the parties *after* the USP was drafted and agreement on it
2 reached. Indeed, TUSD’s Desegregation Director Samuel Brown was a party to the USP
3 negotiations, but the Special Master was not. Decl. Brown at ¶ 3. Regardless, the extrinsic
4 evidence confirms no TPE plan requirement. During the Spring 2013 semester TUSD
5 conducted the USP-required review and assessment of the items in USP § IV.H.1 and then
6 communicated to the Special Master, in May 2013, its compliance with that USP provision.
7 *See* Decl. Brown at ¶ 5; ECF 1666-8 at 9-11. The Special Master never responded that he
8 disagreed with TUSD’s compliance with USP § IV.H.1.

9 On May 13, 2013, Mr. Brown, met with the Special Master to discuss the
10 information TUSD had provided for the TPE processes, and the Special Master did not
11 direct TUSD to prepare two additional “plans” for teacher and principal evaluations during
12 the meeting. *Id.* at ¶ 7. Shortly thereafter, TUSD provided the Special Master and
13 Plaintiffs with a detailed memorandum outlining its compliance with USP § IV.H.1 and
14 with the Principal Evaluation Process. *Id.* at ¶ 8 and 9, ECF 1666-9 at 144-149; ECF 1666-
15 8 at 150-197.

16 In September 2013, the Special Master for the first time asserted that TUSD had not
17 shared its TPE processes. *Id.* at ¶ 12; ECF 1666-10 at 12-13. On October 11, 2013, Mr.
18 Brown notified the Special Master and Plaintiffs that TUSD planned to provide revisions to
19 its TPE processes in April 2014 at the earliest and did not state that TUSD would be
20 submitting any “plan.” *Id.* at ¶ 13 and ECF 1666-9; ECF 1666-10 at 14-15. Mr. Brown
21 later confirmed, in person with the Special Master his understanding that separate “plans”
22 on TPE were not required by the USP and were not being prepared by the District. *Id.* at ¶
23 14; *see also* Decl. Foster at ¶ 6. Following that meeting, the Special Master clarified that
24 TPE processes are *not* “plans” and are not subject to USP § I.D.1 review, but rather were
25 monitored by the Implementation Committee. Decl. Brown at ¶ 15; ECF 1666-10 at 16-21.
26 Specifically, his email stated, “The review of [revisions to the] teacher and principal
27 evaluation is described as procedure, what will be involved, when, etc. The IC will monitor
28 the content and report to the Plaintiffs accordingly.” *Id.*

Rusing Lopez & Lizardi, P.L.L.C.
 6363 North Swan Road, Suite 151
 Tucson, Arizona 85718
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1 In addition to the extrinsic evidence supporting TUSD’s reading of the plain USP
 2 language that it is not required to develop a TPE plan, under the *Taylor* analysis outlined
 3 above, the court must exclude any extrinsic evidence that contradicts or varies the words
 4 written in the agreement. Therefore, any extrinsic evidence the R&R suggests to contradict
 5 § IV.H.1 must be excluded. The extrinsic evidence the R&R presents falls into this
 6 category. For example, the Special Master states he “tried to make it easier for the District
 7 to submit an Action Plan on [TPE] by suggesting that the Action Plans focus on procedures,
 8 rather than the detailed content of the instruments.” ECF 1666-1 at 5. He supports his
 9 contention a plan is required by stating “[t]eachers are the single most important influence
 10 on student learning and effective teaching and student learning are influenced importantly
 11 by principals.” *Id.* at 7. TUSD would never diminish the importance of teachers or
 12 principals in education, but statements like this do nothing to “give effect to the intention of
 13 the parties at the time the contract was made.” *See Taylor*, 175 Ariz. at 153. As stated in
 14 Section II, the Court’s review is confined to whether TUSD’s actions are constitutional and
 15 conform to the USP, *not* whether they conform to the Special Master’s preferences.³

16 IV. CONCLUSION

17 Based on the foregoing, TUSD respectfully requests that the Special Master’s Third
 18 Amended R&R on Teacher and Principal Evaluation Procedures (ECF 1666) be denied.

19 DATED this 10th day of September, 2014.

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

21 s/ J. William Brammer, Jr.

22 J. William Brammer, Jr.

23 Oscar S. Lizardi

24 Michael J. Rusing

25 Patricia V. Waterkotte

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

28 ³ Plaintiff-Intervenor Department of Justice has objected to the Special Master’s recently
 filed First Annual Report (ECF 1641, 1641-1) on the basis that “educational principles such
 as ‘continuous school improvement’ [which the Special Master cited as a principle
 underlying the USP] are not the legal standard, and consequently not the appropriate
 standard by which to assess the District’s progress towards desegregation.” ECF 1662 at 3.

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 **ANDREW H. MARKS**
7 Attorney for Special Master
8 Law Office of Andrew Marks PLLC
9 1001 Pennsylvania Ave., NW
10 Suite 1100
11 Washington, DC 20004
12 amarks@markslawoffices.com

13 **LOIS D. THOMPSON CSBN 093245**
14 **JENNIFER L. ROCHE CSBN 254538**
15 Attorneys for Mendoza Plaintiffs
16 Proskauer Rose LLP
17 2049 Century Park East, Suite 3200
18 Los Angeles, California 90067
19 (310) 557-2900
20 lthompson@proskauer.com
21 jroche@proskauer.com

22 **JUAN RODRIGUEZ, CSBN 282081**
23 **THOMAS A. SAENZ, CSBN 159430**
24 Attorneys for Mendoza Plaintiffs
25 Mexican American LDEF
26 634 S. Spring St. 11th Floor
27 Los Angeles, CA 90014
28 (213) 629-2512
jrodriguez@maldef.org
tsaebz@maldef.org

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

ANURIMA BHARGAVA
ZOE M. SAVITSKY CAN 281616
Attorneys for Plaintiff-Intervenor
Educational Opportunities Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, SW
Patrick Henry Building, Suite 4300
Washington, DC 20530
(202) 305-3223
anurima.bhargava@usdoj.gov
zoe.savitsky@usdoj.gov

1 JULIE TOLLESON ASBN 012913
2 Tucson Unified School District
3 Legal Department
4 1010 E 10th St
5 Tucson, AZ 85719
6 520-225-6040
7 Julie.Tolleson@tusd1.org

8
9
10
11
12
13
14
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16
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20
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22
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s/ Jason Linaman _____

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