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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, Sidney L. Sutton, et al., Defendants-Intervenors,	CV 74-90 TUC DCB (Lead Case) **MOTION FOR RECONSIDERATION/ CLARIFICATION OF NOVEMBER 19, 2015 ORDER (ECF 1870)**
Maria Mendoza, et al. Plaintiffs, United States of America, Plaintiff-Intervenor, v. Tucson Unified School District No. One, et al. Defendants.	CV 74-204 TUC DCB (Consolidated Case) (Oral Argument Requested)

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I. Introduction.

Pursuant to Local Rule 7.2, Tucson Unified School District No. One submits this Motion for Reconsideration/Motion for Clarification of this Court's order filed November 19, 2015 Order (ECF 1870)("Order") regarding TUSD's magnet plan and schools because it is based upon manifest errors of law and fact.

On January 16, 2015, the Court ordered that the Special Master shall file reports as necessary "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…." ECF 1753 at 18. The Court permitted the parties to file a response 30 days after the filing of any such recommendation on magnet status. Id.

On November 5, 2015, the Special Master filed his first magnet report (ECF 1864) which recommended Court-approval of the Magnet Stipulation entered into by TUSD and the Mendoza Plaintiffs (ECF 1865). On November 13, 2015, the Fisher Plaintiffs filed an objection. ECF 1867. On November 19, 2015, prior to the filing of any responses by the Mendoza Plaintiffs, DOJ, or TUSD, the Court issued an Order modifying the Magnet Stipulation and the Special Master's report.

The Court's modifications to the Magnet Stipulation are manifest errors of law under the legal standard in the Order because a USP violation is required prior to Court intervention. Furthermore, as described herein, the modifications to the Magnet Stipulation are based on manifest errors of fact (e.g., the Order states that the parties stipulated to transition plans (which they did not) and that the Special Master recommended the Court order transition plans (which he did not)). Accordingly, as set forth below, the modifications to the Magnet Stipulation must be stricken, or in the alternative, clarified following further briefing.[1]

[1] A motion for reconsideration may be granted where necessary to "correct manifest errors of law or fact upon which the judgment is based," and to "prevent manifest injustice." *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003)

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Last, the Court made a finding that it "has at all times, and will continue, to consider all Plaintiffs' objections and the Special Master's R&Rs in the context of the express provisions of the Unitary Status Plan (USP)." ECF 1870, p. 8. TUSD interprets this Order to mean that matters the Plaintiffs and Special Master raise are limited to the express provisions of the Unitary Status Plan, and that the Court will not consider objections by the Plaintiffs and Special Master that do not arise out of an alleged express USP violation. Because this is an interpretation, TUSD requests clarification on this issue.

II. All Modifications Imposed to the Magnet Stipulation Are Inconsistent With the Legal Standard of Review Articulated In The Order.

The Court articulates the following legal standard of review of TUSD's compliance activities: "TUSD must act in good faith to implement the USP provisions to the extent practicable." ECF 1870 at 9, lines 8-10. "Only when the Court is convinced that TUSD has in the first instance not complied with an express provision of the USP, does the Court intervene." ECF 1870 at 9. The Order did not describe how or why the provisions of the Magnet Stipulation violated the USP. Indeed, the Order modifies the Magnet Stipulation in significant ways including the addition of "transition plans" and "alternative initiatives" without identifying any USP violation in the Magnet Stipulation that would permit Court intervention. Accordingly, all modifications to the Magnet Stipulation should be stricken from the Order.

III. Transition Plans Should Be Stricken from the Order.

1) As stated above, modifying the Magnet Stipulation to add transition plans was outside the permissible scope of judicial review because the Magnet Stipulation did not violate the USP.

(internal quotations and emphasis omitted). A party may file a motion to clarify court orders, and the court has authority to provide such clarification of its orders. *See, e.g.*, *Kruska v. Perverted Justice Found.*, 2009 U.S. Dist. LEXIS 112892 (D. Ariz. Nov. 16, 2009)(granting motion for clarification of order); *McManus v. Schriro*, 2006 U.S. Dist. LEXIS 55501 (D. Ariz. Aug. 8, 2006)(same).

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2) The Order requiring transition plans appears based, in part, on the Magnet Stipulation's requirement of "the simultaneous development of transitional plans.…" ECF 1870 at 6, lines 6-12. However, TUSD and the Mendoza Plaintiffs never stipulated to transition plans. ECF 1865. Indeed, transition plans are not mentioned anywhere in the Magnet Stipulation (and they are certainly not required). Id. Because transition plans were ordered based on the erroneous finding that transition plans were required by the stipulation, the Court should strike from its Order any requirement that TUSD develop "transition plans."

3) The Order requiring transition plans also appears based, in part, because such plans were "recommended by the Special Master." ECF 1870 at 7, line 11. However, the Special Master did not recommend that TUSD develop transition plans in his report to the Court. Indeed, he specifically stated the "Special Master is not recommending that the Court require such plans." ECF 1865 at 4, lines 26-27 (emphasis in original). Because transition plans were ordered based on the erroneous finding that the Special Master recommended them, the Court should strike this requirement from its Order.

4) To the extent transition plans are further based, in part, on the Court's own policy views that such plans are necessary, the Court should not act as a super school board and substitute its own educational policy views for those of TUSD.[2] Judicial deference to discretionary policy judgments is part of the legal framework governing institutional reform

[2] The "Court 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 decisions by the District and will defer to reasonable proposals by the District." *See* ECF 1477; *see also Anderson v. Canton Mun. Separate School Dist.*, 232 F.3d 450, 454 (5th Cir. 2000); *Morgan v. McDonough*, 689 F.2d 265, 276 (1st Cir. 1982); *Richmond WelfareRights Org. v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975) ("Except as last-resort refuges for the protection of constitutional rights, courts should not attempt to function as super school boards"); *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) ("School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts [] have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.").

litigation.[3] The Special Master, as noted above, expressly recommended that the development of transition plans should be left to the District's discretion. The District's discretion regarding transition plans is set forth in the Court-approved CMP (ECF 1803 at 13).[4] The views of the District's officials (as made within the requirements of the CMP) must be accorded judicial deference and the Court should strike the modified transition plan requirements from its Order.

The District recognizes that it must be proactive with regard to the education of students at schools that may not retain magnet status. However, the imposition of the May 2016 deadline for development of transition plans impedes the district's discretion under the CMP of how and when to martial its limited resources.

5) In the alternative, the Court should permit the parties leave to brief the efficacy and appropriateness of developing transition plans for magnet schools whose magnet status have not yet been withdrawn. The January magnet order (ECF 1753), permitted the parties 30 days from the filing date of the special master's report on magnet status to file a response. ECF 1753 at 18. The Court entered an order prior to that 30 day period presumably because the Fisher Plaintiffs had filed a response and TUSD and the Mendoza Plaintiffs had filed the Magnet Stipulation. If the Court is to step outside the

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[3] *See Kendrick v. Bland*, 740 F.2d 432 (6th Cir. 1984)("[j]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge," but also because the operation of prisons in entrusted to the executive, not judicial branch). The operation of school districts is squarely within the domain of state and local government, and this Court must give adequate weight to the views of District officials.

[4] The Comprehensive Magnet Plan states: "If a magnet is eliminated at the end of the year due to achievement deficits, the school will receive the magnet funding allocated during the budgeting process for the following year. Students attending the school under magnet status will receive transportation until they reach the highest grade at that school. The District will create a plan to support schools in building both budgetary and programmatic capacity so that the schools that lose magnet status are able to maintain basic school functions. These plans will vary from site to site, as some schools are more heavily invested in teacher FTEs or support positions." ECF 1803 at 13.

recommendations of the Special Master and the Magnet Stipulation, the parties must be provided the Court-ordered opportunity to brief that issue.

6) The Order further requires clarification that the transition plans, if their mandated development is not stricken from the Order, are not subject to the lengthy USP § I.D.1 process for comment and review.

IV. "Alternative Initiatives" Should Be Stricken from the Order.

The Court made a significant modification to ¶ E of the Stipulation, apparently to respond to the Fisher Plaintiffs' objections. Paragraph E of the Stipulation states: "By March 1, the District shall develop and propose initiatives to increase the number of students attending integrated schools within the District." ECF 1865 at 7. In drafting and stipulating to Paragraph E, the District and the Mendoza Plaintiffs intended the creation of District-wide initiatives to increase the number of students attending integrated schools. This provision would not exclude the development of alternative magnet themes, nor would it require such development. The defined scope of the obligation made possible the District's agreement to the aggressive March 1, 2016 deadline – less than three months away.

The Court's Order now requires the District (possibly with the use of experts provided by the Special Master) "to develop and propose alternative, more integrative, magnet themes or programs and assist these schools in assessing the strength of their existing magnet themes or programs in comparison to alternative stronger more integrative magnet themes or programs." ECF 1870 at 8, lines 5-11. The Court should reconsider the Order's language – different from the language of Paragraph E of the Magnet Stipulation - requiring alternative magnet initiatives, or in the alternative, permit briefing on this issue before issuing an order on initiatives, for the following reasons:

1) As stated above, modifying the Magnet Stipulation to add alternative initiatives was outside the permissible scope of judicial review because the Magnet Stipulation did not violate the USP.

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2) The Court's modifications materially alter the stipulated agreement the District and the Mendoza Plaintiffs entered, thereby jeopardizing the timeliness and quality of the intended initiatives which are to be proposed by March 1, 2016.

3) The District and the Mendoza Plaintiffs intended for Paragraph E to produce initiatives that may go beyond both integrated schools (i.e. to schools that are close to becoming integrated), and magnet schools, but the Court's modification unduly and unnecessarily restricts the scope of the initiatives to "integrated schools" or to "these schools," which creates a need for further clarification. The Court further conflates the concept of "integration initiatives" with the Improvement Plans (neither discussed nor described in the Magnet Stipulation) being drafted for the magnet schools at issue in the stipulation. The Improvement Plans already exist – it is the new initiatives designed to result in more students attending integrated schools that the stipulation described.

4) In the alternative, the Court should permit the parties leave to brief the efficacy and appropriateness of the creation of alternative magnet initiatives for schools that may lose their magnet status. The Court should permit briefing on the original intent of ¶E, which required TUSD to develop and propose initiatives to increase the number of students attending integrated schools. The Order changed Paragraph E beyond recognition of the stipulated provision (without the request of any party or the Special Master) to now require development of alternative magnet themes. The March 16, 2016 development deadline no longer makes sense in light of the changed scope of ¶E, which would require formulation of new magnet themes and involve a different development process.

5) The Order requires clarification on whether the alternative initiatives, if not stricken from the Order, would be subject to the lengthy USP § I.D.1 process for comment and review.

V. The Order Misstates the Applicable Magnet Benchmarks & Grades.

The Order makes a finding that the Special Master concluded certain magnet schools failed to meet integration benchmarks. ECF 1870 at 3, lines 2-4. However, the Order

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defines the integration benchmark as 70% - the USP definition of integration. ECF 1870 at 3, footnote 1; *see also* page 4 at 1-6 (discussing the 7 schools that did not meet "the 70% integration benchmark" instead of meeting or failing to meet their magnet improvement plan benchmarks).

The USP benchmark is not what the Special Master was referring to in his magnet report (ECF 1864, p. 3) or what the Court ordered in its January magnet order. The individual school integration benchmarks for magnet status are set forth in the individual school improvement plans. TUSD requests the Court correct this error by removing any references to 70% as the benchmark for magnet status.

The Order may further create confusion as to the letter grades of magnet schools. ECF 1870 at 4, lines 1-6. The Court identifies four schools that "appear to remain rated as C or D." Id., lines 4-6. However, those identified grades are from the 2013-2014 school year. The embargo on the results of the 2014-2015 state assessment was lifted on November 30, 2015. TUSD understands from the Arizona Department of Education that school districts should have the results of the AZ Merit and 2016 spring tests by July 2016. Until then, neither TUSD, the Court, nor the Special Master and Plaintiffs will have the lens through which to evaluate magnet schools' student achievement pillar. TUSD requests the Court strike this portion of the Order or revise it accordingly.

VI. The Order Stopped Short of Clarifying The Permissible Scope of Plaintiff and Special Master Objections.

TUSD requests clarification on the permissible scope of Plaintiff and Special Master objections. The Order provides that "[t]he Court has at all times, and will continue, to consider all Plaintiffs' objections and the Special Master's R&Rs in the context of the express provisions of the Unitary Status Plan (USP)." Although the Order further found the Special Master and Plaintiffs have not overreached in the scope of their objections, the Order does not define anywhere the scope of permissible objections. TUSD interprets this Order to mean that Plaintiff objections and Special Master R&Rs are limited to the express

provisions of the Unitary Status Plan, and that the Court will not consider objections by the Plaintiffs or Special Master not asserting an express USP violation, but requests clarification on this issue.

VII. Conclusion

Based on the foregoing, TUSD respectfully requests the Court reconsider and/or clarify its November 19, 2015 order as outlined above. TUSD further requests a hearing on its motion for reconsideration so the parties may provide background on the provisions of the Magnet Stipulation (and the intention behind those provisions), provide clarification regarding how the Order's provisions conflict/interact with the existing Comprehensive Magnet Plan implementation, and the lack of educational resources to accomplish implementation of the current plan while simultaneously planning for failure.

DATED this 3rd day of December, 2015.

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