

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

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

4 J. William Brammer, Jr. (State Bar No. 002079)
wbrammer@rllaz.com
5 Oscar S. Lizardi (State Bar No. 016626)
olizardi@rllaz.com
6 Michael J. Rusing (State Bar No. 006617)
mrusing@rllaz.com
7 Patricia V. Waterkotte (State Bar No. 029231)
pvictory@rllaz.com

8 **TUCSON UNIFIED SCHOOL DISTRICT**

9 LEGAL DEPARTMENT
10 1010 E. TENTH STREET
TUCSON, AZ 85719
(520) 225-6040

11 Julie C. Tolleson (State Bar No. 012913)
12 Julie.Tolleson@tusd1.org
Samuel E. Brown (State Bar No. 027474)
13 Samuel.Brown@tusd1.org

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

15 **IN THE UNITED STATES DISTRICT COURT**

16 **FOR THE DISTRICT OF ARIZONA**

17 Roy and Josie Fisher, et al.,
18 Plaintiffs

19 v.

20 United States of America,
21 Plaintiff-Intervenor,

22 v.

23 Anita Lohr, et al.,
24 Defendants,

25 and

26 Sidney L. Sutton, et al.,
27 Defendants-Intervenors,

CV 74-90 TUC DCB
(Lead Case)

**RESPONSE TO MENDOZA
PLAINTIFFS' COMMENTS AND
OBJECTIONS TO THE
INDIVIDUAL MAGNET
SCHOOL IMPROVEMENT
PLANS**

CV 74-204 TUC DCB
(Consolidated Case)

1	Maria Mendoza, et al.
2	
3	Plaintiffs,
4	United States of America,
5	
6	Plaintiff-Intervenor,
7	v.
8	Tucson Unified School District No. One, et al.
9	
10	Defendants.

Tucson Unified School District #1 (“TUSD”), by and through undersigned counsel, responds to Mendoza Plaintiffs’ Comments and Objections to the Individual Magnet School Improvement Plans in the TUSD Comprehensive Magnet Plan (ECF 1822) as follows.

I. Introduction

On June 30, 2015, the Mendoza Plaintiffs (the “Mendozas”) filed objections to the individual Magnet school plans TUSD filed on June 19, 2015 (ECF 1816). The Department of Justice and the Fisher Plaintiffs did not file objections to the individual plans. As described herein, many of these objections had been addressed previously in TUSD’s June 26 response (ECF 1819) to the Mendoza Plaintiffs’ June 18 objections to the CMP (ECF 1813). The remaining objections raise errors that TUSD has corrected (in the case of teaching assistants and academic measures) or are based on what appears to be misunderstanding of the individual plans. This response is based upon the declaration of Martha Taylor (“Decl. Taylor”) and the revised school plans attached thereto.

II. The Mendoza Objections Are Fundamentally Improper.

It is axiomatic – and has been oft-repeated in this case – that judicial oversight is constrained to evaluate District policymaking only for compliance with the USP and the Constitution. This Court has correctly stated that it “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

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

1 decisions by the District and will defer to reasonable proposals by the District.” *See* ECF
 2 1477.¹ Once again, however, Mendozas ask this Court to breach that boundary and dive
 3 deep down into the weeds of educational policy. They ask this Court to intervene and
 4 resolve disputes about whether Gifted and Talented Education is better conceived of as a
 5 magnet school theme or an “Advanced Learning Experience.” They suggest that the Court
 6 should decide what goals should be set on what time frames and be the arbiter of whether
 7 certain intervention strategies constitute a “deficit model.” It is telling that the Mendoza
 8 objection contains not a single citation to legal authority.

9 Likewise, the objection cites no USP mandate or prohibition that is implicated by the
 10 site plans.² The USP directed creation of a Comprehensive Magnet Plan containing certain
 11 specific elements, including: a process for changing themes, boundaries, or admissions
 12 priorities, addition of new magnets that will enhance integration/educational opportunity,
 13 provide necessary training and support to magnet school personnel, include student
 14 engagement strategies for students in the plaintiff classes, and set goals for integrating
 15 magnet schools. USP § II(E)(3)(vii-xi). Nowhere does the USP direct the outcomes
 16 Mendozas demand. The Court must decline the invitation to cross the Rubicon.

17 In its Order directing revisions to the CMP and the preparation of individual site
 18 plans, the Court did not suggest it intended to travel the path the Mendozas suggest. The
 19 Court wrote:

22 ¹ *See also Anderson v. Canton Mun. Separate School District*, 232 F.3d 450, 454
 23 (5th Cir. 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *United States v.*
 24 *South Bend Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981); *Richmond*
 25 *Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975); *Swann v. Charlotte-*
 26 *Mecklenburg Bd. of Ed.*, 402 U.S. 1, 12 (1971), quoting *Brown v. Bd. of Ed.*, *Brown II*, 349
 27 U.S. 249, 299 (1955).

28 ² Mendozas do cite the USP’s “focus on access and support for participation in
 Advanced Learning Experiences and the requirements for culturally relevant and
 multicultural courses” as evidence that it conceptually favors asset model strategies (Obj. at
 p. 7, fn. 6) but nothing more.

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that *the District, in consultation with the Special Master, shall work with its schools to prepare the Improvement Plans over the next three months, which shall identify clear and specific annual bench marks for attaining magnet status by SY 2016-17. The Special Master shall monitor compliance by each school regarding its Improvement Plan.* The Special Master shall file reports as necessary with the Court identifying any failure to attain a requisite benchmark, and may accordingly recommend eliminating a magnet school or program, or recommend that the school should be given more time and how much more time should be allowed for the school to reach the missed improvement bench mark. The parties will have 30 days from the filing date of any recommendation that magnet status be withdrawn to file a Response. The Special Master shall file a Reply within 15 days of the filing date of any Response.

ECF 1753 at 18 (emphasis added). Nowhere does the court suggest endless litigation and/or the oversight-by-committee invited by the Mendoza filing. As noted in the District’s Response to the Mendoza objection to the Revised CMP (ECF 1819 at 2-3), staff spent some 70 hours over a four month period consulting with the Special Master and his Implementation Committee to create the plans and revise the CMP. Thereafter, compliance monitoring is entrusted to them. The District asks that the Court – consistent with the legal authority noted above – allow the process that it put in place to move forward without further costly litigation.

III. The Mendoza Objections Fail Substantively

For the reasons discussed above, the Mendozas’ request for judicial intervention on topics like the use of teaching assistants, the selection of magnet themes, and the selection of strategies for student discipline, is improper. Should the Court choose to review those objections on the merits, however, they should be rejected.

A. TUSD Revised the Use of Teaching Assistants in the Davis Plan

The Mendozas object to the use of teaching assistants in the Davis after-school program geared towards the academic bottom 25% of the student body because the CMP provides that that teaching assistants will not be used to support struggling students. TUSD

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

1 has corrected this. *See* Decl. Taylor ¶ 2, Ex. A-1, Revised Davis Plan at p.8 (“Teacher
2 Assistants will be used to support classroom management and will not be providing
3 intervention instruction for students.”)

4 **B. Transportation Will Be Provided**

5 The Mendozas’ objection that transportation is subject to a “minimal fee” and
6 subject to receipt of a grant misconstrues the CMP and re-raises a resolved issue. *See* ECF
7 1819 at 4 (TUSD brief clarifying transportation will be provided). The minimal fee does
8 not refer to transportation – but rather a fee related to an after school program. Additionally,
9 although the CMP refers to a grant, it does not state anywhere that free transportation is
10 contingent upon receipt of the grant as the Mendozas suggest. Indeed, the CMP states that
11 transportation will be provided (ECF 1819-1 at 35) and the Special Master already
12 confirmed for the Plaintiffs that TUSD agreed to provide transportation (ECF 1819-1 at
13 108).

14 **C. The Academic Goals Have Been Revised**

15 TUSD already has agreed to modify individual school goals and benchmarks to
16 ensure they are not lower than current performance. *See* ECF 1819 at 4-5 (TUSD brief) and
17 ECF 1819-1 108 (Special Master confirming agreement to Plaintiffs). TUSD appreciates
18 that the Mendozas have noted three schools (Cholla, Ochoa and Roskruge) where TUSD
19 had not revised that criteria. TUSD now has corrected this goal for these three schools.³
20 *See* Decl. Taylor, ¶ 2, Exs. A-2 – A-4, revised Cholla, Ochoa and Roskruge plans. TUSD
21 also revised the Tucson High plan for the same reason. *See* Ex. A-5.

22
23
24 ³ The Mendozas further complain in a footnote that they do not understand why
25 some schools have more ambitious goals than others (*i.e.*, Borton’s goal to move from a C
26 to an A versus Bonillas’ goal to move from a C to a B). The Mendozas do not request any
27 modification to the CMP or relief from the Court in the context of this complaint.
28 However, to clarify, there is no “one-size fits all” approach to setting goals. TUSD
reviewed the goals of each school on an individual basis and sought to assign realistic goals
based upon the individual circumstances of the school. For various reasons it may take
longer for one school (Bonillas) to move from a C to an A than another school (Borton).

1 **D. There is Nothing Wrong With The Magnet Themes**

2 TUSD already has addressed the Mendozas’ objections concerning asset model
3 strategies. *See* ECF 1819 at 3-4. Furthermore, despite their claim the magnet themes are not
4 “rich” enough, TUSD has not abandoned the development of robust themes. As teachers
5 work in Professional Learning Communities (PLCs), they will be learning more about
6 theme content and working on theme integration along with how to deliver instruction. The
7 Magnet Coordinator, Leadership, and Magnet Department will be monitoring the progress
8 of themes. The Mendozas focus much of their objection on the revision to the Holladay plan
9 because of the removal of expensive art integration consultants from the plan. Holladay
10 does not need consultants to retain its theme, and indeed, has designated fine arts teachers
11 in drama and music and a magnet coordinator developing integrated fine arts curriculum
12 with the teachers.

13 **E. 2015-16 Funding Has Increased For Ochoa, Robison, Holladay &**
14 **Utterback.**

15 The Mendozas object that certain magnet schools are allotted less funds than they
16 were in the original draft school plans submitted to the parties in the July 2014 CMP (the
17 subject of the Court’s January 2015 CMP order). In doing so, they ask this Court to
18 compare the funding in the June 2015 school plans with earlier drafts of the 2014 school
19 plans. However, the preliminary budgets set forth in the 2014 school plans were extremely
20 early figures and they had not yet been vetted in connection with the final 2015-16 budget.
21 Moreover, all budgeting of the school plans reflects TUSD’s best efforts to stretch limited
22 dollars in a way that makes conceptual sense. In any event such a comparison creates an
23 inaccurate impression because when comparing the June 2015 school plans to the budgeted
24 funding of the prior school year, funding for those schools has increased significantly from
25 the prior year:

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

	Ochoa	Robison	Holladay	Utterback
2014-15	\$116,989	\$119,009	\$173,113.	\$332,693
2015-16	\$178,046	\$170,396	\$337,831	\$449,693
Difference	+\$61,057	+\$51,387	+\$164,718	+\$117,000

F. Tully Magnet Is Consistent With the USP

TUSD already has addressed the Mendozas' objections concerning Tully. *See* ECF 1819 at 6-7. TUSD sees this theme as an opportunity to do something creative and different, and perceives the Tully magnet as an opportunity to make an amazing school that is truly unique for Tucson. Although students who tested into GATE will be admitted to Tully, they will be in classrooms with a heterogeneous mix of students receiving gifted and talented instruction. The District is willing to try this progressive approach using other gifted and talented themed magnet schools as examples and resources. This theme is consistent with the USP, and the Court should defer to TUSD's proposal.⁴

G. ELL Strategies Are Addressed Elsewhere.

The Mendozas object that Carrillo, Robison and Ochoa do not specify strategies for success of ELL students as provided in the CMP. The CMP addresses ELL engagement. *See* ECF 1819-1 at 33. Additionally, TUSD already requires teachers to have a Structured English Immersion (SEI) endorsement to work in classrooms, ensuring teachers are proficient in working with ELL students. The work teachers will do in Professional Learning Communities and in Learning Centered Professional Development will address all effective strategies for ELL students. The first instruction a student receives includes SEI strategies as does the small group instruction. Those schools that did not obtain sufficient

⁴ *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.")

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

1 points for ELL for the AZLearns Letter Grade have specific actions in their school plans
2 addressing both teacher learning and providing services for struggling learners and learners
3 in the lower 25%, including ELL students.

4 **H. Goals In School Plans for Reducing Achievement Gaps Are Consistent**
5 **With the CMP**

6 The Mendozas note that certain school plans contain data contemplating reduction of
7 achievement gaps with white students even when that group is not the highest performing
8 group. Individual schools studied their respective achievement gaps. In some schools, they
9 chose to address the lower 25% instead of listing the ethnicity of the students. For some
10 schools, there are only one or two students of an ethnicity and therefore are included in the
11 lower 25%. The closing of the achievement gap will be addressed as sites provide services
12 to the lower 25%. The highest performing ethnic group of most magnet school is “White”
13 with the exception of Cholla where “Hispanic” is the highest performing group.

14 **I. Alternative Funding Will Support Disciplinary Strategies at Safford**

15 The Mendozas object to the removal of strategies addressing disciplinary issues at
16 Safford. The strategies are no longer included within the Safford plan because Title I
17 funding has become available for this purpose for a Dean of Students to assist with
18 behavioral issues. Accordingly, the strategies will be implemented using separate funding
19 because behavioral issues remain a priority at Safford.

20 **IV. Conclusion**

21 In the first instance, the Court should decline the Mendoza invitation into the weeds
22 of school-by-school educational planning. In the alternative, the objections should be
23 rejected on the merits. TUSD respectfully requests that the Court enter an order permitting
24 TUSD to proceed with implementation of the Further Revised Comprehensive Magnet Plan
25 filed on June 26, along with the revised school plans filed herewith.

1 DATED this 7th day of July, 2015.

2
3 **RUSING LOPEZ & LIZARDI, P.L.L.C.**

4 s/ J. William Brammer, Jr.
5 J. William Brammer, Jr.
6 Oscar S. Lizardi
7 Michael J. Rusing
8 Patricia V. Waterkotte
9 Attorneys for Tucson Unified School District No.
10 One, et al.

11 **TUCSON UNIFIED SCHOOL DISTRICT
12 LEGAL DEPARTMENT**

13 Julie C. Tolleson
14 Samuel E. Brown
15 Attorneys for Tucson Unified School District No.
16 One, et al.

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

17 **ORIGINAL** of the foregoing filed via the CM/ECF
18 Electronic Notification System and transmittal of a
19 Notice of Electronic Filing provided to all parties
20 that have filed a notice of appearance in the District
21 Court Case, as listed below.

22 **ANDREW H. MARKS**
23 Attorney for Special Master
24 Law Office of Andrew Marks PLLC
25 1001 Pennsylvania Ave., NW
26 Suite 1100
27 Washington, DC 20004
28 amarks@markslawoffices.com

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JUAN RODRIGUEZ, CSBN 282081
THOMAS A. SAENZ, CSBN 159430
Attorney for Mendoza Plaintiffs
Mexican American LDEF
634 S. Spring St. 11th Floor
Los Angeles, CA 90014
(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
JAMES EICHNER
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
james.eichner@usdoj.gov

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

s/ Jason Linaman