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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,

CV 74-90 TUC DCB
(Lead Case)

**OBJECTION TO REPORT AND
RECOMMENDATIONS
REGARDING THE REVISION
OF TUSD'S COMPREHENSIVE
MAGNET PLAN**

CV 74-204 TUC DCB
(Consolidated Case)

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

8

9 Tucson Unified School District #1 (“TUSD”), by and through undersigned counsel,
 10 objects to Special Master’s Report and Recommendations Regarding the Revision of
 11 TUSD’s Comprehensive Magnet Plan (“R&R”)(ECF 1825) as follows. This objection is
 12 supported by the declaration of Martha Taylor (“Decl. Taylor”).

13 **I. Introduction**

14 The Plaintiffs’ magnet objections, and resulting R&R, raise issues outside the scope
 15 of permissible judicial review. The case authority¹ is clear that this Court is constrained to
 16 evaluate District policymaking only for compliance with the Constitution, the USP and this
 17 Court’s prior orders. Indeed, this Court has made it clear that it “is not here to act as a
 18 ‘super school board’ and is mindful of its role; the Court does not intend to micro-manage
 19 programmatic decisions by the District and will defer to reasonable proposals by the
 20 District.” ECF 1477. Unfortunately, the Plaintiffs continue to burden this Court (and
 21 taxpayer dollars) with time-consuming and costly objections that have nothing to do with
 22 the Comprehensive Magnet Plan’s compliance with the Constitution, USP or this Court’s
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25 ¹ *Anderson v. Canton Mun. Separate School District*, 232 F.3d 450, 454 (5th
 26 Cir. 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *United States v.*
 27 *South Bend Community School Corp.*, 511 F.Supp. 1352 (N.D. Ind. 1981); *Richmond*
 28 *Welfare Rights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975); *Swann v. Charlotte-*
Mecklenburg Bd. of Ed., 402 U.S. 1, 12 (1971), quoting *Brown v. Bd. of Ed.*, *Brown II*, 349
 U.S. 249, 299 (1955).

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1 orders. Accordingly, Plaintiffs' magnet objections, and the resulting R&R, should be
2 denied on this basis alone.

3 Furthermore, TUSD respectfully submits that this Court should instruct Plaintiffs to
4 limit objections filed with the Court to those within the permissible scope of judicial
5 review. If left unfixed, Plaintiffs will continue to ask the Court to micro-manage
6 programmatic decisions within the school district. This is a disservice to the public both in
7 terms of expense (taxpayers pay for every word of the objections and resulting
8 recommendations) and in terms of slowing down the finalizing of plans as they remain in
9 limbo pending judicial resolution of non-USP related objections.²

10 In any event, TUSD has already addressed the vast majority of the recommendations
11 in the R&R, and therefore the R&R should be denied on this additional basis. The R&R
12 fails to acknowledge the revisions TUSD made in its June 26 further Revised
13 Comprehensive Magnet Plan ("June 26 plan")(ECF 1819-1, redline version of June 26 plan
14 begin. at p. 26).³ The June 26 plan reflects the agreements TUSD had reached with
15 Plaintiffs following extensive collaboration which has mooted the majority of the R&R.⁴

16 Additionally, the recommended revisions regarding ELL strategies for Carrillo,
17 Robison and Ochoa are both unnecessary and inappropriate because they do not relate to
18

19 ² TUSD anticipates further programmatic policy objections to be submitted
20 shortly by Plaintiffs in connection with the 2015-16 budget filed on July 15 and principal
21 evaluation plans.

22 ³ A "clean" copy of the June 26 plan without redlines is attached hereto. *See*
23 Decl. Taylor ¶ 2, Ex. A.

24 ⁴ The Compressive Magnet Plan was already the subject of extensive
25 collaboration and then litigation prior to this Court's January 16, 2015 order requiring a
26 Revised Comprehensive Magnet Plan. Following the January 16 order, TUSD
27 administration spent months working with the Special Master and his Implementation
28 Committee member, Dr. Montañó, to revise the plan in accordance with the January 16
order. The time spent reviewing magnet issues and conferring with the superintendent,
assistant superintendent, district administrators and principals is reflected in both the
invoices of the Special Master (7.9 hours in February, 10.9 hours in March, 2.5 hours in
April and 20 hours in May on the Revised Comprehensive Magnet Plan) and of Dr.
Montañó (15 hours in February, 13.5 hours in March, 2.5 hours in April and 3.2 hours in
May on the Revised Comprehensive Magnet Plan). *See* ECF 1819.

1 magnet themes or issues and would be redundant of existing ELL strategies reflected in the
2 Dropout and Retention Plan approved by the Special Master and Plaintiffs.

3 **II. The Recommendations of The Special Master Exceed The Scope of Judicial**
4 **Authority.**

5 As stated above, the Plaintiffs and Special Master continue to invite this Court into
6 areas in which well-established case law directs it not to tread. They seek the power of the
7 federal judiciary to dictate details of educational strategy, while pursuing through litigation
8 every discretionary judgment call with which they do not agree. The District respectfully
9 submits that this costly and litigious process must be stopped, and asks the Court to provide
10 some limiting direction to the parties regarding the limits of judicial intervention in
11 accordance with the oft-cited case law on this topic.

12 The R&R does not suggest that TUSD's June 26 plan is unconstitutional or violates
13 a USP mandate. *Compare United States v. South Bend Community School Corp.*, 511 F.
14 Supp. 1352, 1360 (N.D. Ind. 1981). *See also Mendoza v. United States*, 623 F.2d 1338,
15 1345 (9th Cir. Ariz. 1980) ("If the school officials present a plan which will correct the
16 violations found, and it does not infringe upon other rights in the process, the District Court
17 must approve that remedy even if the Court does not believe it was the most desirable plan
18 which could have been selected."). Just as the Special Master is not empowered to "act as a
19 super school board" when evaluating a desegregation plan, neither is the Court given such
20 authority. *See Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 319 (3rd Cir. 1944)
21 (master appointed pursuant to Rule 53 "operates as an arm of the court" and therefore "the
22 master's function can go no further than to aid in the court's discharge of its duties").

23 The USP establishes a detailed framework for magnet plan development. *See* USP §
24 II.E.3. Nowhere in his R&R does the Special Master charge that the June 26 plan or the
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1 individual school improvement plans violate either the USP or this Court's January 16,
2 2015 order requiring a Revised Comprehensive Magnet Plan.⁵

3 **III. The Comprehensive Magnet Plan Requires No Further Revision**

4 The Special Master reports the agreements reached to resolve Plaintiffs' objections
5 are not reflected in the "June 19 plan" attached as Exhibit H to his R&R.⁶ *See* R&R at 16.
6 However, recommendations (a-h) are moot because they are reflected in the June 26 plan
7 and/or the individual school improvement plans. *See* ECF 1819-1 at 26 (June 26 plan); ECF
8 1816 (school plans). Each of the Special Master's recommendations (a-h) and
9 "clarifications" (1-5) require no further revisions and are addressed as follows:

10 **Recommendations**

11 **A. "Ochoa Elementary School will not be a lighthouse school."**

12 All references to Ochoa Elementary School as a lighthouse school have been
13 removed from the Ochoa plan (ECF 1816 at 74-80) and the June 26 plan (ECF 1819-1 at
14 30).

19 ⁵ The R&R mischaracterizes TUSD's prior response to the Mendozas'
20 objections to the school plans (ECF 1824) by claiming that the DOJ and TUSD repeatedly
21 attempt to "narrow the range of issues that the plaintiffs and the Special Master can
22 address." R&R at 17. TUSD simply asks this Court to review the June 26 plan and
23 Plaintiffs' objections thereto in accordance with the applicable legal standards under the
24 USP, this Court's prior orders and the applicable case law (summarized above). The
25 Mendozas' objections to the school plans (ECF 1816) were not permitted by the magnet
26 order (ECF 1753 at 18) but nonetheless ask the Court to engage in policy-making decisions
27 unrelated to compliance with the USP, this Court's prior orders, and the Constitution.

28 ⁶ It is not clear what "plan" the Special Master refers to here. TUSD's June 19
filing attached only the revised individual school plans (ECF 1816). However, Exhibit H to
the R&R appears to be the text of an email from Richard Foster to the Special Master, the
Special Master's list of stipulations, and TUSD's July 7 response to the Mendoza Plaintiffs'
Comments and Objections to the Individual School Improvement Plans (ECF 1824). None
of these documents point to *any* version of the CMP.

1 **B. “Categories will no longer be used.”**

2 All references to “categories”⁷ of schools have been removed from the school plans
3 (ECF 1816) and the June 26 plan (ECF 1819-1 at 30).

4
5 **C. “Magnet funding will not be continued beyond the year in which funding
6 is withdrawn, but schools that had been magnet schools will be funded as
7 needed to meet student needs. This can exceed formula funding.”**

8 The June 26 plan reflects this agreement regarding magnet funding. *See* ECF 1819-1
9 at 36 (“If a magnet is eliminated because of lack of progress in improving student
10 achievement, magnet funding will not be continued beyond the year in which funding is
11 withdrawn. However, schools that lose magnet status will be funded as needed to meet
12 student needs. In this case, schools will be allowed to exceed formula funding.”)

13 **D. “Recommendations with respect to integration will take place no later
14 than October in each of the two school years remaining, and
15 recommendations relating to academic performance will be made as soon
16 as data from the previous year becomes available.”**

17 The Schedule for Magnet Programs in the June 26 plan was revised in accordance
18 with this agreement. *See* ECF 1819-1 at 36-37.

19 **E. “Transportation will be provided to all students who are involved in
20 activities beyond the school days when individual magnet school plans
21 call for such learning activities.”**

22 The June 26 plan reflects the transportation agreement. *See* ECF 1819-1 at 35 (“After
23 school tutoring and Saturday school will include transportation”).⁸

24 **F. “There is no “exclusionary option” either now or in the future.”**

25 All references to “exclusionary option”⁹ have been removed from the school plans
26 (ECF 1816) and the June 26 plan (ECF 1819-1 at 30).

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⁷ Prior drafts of the magnet plan created three categories of magnet school improvement (Excelling, Strategic and Intensive) so that Intensive schools could receive much different support than those categorized as Strategic or Excelling. This was removed to resolve Plaintiffs’ objections.

⁸ This sentence previously provided that transportation “may” be provided. The redline version filed on June 26 added that it “will” be provided.

1 **G. “Goals for individual schools must be at least as high as the current**
 2 **school measures of academic performance.”**

3
 4 Prior to the July 9 R&R, TUSD filed revised school plans (ECF 1816 on June 19)
 5 and further revised plans for Cholla, Ochoa and Roskruge (ECF 1824-1 at 14-56 on July 7)
 6 correcting benchmarks to align with this agreement.

7 **H. “Paraprofessionals will not be used to provide remediation for students**
 8 **who are underachieving.”**

9 The June 26 plan reflects this agreement regarding paraprofessionals. *See* ECF 1819-
 10 1 at 34 (“Balancing a full classroom and providing small group and individualized learning
 11 can be a challenge for the best of teachers. Teacher Assistants in the classroom can provide
 12 the support needed so that all students can succeed by providing guidance and direction
 13 while the teacher works with small groups or one-on-one.”)

14 **Clarifications**

- 15 **1. “On page 4 of the overall plan, the role of the Special Master in**
 16 **development of the plan is characterized as “supervisory.” The Special**
 17 **Master has not dictated any particular strategy nor did the Special**
 18 **Master supervise any personnel. The Special Master did work closely**
 19 **with the District and many of his suggestions were incorporated in the**
 20 **plan.”**

21 The phrase “[u]nder the supervision of the Special Master” was removed in the June
 22 26 plan.¹⁰ *See* ECF 1819-1 at 30.

23 ⁹ The District created an exclusionary option for schools that are highly
 24 performing but have little chance of integrating. For example, the District had selected
 25 Ochoa for this exclusionary option. This option, called Lighthouse, involves creating a lab
 26 school environment where highly successful teachers share their expertise and classrooms
 27 as models. As a Lighthouse School, Ochoa would have no longer been a magnet school and
 28 would have accepted only open enrollment and neighborhood students. The school would
 have continued to receive magnet funding for three years beginning in 2015-16. This was
 removed to resolve Plaintiffs’ objections.

¹⁰ In addition, this proposed “clarification” fails procedurally. Each
 recommendation must be made upon a Plaintiff’s request for judicial review and include an
 explanation of the parties’ disagreement along with the Special Master’s recommendation
 for resolution. *See* ECF 1713 at 6-7, USP § I.D.I (“If any disagreements cannot be resolved
 within (30) days from the date Plaintiffs provide their comments to the district, the Special

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2. **“The Special Master does not endorse the establishment of Carrillo as a communication and creative arts school as it suggested he did on page 4. The Special Master has consistently urged that Carrillo be what the District now wants to call a lighthouse school and that it lose its magnet status. There is no reason to add a new theme to a school that may result in diminishing the school’s rather extraordinary achievements as an A school.”**

The phrase “[u]nder the supervision of the Special Master” was removed in the June 26 plan. *See* ECF 1819-1 at 30. This removes any suggestion that he endorsed specific aspects of the plan, including establishment of Carrillo as a communication and creative arts school.

3. **“On page 5, the plan says that schools show substantial progress towards integration will have until June 2017 to meet the USP integration standards. That is not correct. The Special Master will be making recommendation to the court with respect to the magnet status based on integration no later than October 2015 and then again no later than October 2016. For schools that lose magnet status in the fall of 2016, there would be no way that such a school could change its integration status.”**

The Special Master can make a recommendation to the Court at any time in his supervisory role, however this does not require a revision to the June 26 plan. Rather, any disputes about magnet status can be resolved at the time they are raised. The plan does envision that a school making substantial progress the first year can and should be given an opportunity to continue its efforts for another year.

4. **“On page 6, the plan says that funding for D schools is to be focused on student achievement. While this may make sense, the plan also allows some D schools to use magnet funding to improve their integration status.”**

Magnet funding at all sites has both academic support components and some components related to student recruitment/marketing (*i.e.*, integration). Revision is not necessary because schools must meet both pillars to retain their status. Although the

Master shall report such disagreements to the Court together with his recommendation concerning how the disagreement(s) should be resolved”), ECF 1510 at 8, lines 4-12, ECF 1510 at 8, lines 14- 17, ECF 1529 at 5-10 (same). Accordingly, a *request by the Plaintiffs* for an R&R and an *unresolved disputed issue* are both prerequisites for an R&R. No Plaintiff requested this clarification regarding supervision of the Special Master.

1 “focus” at several underperforming schools can and should be student achievement, given
 2 that this is a desegregation case, simply allowing funds to be used to support integration is
 3 manifestly permissible.

4
 5 **5. “In the June 11 version of the plan, a schedule for briefings, reviews, and
 6 comments is described on page 9. This schedule is not correct and should
 7 be updated.”**

8 The June 26 plan has the revised briefing schedule. *See* ECF 1819-1 at 36-37.

9 **IV. ELL Strategies Are Already In Place**

10 The Mendoza Plaintiffs object that the plans for three schools (Carrillo, Robison and
 11 Ochoa) do not specify strategies for success of ELL students. The Special Master
 12 recommends that the Court require TUSD to identify specific strategies for these schools.
 13 As described in TUSD’s response to the Mendozas’ objections to the school plans, ELL
 14 strategies are addressed elsewhere. *See* ECF 1824 at 7-8. Indeed, ELL support is the subject
 15 of an entirely separate budget activity code, funded at \$8 million. The ELL support in place
 16 was the subject of lengthy collaboration and negotiations with the Special Master and
 17 Plaintiffs, and is reflected in the Dropout and Retention Plan dated January 30, 2015 and
 18 revised March 13, 2015. *See* Taylor Decl. ¶ 3, Ex. B. The ELL strategies in place under
 19 the Dropout and Retention Plan already apply to Carrillo, Robison and Ochoa. Any order
 20 directing a revision to the June 26 plan or school plans would be duplicative of or,
 21 depending on its content, inconsistent with the strategies already in place. Accordingly, the
 22 ELL recommendation is both unnecessary and inappropriate and should be rejected.

23 **V. Conclusion**

24 Neither the Plaintiffs nor the R&R suggest that TUSD’s June 26 plan is
 25 unconstitutional, violates a USP mandate, or any of this Court’s orders. Accordingly, the
 26 Court should neither dip its toe, nor take the invited dive, into the waters of school district
 27 policy-making. Plaintiffs’ objections and the R&R should be denied on this basis alone.
 28 TUSD respectfully requests the Court to issue an order instructing Plaintiffs to confine
 future objections to issues within the scope of permissible judicial review.

1 Furthermore, the R&R should be denied on the additional basis that the
2 Comprehensive Magnet Plan requires no further revision for the reasons described above.
3 TUSD requests that the Court also enter an order permitting TUSD to proceed with
4 implementation of the Further Revised Comprehensive Magnet Plan filed on June 26 (a
5 clean version of which is attached hereto as Exhibit A), along with the revised school
6 improvement plans filed on June 19 (as amended by the school plans filed on July 7).

7 DATED this 20th day of July, 2015.

8
9 **RUSING LOPEZ & LIZARDI, P.L.L.C.**

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23 **ORIGINAL** of the foregoing filed via the CM/ECF
24 Electronic Notification System and transmittal of a
25 Notice of Electronic Filing provided to all parties
26 that have filed a notice of appearance in the District
27 Court Case, as listed below.

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