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12 **UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF ARIZONA**

14 Roy and Josie Fisher, et al.,

15 Plaintiffs,

16 v.

17 United States of America,

18 Plaintiff-Intervenors,

19 v.

20 Anita Lohr, et al.,

21 Defendants,

22 Sidney L. Sutton, et al.,

23 Defendant-Intervenors,

Case No. 4:74-CV-00090-DCB

**MENDOZA PLAINTIFFS' MOTION TO STRIKE TUCSON UNIFIED SCHOOL DISTRICT'S OBJECTION TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS RELATING TO PRINCIPAL AND TEACHER EVALUATIONS (ECF 1845) OR, IN THE ALTERNATIVE, TO PROVIDE THE PLAINTIFFS AND THE SPECIAL MASTER A REASONABLE OPPORTUNITY TO RESPOND TO THE NEW EVIDENCE OFFERED FOR THE FIRST TIME IN THE OBJECTION AND TO THE DISTRICT'S ATTACK ON THE R&R AS "PUNITIVE"**

**MOTION FOR ACTION**

Hon. David C. Bury

1 Maria Mendoza, et al.,

Case No. CV 74-204 TUC DCB

2 Plaintiffs,

3 United States of America,

4 Plaintiff-Intervenor,

5 v.

6 Tucson United School District No. One, et al.,

7 Defendants.

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10 **Introduction**

11 As this Court knows all too well, the USP provision relating to the evaluation of  
12 teachers and principals (USP § IV, H, 1) has been a source of dispute. The sole issue now  
13 before the Court is the District's objection to the Special Master's recommendation that of  
14 the 100 possible points on the principal evaluation instrument, 17 be allotted to the results  
15 of surveys (11 points for teacher surveys; 6 points for student surveys). In support of its  
16 objection, the District has tendered new evidence never presented to the parties or the  
17 Special Master during the months they were discussing the weight to be given surveys in  
18 the evaluations and asks this Court to rely on that untested evidence to reject the  
19 recommendation of the Special Master. Such a request is particularly inappropriate in the  
20 circumstances of the pending R&R because the District had months in which it could have  
21 presented its evidence to the Special Master and the parties (and thereby have permitted  
22 them an opportunity to rebut or respond to it) and because the new evidence has been  
23 presented to this Court under a procedure that, the District well knows, affords the Special  
24 Master no opportunity to respond and allows the parties to respond only if this Court so  
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1 orders. (Stipulated Process for Parties’ Review of District Plans Covered by Section I(D)1  
2 of the USP (“Stipulated Process”), Doc. No. 1581, at para. 6.)

3 The District’s objection -to which no response is permitted without order of this  
4 Court -also asks this Court to strike a portion of the R&R dealing with the context of the  
5 R&R on the grounds that, according to the District, it is “punitive in nature” and is  
6 supposedly “intended to deter TUSD from asserting legal positions to protect its legal  
7 rights” (Tucson Unified School District’s Objection to Special Master’s Report and  
8 Recommendations Relating to Principal and Teacher Evaluations (ECF 1845) (“TUSD  
9 Objection”) at 3:20-21). Such assertions directed to the Special Master should not be  
10 permitted to stand unresponded to and un rebutted.  
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13 Accordingly, the Mendoza Plaintiffs ask that the Court strike the objection or, in the  
14 alternative, permit them AND the Special Master a reasonable time to respond to the new  
15 evidence and the accusations directed to the Special Master.  
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17 **TUSD Had Months in Which It Could Have Provided the Evidence Proffered for the**  
18 **First Time with Its Objection and Thereby Have Afforded the Special Master and**  
19 **Mendoza Plaintiffs the Opportunity to Consider and Respond to It**  
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21 In the October 2, 2015 TUSD Objection, the District says that “[b]ecause the  
22 Special Master’s assertions regarding assigning weights was facially unsupported, the  
23 District consulted Dr. Alyson Lavigne... to determine whether research in the area was  
24 available...” (TUSD Objection at 6:14-15.) However, in the period of over five months  
25 during which the parties and Special Master attempted to resolve the issue of the weight to  
26 be accorded surveys in principal evaluations, the District could have -- but did not --  
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1 proffer the evidence it now for the first time puts forth in response to the Special Master's  
2 purportedly "unsupported" assertions.

3 The Special Master first recommended the supposedly "facially unsupported" 17%  
4 weight for surveys in principal evaluations on April 21, 2015. (See the Special Master's  
5 April 21, 2015 Email, attached as Exhibit A.)<sup>1</sup> Since that time, the District repeatedly  
6 received notice that the issue of the weight to be accorded surveys remained unresolved, as  
7 it acknowledges in its Objection. (See, e.g., TUSD Objection at 7, n.7.) In the time after it  
8 received the Special Master's email and before it filed the pending Objection, it had many  
9 opportunities to address outstanding principal evaluation issues, including the issue of the  
10 weight of surveys in principal evaluations; yet it failed to put forth the evidence it  
11 submitted for the first time with the TUSD Objection.

14 On June 9, 2015, the Mendoza Plaintiffs reminded the District that they had  
15 deferred to the Special Master regarding the weight of surveys in principal evaluations.  
16 (See Mendoza Plaintiffs' June 9, 2015 comments, attached hereto as Exhibit C.) In its  
17 June 22 response, the District responded to Mendoza Plaintiffs' June 9 comments by  
18 taking the opportunity to address the issue of how student surveys would be administered  
19 for principal evaluations but it did not address, let alone offer its new expert testimony  
20 regarding, the 17% weight the Special Master recommended for surveys in principal  
21 evaluations. (See "TUSD's Response to the Mendoza 06/09/2015 Comments re TUSD's  
22 proposed TEI and PEI Plans," attached hereto as Exhibit D.)

26 <sup>1</sup> The District first proposed a weight for surveys in principal evaluations in the April 3,  
27 2015 version of its principal evaluation plan. On April 10, 2015, the Mendoza Plaintiffs  
28 deferred to the Special Master's expertise on whether the 7% weight proposed by the  
District was adequate under the USP. (Mendoza Plaintiffs' April 10 Comments and  
Objections to TUSD's Principal Evaluation Plan, attached hereto as Exhibit B.)

1 The Mendoza Plaintiffs again raised the issue in their July 30 R&R request,  
2 indicating that they “object to the weight given to teacher and student surveys in principal  
3 evaluations because they do not accord any meaningful weight to those surveys.”  
4 (Mendoza Plaintiffs’ July 30 Request for an R&R regarding the Teacher and Principal  
5 Evaluation Plans (Doc. 1845-5) at 5.) In its August 10 Response to Mendoza Plaintiffs’  
6 July 30 R&R request, the District addressed the “weight of student surveys in teacher and  
7 principal evaluations,” but again failed to present the evidence it offered in the TUSD  
8 Objection. (*See* Doc. 1845-6 at 5.)  
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11 On August 13, 2015, in an attempt to resolve outstanding disputes without the need  
12 for court intervention, the Special Master again recommended that the District adopt a total  
13 17% weight for surveys in principal evaluations. (*See* 1845-7 at 4-5.) Although the  
14 express purpose of that memo was to have the parties “consider my observations and  
15 proposals” in the “hope [that they] can be resolved without going to the Court” (*see id.* at  
16 1), so far as Mendoza Plaintiffs are aware, the District never responded to those proposals  
17 and certainly did not present its new evidence for consideration by the Plaintiffs and the  
18 Special Master. If the District believed the new evidence in the TUSD Objection was  
19 persuasive, this period, four months after the issue first had been raised during which the  
20 focus was on seeking to eliminate the need for court intervention would have been an ideal  
21 time for the District to have offered its evidence for the Mendoza Plaintiffs to have  
22 considered in determining whether they would continue to seek an R&R on the issue and  
23 for the Special Master to have considered in framing his recommendation. The District did  
24 not take that opportunity.  
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1 Yet another opportunity for the District to have presented its new information  
2 occurred during the period afforded by the parties' stipulated process for the District to  
3 have ten days prior to the actual submission of an R&R to the court to align its position  
4 with the R&R should it wish to do so. ((Stipulated Process, ¶5.) On September 15, 2015,  
5 the District submitted its Alignment Response to the Special Master's Draft R&R on the  
6 Principal Evaluation Instrument. (Doc. 1845-10.) Although it attached some 230 pages of  
7 exhibits to that Alignment Response and expressly stated its continued disagreement with  
8 the Special Master's recommendation concerning the weight to be accorded surveys in  
9 principal evaluations (*id.* at 2-3) nowhere in that Alignment Response did it reference the  
10 new evidence it submitted for the first time to this Court or suggest that it believed expert  
11 opinion was available to challenge that recommendation or that it challenged the Special  
12 Master's understanding of the term "adequate" as it appears in the governing provision of  
13 the USP. (USP § IV, H, 1.)  
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17 In summary, although the District had over five months in which it could have  
18 presented the new evidence in the TUSD Objection to the Special Master and the Plaintiffs  
19 and thereby permitted them an opportunity to respond to it, it failed to do so. Instead it  
20 presented its new evidence with the TUSD Objection under a procedure that does not give  
21 the Special Master an opportunity to respond and allows the Plaintiffs to respond only if  
22 this Court so orders. (Stipulated Process, Doc. No. 1581, at para. 6.)  
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1 **The District Has Made a Motion to Strike a Portion of the Special Master’s Report**  
2 **That Both He and the Plaintiffs Should Be Permitted to Rebut Should This Court**  
3 **Elect Not to Strike the Objection in its Entirety.**

4 The prejudicial nature of the TUSD Objection is compounded by the fact that the  
5 District also asks this Court to strike a portion of the R&R concerning the context of the  
6 R&R because it purportedly is “punitive in nature” and “intended to deter TUSD from  
7 asserting legal positions to protect its legal rights.” (TUSD Objection at 3:20-21.) As with  
8 the new evidence proffered in the TUSD Objection, the Special Master does not have an  
9 opportunity to respond to these allegations, and the Plaintiffs may respond only if so  
10 ordered by this Court. This Court should not allow such serious accusations to remain  
11 unresponded to and un rebutted.

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14 Indeed, the Mendoza Plaintiffs submit that the District should be the first to  
15 recognize that such assertions directed at the Special Master should not be allowed to go  
16 unresponded to. The District has repeatedly sought the opportunity to respond to various  
17 filings so as to provide the Court a “comprehensive” understanding of the issues or to  
18 address purportedly serious assertions it claimed necessitated a response where under  
19 controlling procedures one was not allowed. (See, e.g., Doc. 1521 at 7 (claiming it was  
20 denied due process because “the Special Master has submitted a proposal to the Court that  
21 is materially different than any previous version reached by the Parties... TUSD insists on  
22 its right to be heard so that it can spell out its concerns for the Court on the record...  
23 Indeed, any party should have the right to be heard on these matters.”); Doc. 1675 at 2:13-  
24 15 (“[g]ranting TUSD the ability to file responses to the budget Objections... will ensure  
25 that the Court has a comprehensive view of the issues presented before it rules.”); Doc.

1 1780 at 2:18-21 (in response to the purportedly incorrect statement that it had made false  
2 statements, “the District began a process of requesting from the Plaintiffs and Special  
3 Master leave to respond to the Fisher Plaintiffs’ objection. The District stated that it felt  
4 the assertion was a serious one, particularly as it called into question the integrity of the  
5 attorneys responsible for the court filing.”)<sup>2</sup>.) Indeed just last year, the District appealed  
6 from several of this Court’s orders (which in part put in place time and page limitations on  
7 R&R objections) based on its claim that they “eliminated key due process entitlements and  
8 procedures” by “limit[ing] severely TUSD’s record” and “reduc[ing] the record in a one-  
9 sided and prejudicial fashion.” (See Attachment A to Declaration of Juan Rodriguez,  
10 attached hereto as Exhibit E, at 11-12.)  
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13 The District’s accusation that the Special Master’s R&R is “punitive in nature” and  
14 “intended to deter TUSD” from protecting its legal rights is serious, calls into question the  
15 Special Master’s motivations, and should therefore not be permitted to go unresponded to.  
16

### 17 **Conclusion**

18 Based on the foregoing and the documents referenced herein, the Mendoza  
19 Plaintiffs ask that this Court strike the TUSD Objection or, in the alternative, allow them  
20 AND the Special Master a reasonable time to respond to the District’s new evidence and  
21 the accusations directed to the Special Master.  
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27 <sup>2</sup> The Special Master notes that he decided to inform the Court of the District’s dispute  
28 with the Fisher filing rather than to engage in additional briefing on the matter, which  
would “burden the Court with another set of filings and costly efforts[.]” (Doc. 1780 at  
2:23-24.)



Dated: October 9, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2015, I electronically submitted the foregoing Mendoza Plaintiffs' Motion to Strike Tucson Unified School District's Objection to Special Master's Report and Recommendations Relating to Principal and Teacher Evaluations (ECF 1845) or, in the Alternative, to Provide the Plaintiffs and the Special Master a Reasonable Opportunity to Respond to the New Evidence Offered for the First Time in the Objection and the District's Attack on the R&R as "Punitive;" Declaration of Juan Rodriguez in Support of Mendoza Plaintiffs' Motion; Proposed Order to the Office of the Clerk of the United States District Court for the District of Arizona for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Dated: October 9, 2015