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**UNITED STATES DISTRICT COURT
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)

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)

**SPECIAL MASTERS RESPONSE TO FOUR OBJECTIONS
TO THE SPECIAL MASTER'S 2015-16 ANNUAL REPORT**

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3 Recently, the Court clarified the processes and content of the District's and the Special
4 Master's annual reports for 2016-17. In this order, the Court directed the Special Master to
5 address objections to the 2015-16 Special Master's Annual Report (SMAR) raised by the
6 plaintiffs and the District. Given the scheduling of the District and the Special Master's annual
7 reports and the probable objections to both the DAR and the SMAR for 2016-17, it is unlikely
8 that the Court will be able to rule on the concerns reflected in the objections of the parties to the
9 SMAR until well into 2018. This means that some of the concerns that could have implications
10 for students and data gathering during the current year would not be addressed in a timely way.
11 This would not only affect students and their families but also could complicate the analysis of
12 data relating to the District's progress going forward.

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14 In the 2015-16 SMAR, the Special Master drew attention to some of these issues but did
15 not recommend that the Court resolve them based on the assumption that the District would take
16 appropriate action in view of the fact that these issues have been discussed in some detail and
17 were identified by the Special Master as problematic.. In retrospect, the Special Master
18 recognizes that he should have made more specific recommendations to the Court. For this
19 reason, the Special Master is submitting this report to provide several recommendations related to
20 objections to the 2015-16 SMAR.
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23 On August 25, 2017, the Special Master submitted a draft report on these matters to which
24 the Mendoza plaintiffs responded. Neither the Fisher plaintiffs nor the Department of Justice
25 responded, but the District responded at some length to this draft report on September 13, 2017.
26 *See* Exhibit 1. As a result of comments by the Mendoza plaintiffs and the District, the Special
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1 Master has modified the initial recommendations. The Special Master’s goal has been and
2 continues to be to see if these matters could be resolved without burdening the Court.

3 The recommendations made here deal with the following issues:

- 4 1. The enrollment process for children of District employees in oversubscribed
5 schools.
- 6 2. The categorization of disciplinary actions, particularly those that involve
7 “exclusionary practices.”
- 8 3. Reasons for and implications of changes in the criteria by which students’ ethnic
9 identities are determined.
- 10 4. Comment and review related to the Facility Condition Index.

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13 Recommendation No. 1 - Priority for Admission to Oversubscribed Schools

14 The Special Master recommends that, consistent with the agreement (Policy JFB) arrived
15 at by the parties, the District shall commit to giving priority to the admission of students of
16 District employees in oversubscribed schools **if** (emphasis added) the admission of such students
17 will increase the integration of the receiving schools. This commitment applies to Level II of the
18 lottery process. At level V of the lottery process, the District would give priority to District
19 employees’ children regardless of integrative impact. This recommendation, in effect, clarifies
20 the previously agreed upon policy with respect to priorities. *See* Exhibit 1, page 2 for a
21 description of Policy JFB.

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23 Recommendation No. 2 – The Definition of Exclusionary
24 Discipline and Its Implications for Disciplinary Actions and Due Process.

25 The primary issue here is how disciplinary actions are defined by the District as
26 “exclusionary.” A related concern deals with how disciplinary actions are categorized when they
27 are reported and analyzed.

1 In Appendix A of the USP, the term “exclusionary discipline” refers to:

2 “any disciplinary consequence that removes a student from classroom instruction
3 including, but not limited to, in-school suspension, out-of-school suspension,
4 placement in an alternative setting or program, and expulsion.”

5 The District insists that in-school interventions that take students out of their classrooms,
6 including the assignment of students to the District’s Alternative Educational Program (DAEP),
7 are not exclusionary because students are being provided instruction in these situations. But there
8 is no question that the USP intended to define programs like DAEP and in-school suspension as
9 exclusionary. The only question here is how in-school suspension should be defined. That is, for
10 how many hours and under what conditions is a student removed from his or her classroom
11 before a disciplinary action is defined as “in-school suspension” rather than “in-school
12 discipline.”

13 Exhibit 1 acknowledges that the District changed policies but that it did so only because
14 these were not consequential changes. However, as noted, these changes affect student access to
15 due process which could hardly be considered inconsequential. Moreover, these revisions by the
16 District render the classification of violations of provisions of the GSRR difficult to comprehend
17 and inappropriately convey the extent of declines in the amount of serious student misbehavior.

18 The issues here have been contested by the parties for well over a year with no
19 satisfactory resolution. No doubt, the parties could continue to belabor this issue, but rather than
20 rehash the continuing debate, it seems that will be necessary for the Court to determine the
21 conditions under which particular due process provisions apply and how exclusionary discipline
22 should be defined. It defies credulity to believe that students and parents can understand what
23 their rights are given the fact that the parties and the Special Master have been unable to agree on
24 the issues.
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1 The Special Master therefore recommends that the Court confirm that full due process
2 rights – as specified on page 6 of Exhibit 1, Box 3 – be granted to all students and parents when
3 the student conduct at issue involves either an in-school suspension, an out-of-school suspension,
4 an alternative setting or program, or expulsion. This recommendation rejects the District’s
5 position that disciplinary actions defined in the USP as exclusionary are not exclusionary.
6

7 The District apparently objects to this recommendation not only because it wishes to
8 redefine what exclusionary discipline means but also because it specifies what it calls
9 “rudimentary” due process and contrasts that, interestingly enough, with due process rights that
10 are “constitutionally guaranteed.” Should the District wish to limit due process rights, it should
11 make such a proposal. Such a proposal would need to define the amount of time and learning
12 conditions associated with disciplinary actions that would be exempt from what the District
13 describes as constitutional guarantees.
14

15 To remedy the dispute related to the nature of student misbehavior that needs to be
16 monitored and analyzed, the Special Master recommends that the District be required to specify
17 categories of student misbehavior focusing on the behavior rather than the remedy or response.
18 These categories should be used to report student behaviors requiring disciplinary action as well
19 as the nature of these actions. Because the District has inappropriately redefined suspensions in
20 recent reports to the plaintiffs and the Court, the data reported should be corrected. This will
21 allow comparisons of progress made by the District.
22

23 The Special Master further recommends that if the District wishes to revise the meaning
24 of exclusionary discipline as provided in the USP, it should submit such a proposal to the
25 plaintiffs for review and comment under Section I.D.1 of the USP and, following that, petition the
26 Court to modify the USP accordingly.
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1 Recommendation No. 3 – Clarifying the Criteria for Determining Student Race and Ethnicity

2 The Special Master recommends that the District provide the plaintiffs, the Special Master
3 and the Court with (1) a description of why, when and how the criteria for determining student
4 ethnicity were changed, and (2) the effects these changes might have on the ability of the parties
5 to understand the extent of progress being made in implementing provisions of the USP.

6
7 This recommendation does not imply that the District has done anything inappropriate
8 with respect to the coding criteria for determining student ethnicity. The concern about using the
9 criteria set forth by the federal government, which had been adopted by the District and the State
10 of Arizona, was initially raised by plaintiffs who believed that the federal coding misrepresented
11 the number of students categorized as members of different ethnic/racial groups. After
12 considerable discussion, the parties agreed to revised criteria for determining the ethnicity/race of
13 TUSD students.¹ There were, however, difficulties in implementing the new criteria and it was
14 not until the 2014-15 school year that the new criteria were fully in place. It is important that the
15 parties, the Special Master and the Court understand the reasons why changes in the way student
16 ethnicity has been and is now recorded came about and the extent to which the changes in coding
17 might affect conclusions reached about the District's progress in implementing the USP.
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19 The District agrees with this recommendation and will submit to the Court and the
20 plaintiffs the description of the history and implications of the changes in the coding of student
21 ethnicity since the adoption of the USP.
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¹ The Mendoza plaintiffs do not challenge this recommendation but assert that the intent of the
27 revision was to categorize students whose parents defined them as Hispanic and African American as
28 African American and was not, for example, meant to apply to Native Americans whose parents categorize
them as Hispanic as well as Native American.

1 Recommendation No. 4 – Revision of the Facility Condition Index:

2 The Special Master recommends that the District return to the formula for determining the
3 Facility Condition Index (“FCI”) for schools that the parties had approved prior to the 2015-16
4 school year.

5 The FCI is used to assess the condition of facilities at each of the District schools (*see*
6 Section IX.A of the USP). Coupled with the Educational Suitability Score for each school, the
7 FCI facilitates the development of priorities for the allocation of resources to the schools most in
8 need of repairs and improvements. The formula for determining the FCI of schools was
9 unilaterally altered by the District during the 2015-16 school year without plaintiff input. If the
10 District believes that changes in the weights that make up the formula for determining the FCI
11 index for schools are needed, such proposals should be submitted to the plaintiffs and the Special
12 Master for review and comment.

13 The District does not agree with this recommendation based on its assertion that the
14 change is inconsequential.² However, it is not up to the District to decide whether a change in
15 policies is consequential. In its response to the Special Master’s initial recommendation, the
16 District implied that it would consider submitting changes it considers to be inconsequential to
17 the Special Master, who could then determine whether the change should be reviewed by the
18 plaintiffs. However, the Mendoza plaintiffs indicate that they would not support this procedure,
19 and it is not recommended by the Special Master.

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² The Special Master notes that the District categorized its revisions of the above-discussed
28 regulations JK-R1 and JK-R2 as inconsequential.

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Respectfully submitted,

/s/
Willis D. Hawley
Special Master

Dated: October 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on, October 13, 2017, I electronically submitted the foregoing via the CM/ECF Electronic Notification System and transmittal of a Notice of Electronic Filing provided to all parties that have filed a notice of appearance in the District Court Case.

Andrew H. Marks for
Dr. Willis D. Hawley,
Special Master