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**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,

**OBJECTION TO SPECIAL  
MASTER'S REPORT AND  
RECOMMENDATION  
REGARDING TUSD'S  
COMPREHENSIVE MAGNET  
PLAN (ECF 1730)**

v.

Anita Lohr, et al.,

Defendants,

CV 74-204 TUC DCB  
(Consolidated Case)

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.

## I. INTRODUCTION

Defendant TUSD objects to the Special Master's Report and Recommendation regarding the District's Comprehensive Magnet Plan. This objection is made on the grounds that the Magnet Plan complies with the USP and the Constitution and, accordingly, should not be disturbed.

The R&R makes recommendations on four issues: 1) whether the Magnet Plan criteria for withdrawing magnet status should be modified; 2) whether the Magnet Plan process for withdrawal of magnet status is "too slow;" 3) whether the Court should determine that there are "too many" magnet schools in TUSD; and 4) whether the Court should make a determination whether Cragin Elementary School, Mansfeld Middle School, and Utterback Middle School should continue as magnet schools.

The recommendations largely relate to the Magnet Plan approved by the District's Governing Board in July, 2014. Since then, TUSD twice has proposed revisions in an attempt to satisfy all of the Plaintiffs' and Special Master's concerns, including revised drafts submitted on November 7 ("First Revised Plan") and November 17 ("Second Revised Plan"). Accordingly, TUSD respectfully requests the Court reject the R&R in its entirety, refuse to permit the Special Master to serve as a "super school board," and permit TUSD to adopt and implement the Second Revised Plan.

## II. STANDARD OF REVIEW

The R&R does not suggest that TUSD's Magnet Plan is unconstitutional, so the Court's review is confined to whether it conforms to the USP. *See United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1360 (N.D. Ind. 1981). *See also Mendoza v. United States*, 623 F.2d 1338, 1345 (9th Cir. Ariz. 1980)("If the school officials present a plan which will correct the violations found, and it does not infringe upon other rights in the process, the District Court must approve that remedy even if the Court does not believe it was the most desirable plan which could have been selected."). Just as the Special Master is not empowered to "act as a super school board" when evaluating a

1 desegregation plan, neither is the Court given such authority. *See Webster Eisenlohr, Inc. v.*  
 2 *Kalodner*, 145 F.2d 316, 319 (3rd Cir. 1944) (master appointed pursuant to Rule 53  
 3 “operates as an arm of the court” and therefore “the master’s function can go no further than  
 4 to aid in the court’s discharge of its duties”).

### 5 **III. THE DISTRICT’S MAGNET PLAN COMPLIES WITH THE USP**

6 The USP sets forth a detailed framework for the development of a magnet plan,  
 7 including a process and schedule for withdrawal of magnet status. *See* USP § X.E.3.<sup>1</sup>  
 8 Nowhere in his R&R does the Special Master charge that the proposed plan violates the  
 9 USP. Instead, the entire R&R is filled with the Special Master’s alternative proposals and  
 10 policy preferences.

11 The USP does not mandate that any particular magnet program must be eliminated.  
 12 Instead, the USP requires the District to develop a criteria and process for the examination  
 13 and potential elimination of magnet schools. USP § II.E.3.<sup>2</sup> The Magnet Plan does exactly  
 14 that.

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15 <sup>1</sup> USP § X.E.3: “In creating the Plan, the District shall, at a minimum: (i) consider  
 16 how, whether, and where to add new sites to replicate successful programs and/or add new  
 17 magnet themes and additional dual language programs,<sup>2</sup> focusing on which geographic  
 18 area(s) of the District are best suited for new programs to assist the District in meeting its  
 19 desegregation obligations; (ii) improve existing magnet schools and programs that are not  
 20 promoting integration and/or educational quality; (iii) consider changes to magnet schools  
 21 or programs that are not promoting integration and/or educational quality, including  
 22 withdrawal of magnet status; (iv) determine if each magnet school or school with a magnet  
 program shall have an attendance boundary; (v) determine admissions priorities/criteria for  
 each magnet school or program and a process for review of those criteria; and (vi) ensure  
 that administrators and certificated staff in magnet schools and programs have the expertise  
 and training necessary to ensure successful implementation of the magnet.”

23 <sup>2</sup> USP § X.E.3: “Pursuant to these considerations, the Magnet School Plan shall, at a  
 24 minimum, set forth a process and schedule to: (vii) make changes to the theme(s),  
 25 programs, boundaries, and admissions criteria for existing magnet schools and programs in  
 26 conformity with the Plan’s findings, including developing a process and criteria for  
 27 significantly changing, withdrawing magnet status from, or closing magnet schools or  
 28 programs, that are not promoting integration or educational quality; (viii) add additional  
 magnet schools and/or programs for the 2013-2014 school year as feasible and for the 2014-  
 2015 school year that will promote integration and educational quality within the District,  
 including increasing the number of dual language programs; (ix) provide necessary training  
 and resources to magnet school and program administrators and certificated staff; (x)

1 **IV. THE RECOMMENDATIONS REGARDING THE MAGNET PLAN**  
 2 **CRITERIA ARE LARGELY MOOT AND SHOULD BE REJECTED**

3 The R&R devotes considerable space to an issue already resolved: the number and  
 4 kind of criteria to use when evaluating magnet status. ECF 1730-1 at 9-11. The July  
 5 Magnet Plan proposed five criteria: Diversity, Innovative Curriculum, Academic  
 6 Excellence, High Quality Instructional Systems, and Family and Community Partnerships.  
 7 ECF 1730-2. However, pursuant to feedback from the Special Master (supported by the  
 8 Fisher and Mendoza Plaintiffs), the revised Plan distills those down to two: integration and  
 9 academic achievement. ECF 1721-19 (First Revised Plan) and ECF 1730-12 (Second  
 10 Revised Plan).<sup>3</sup>

11 The R&R acknowledges TUSD already has agreed to limit evaluation criteria to  
 12 integration and academic achievement. Declaration of Steven Holmes (“Decl. Holmes”) ¶  
 13 4. The USP and this Court’s orders require there be an ongoing disagreement between  
 14 Plaintiffs and the District before the Special Master may make a recommendation to the  
 15 Court. *See* USP § I.D.I, ECF 1510 at 8, ¶ 4-12, 1529 at 7-10. Accordingly, as there is no  
 16 disagreement to resolve, the recommendation regarding the same should be disregarded.  
 17

18 The Second Revised Plan is ready to go to the Governing Board. Decl. Holmes ¶ 4.

19 Recommendations Regarding Measures for Integration: The Special Master’s  
 20 recommendation for this measure already is incorporated into the Second Revised Plan.  
 21 ECF 1730-12 at 20 (“The enrollment at entry level grades from year to year on the 40<sup>th</sup> day  
 22 will be compared to prior years. If schools do not meet Pillar I, schools will set specific  
 23

24 include strategies to specifically engage African American and Latino families, including  
 25 the families of English language learner (“ELL”) students; and (xi) identify goals to further  
 26 the integration of each magnet school which shall be used to assess the effectiveness of  
 efforts to enhance integration at the school.”

27 <sup>3</sup> The Second Revised Plan attached to the R&R contains a notation date of  
 28 12/8/2014 at the bottom of the document’s pages. TUSD does not know where that date  
 came from; it was not present on the Second Revised Plan when transmitted to the Special  
 Master and Plaintiffs on November 17, 2014.

1 recruitment goals. Progress toward meeting Pillar I will be measured by students enrolled  
 2 in entry grade levels (Kindergarten, 6<sup>th</sup> grade, 9<sup>th</sup> grade). The baseline year will be 2013-14.  
 3 For each year after, schools will show progress toward meeting integration using 40<sup>th</sup> day  
 4 data.”) Accordingly, this recommendation is moot.

5  
 6 Recommendations Regarding Measures for Academic Achievement: The Magnet  
 7 Plan measures academic success by comparing annual student achievement data to the state  
 8 median. ECF 1730-12 at 20. Magnet schools and programs are to be evaluated based upon  
 9 the state criteria for assignment of letter grades to Arizona schools.<sup>4</sup> ECF 1730-12 at 20-21.  
 10 The R&R refers to Arizona’s criteria as TUSD’s proposal for “multi-dimensional rubric for  
 11 scoring.” ECF 1730-1 at 13. The Special Master recommends that there is no need for state  
 12 criteria and the “cut off” points should be determined [*a*] *priori* based on reasonable  
 13 estimates that ultimate goals can be attained.” ECF 1730-1 at 13. Not only does the R&R  
 14 fail to recommend an alternative measure for academic success, it fails to set forth any  
 15 justification for disregarding state letter grades as a measure of school academic  
 16 achievement.<sup>5</sup>

17  
 18  
 19 <sup>4</sup> The criteria are: Standard A.1: For each year, beginning 2014-15, a higher  
 20 percentage of students will score higher than the state median in reading and math on the  
 21 state assessment. Standard A.2: The academic growth of all students at magnet schools is  
 22 higher than the state median growth in reading and math. Standard A.3: For each year, the  
 23 growth of the bottom 25% of students at magnet schools is higher than the state median  
 24 growth. Standard A.4: The growth of the subgroups at the magnet school is greater than  
 25 the state median growth of subgroups (this measure is intended to close achievement gaps  
 26 between racial groups at a higher rate than the state median, ECF 1730-12 at 19). ECF  
 27 1730-12 at 8.

28 <sup>5</sup> Additionally, TUSD notes the Mendoza Plaintiffs seek reinstatement of the  
 following language, present in the July Magnet Plan, and which was omitted in subsequent  
 revisions: “[t]he achievement gaps between the racial groups participating in magnet  
 programs will be less than the achievement gaps between racial groups not participating in  
 magnet programs.” ECF 1730-11 at 1-2. TUSD removed that language at the request of  
 the Special Master, Decl. Holmes ¶ 6. However, TUSD was, and remains, willing to  
 include that language in the Second Revised Plan as an additional academic achievement  
 measure. Decl. Holmes ¶ 6.

1 The Special Master also recommends, without a supporting reason and for the first  
2 time in his R&R filings (ECF 1721 & 1730), that schools should not be allowed to set their  
3 own magnet status goals. ECF 1730-1 at 13. Goal-setting based on site input is appropriate  
4 because school staff and leadership have the most knowledge about their own  
5 programming. Decl. Holmes ¶ 5. Schools' individual goals also are subject to final review  
6 by the Director of Magnet Programs, Victoria Callison, Ed.D, and District leadership. Decl.  
7 Holmes ¶ 5. Accordingly, this recommendation should be rejected.

8 **V. RECOMMENDATIONS REGARDING THE PROCESS FOR**  
9 **WITHDRAWAL SHOULD BE REJECTED**

10 The Special Master recommends two changes to the process for withdrawal of  
11 magnet status. ECF 1730-1 at 15-16. First, he recommends TUSD use “the criteria  
12 developed in response to the recommendation in the discussion of Objection Three [on  
13 Magnet Plan criteria]”. ECF 1730-1 at 15. *See* Section IV above on magnet criteria.  
14 Second, the Special Master recommends decisions on magnet status can be made at the  
15 beginning of the year based solely on whether a school's incoming class is fully integrated  
16 as defined by the USP. ECF 1730-1 at 15-16. He asks the Court to deny an academically  
17 successful magnet school time to improve its demographic diversity based on a zero  
18 tolerance application of his “integration standard,” even where such program is trending in  
19 the right directly. *Id.*

20 Under the Second Revised Plan, the process for withdrawal of magnet status allows  
21 programs until June 2017 to move to Excelling (meeting both integration and achievement  
22 standards). ECF 1730-12 at 20. However, schools or programs may have an opportunity to  
23 improve if not meeting one or both of the criteria by creating a “Magnet Improvement  
24 Plan.” *See* ECF 1730-12 at 23 (plan description); ECF 1721-19 at 63-64; ECF 1721-19 at  
25 60-64 (improvement plan forms). Magnet schools meeting both criteria will prepare a  
26 magnet sustainability plan. *See* ECF 1730-12 at 22 (plan description); ECF 1721-19 at 65-  
27 67 (sustainability plan form).  
28

1 TUSD drafted the Magnet Plan process in this manner because those schools  
2 showing improvement in school letter grade (*e.g.*, moving from a C to a B), are likely to  
3 move towards integration because of increased demand for enrollment. Decl. Holmes ¶ 7.<sup>6</sup>

4 Additionally, the Special Master's reason for making a magnet status decision at the  
5 beginning of the year based upon integration alone does not make sense. He posits doing so  
6 would speed up the withdrawal of magnet status and the process for reallocating funds to  
7 new magnet programs. ECF 1730-1 at 16. However, this is not the case. The R&R fails to  
8 take into account the USP's mandate that the District "shall allow all students currently  
9 enrolled in a magnet school or program to remain in that program until they complete the  
10 highest grade offered by that school." USP § II.E.1. Thus, even if magnet status is  
11 withdrawn, funding still will flow to that particular school for up to five more years, and  
12 reallocation to another magnet will not be expedited by rushing the determination.  
13 Accordingly, the Court must defer to the District's well-reasoned, USP- and Constitution-  
14 compliant proposal.

15 Most importantly, immediate demagnetization of a magnet school for not meeting  
16 integration standards is contrary to the USP requirement that TUSD must "improve existing  
17 magnet schools and programs that are not promoting integration and/or educational  
18 quality." USP § II.E.3. If magnet status is withdrawn immediately based solely on the  
19 integration criterion, the opportunity to improve the school academically will be  
20 significantly jeopardized.

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21  
22  
23 <sup>6</sup> TUSD is aware of schools that, in the past, did not see an immediate increase in  
24 integration following an increase in school letter grade by the state. Decl. Holmes ¶ 8.  
25 However, prior to the USP, TUSD's legal standard was elimination of segregation to the  
26 extent practicable, requiring no affirmative efforts to market academically improving  
27 schools for integration purposes. Now, TUSD operates under the USP which, although the  
28 same legal standard for desegregation still applies, requires more — that TUSD attempt to  
integrate all of its schools (no single racial or ethnic group exceeds 70% of the school's  
enrollment) to the extent practicable. USP§ II.B.2. Accordingly, academically improving  
magnets are more likely to achieve integration now because TUSD will be marketing its  
academic successes for integration purposes. Decl. Holmes ¶ 8.

1           **VI. THE NUMBER OF MAGNET SCHOOLS COMPLIES WITH THE**  
 2           **USP AND MUST BE RESOLVED BY THE MAGNET PLAN PROCESS**

3           The Fisher Plaintiffs contend there are too many magnet schools in TUSD. ECF  
 4 1721-14 at 1-2.<sup>7</sup> They, however, provided no supporting evidence or expert opinion, and  
 5 none exists in the record. They likewise make no specific alternate proposal or suggestion  
 6 how the Magnet Plan should be revised. The USP does not authorize the Special Master or  
 7 the Court to set a maximum or minimum number of magnet schools or programs. The  
 8 Special Master concurs. ECF 1730-1 at 7.<sup>8</sup>

9           **VII. THE WITHDRAWAL OF ANY MAGNET SCHOOL MUST BE**  
 10           **RESOLVED BY THE MAGNET PLAN PROCESS**

11           Although TUSD appreciates Plaintiffs' concerns regarding Utterback and Cragin<sup>9</sup>,  
 12 any decisions regarding the creation, continuation or withdrawal of magnet status must  
 13 occur within the USP's Magnet Plan process. The Special Master concurs in his  
 14 recommendation, finding that these schools should not be disturbed and the District should  
 15 determine any changes to these magnets through the USP process in the Magnet Plan. ECF  
 16 1730-1 at 6. As such, the USP does not permit the Special Master or the Court to eliminate  
 17 any specific magnets outside the USP's Magnet Plan process.

18 \_\_\_\_\_  
 19           <sup>7</sup> The R&R states the Mendoza Plaintiffs also argued this directly or indirectly. To  
 20 the contrary, nothing in the record supports that the Mendoza Plaintiffs join in the Fisher  
 21 Plaintiffs' objection to the number of magnets.

22           <sup>8</sup> In connection with this objection, the Special Master refers to his proposed  
 23 recommendations for changing the criteria and process in the Magnet Plan. Those are  
 24 addressed separately below.

25           <sup>9</sup> See Decl. Holmes ¶ 2. Although TUSD understands Plaintiffs' concerns regarding  
 26 Utterback and Cragin, TUSD disagrees with the Mendoza Plaintiffs' assessment of  
 27 Mansfeld. Mansfeld shows great promise for achieving integration. Mansfeld's location,  
 28 across the street from the University of Arizona is perfect for partnerships with the  
 University and is easily accessible to professionals working at the University and in nearby  
 downtown. ECF 1721-17 at 3; Decl. Holmes ¶ 3. Additionally, Mansfeld's integration  
 suffered when it absorbed students from Maxwell during its temporary closure reducing the  
 number of enrollment seats available. Maxwell's 6<sup>th</sup> grade reopened last year, 7<sup>th</sup> grade  
 opened this year and 8<sup>th</sup> grade will be added next year. The additional space capacity likely  
 will have a positive impact on Mansfeld's integration. Decl. Holmes ¶ 3. The continuation  
 of Mansfeld also should occur within the USP process in the CMP.



**VIII. CONCLUSION**

Based on the foregoing, TUSD respectfully requests that the Court reject the R&R and permit TUSD to submit the Second Revised Magnet Plan to the TUSD Board for approval.

DATED this 19<sup>th</sup> day of December, 2014.

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