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6 **UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 ROY and JOSIE FISHER, et al.,)
Plaintiffs,)

9 UNITED STATES OF AMERICA,)
Plaintiff-Intervenor,)

10 vs.)

No. 4:74-CV-90 (DCB)
(lead case)

11 ANITA LOHR, et al.,)
12 Defendants,)

13 and)

14 SIDNEY L. SUTTON, et al.,)
15 Defendants-Intervenors.)

PLAINTIFF-INTERVENOR’S
RESPONSE AND PARTIAL
OBJECTION TO SPECIAL
MASTER’S REPORT AND
RECOMMENDATION REGARDING
DEFENDANT’S SUPPLEMENTAL
PETITION FOR UNITARY STATUS

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)
17 MARIA MENDOZA, et al.,)
Plaintiffs,)

18 UNITED STATES OF AMERICA,)
19 Plaintiff-Intervenor,)

20 vs.)

No. 74-CV-204 (TUC) (DCB)
(consolidated case)

21 TUCSON UNIFIED SCHOOL DISTRICT)
NO. 1, et al.,)
22 Defendants.)

23 On May 12, 2020, the Special Master filed a Report and Recommendation (“R&R”)
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1 regarding the December 31, 2019, Supplemental Petition for Unitary Status (“Supplemental
2 Petition”) of Defendant Tucson Unified School District No. 1 (the “District”). ECF No. 2468.¹
3 Pursuant to the Court’s April 28, 2020, order, ECF No. 2466, Plaintiff-Intervenor the United States
4 of America (“the United States”) hereby submits this response and objection (“Response”) to the
5 R&R.

6 The United States files this Response to clarify the legal standards the Court should apply
7 to the Supplemental Petition, and to correct the overly narrow view of the District’s legal
8 obligations set forth in the Supplemental Petition. This Response also identifies ambiguities in the
9 R&R, explains how those ambiguities should be resolved, and objects to portions of the R&R that
10 appear to condition a recommendation for unitary status on action not required by the USP. The
11 United States ultimately concludes that the District has complied with the Court’s desegregation
12 orders, including the Unitary Status Plan (“USP”), for a reasonable period of time, has eliminated
13 the vestiges of past *de jure* discrimination to the extent practicable, has demonstrated its good-
14 faith commitment to the whole of the Court’s decrees and the Constitution, and therefore has met
15 the legal standards for a declaration of full unitary status and termination of this Court’s
16 supervision.

17 I. BACKGROUND

18 The order appointing the Special Master requires him to issue a “final report” when
19 considering whether the Court should determine that the District is entitled to full unitary status.
20 Order Appointing Special Master § IV, ECF No. 1350. In that final report, the Special Master
21 must make findings of fact as to whether the District “has fully implemented the programs and
22 activities required by the USP” and “eliminated the vestiges of the dual system,” and advise the

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24 ¹ The Special Master refiled the R&R on May 19, 2020, to include an additional addendum, but the refiled R&R
is otherwise identical to the original. ECF No. 2469.

1 Court “whether unitary status should be granted and judicial oversight terminated.” *Id.* § IV(1)-
2 (3). In addition, the Court ordered the Special Master to develop a plan that includes
3 recommendations “to ensure the future good faith operation of the District in accordance with
4 constitutional principles” after unitary status is awarded.² *Id.* § IV(4).

5 The R&R recommends a declaration that the District has achieved “partial unitary status”³
6 in “identification of potential magnets and planning for transportation to foster integration,” R&R
7 at 11; “retention of teachers and administrative staff,” *id.* at 15; “advanced learning experiences,”
8 *id.* at 29; “inclusiveness and civility,” *id.* at 30; “family and community engagement activities,”
9 *id.* at 50; and “extracurricular activities,” *id.* at 51. In seven additional areas, the R&R concludes
10 that the Court should grant partial unitary status, but also makes post-unitary recommendations for
11 future action by the District. These additional areas are “support for beginning teachers,” *id.* at
12 15; “administrative diversity,” *id.* at 17; the “grow your own” leadership programs, *id.* at 18;
13 culturally responsible curriculum, culturally responsible pedagogy, and multicultural curriculum,
14 *id.* at 33; dual language programs, *id.* at 43; discipline, *id.* at 48; and technology, *id.* at 53.

15 The conclusions reached in the remainder of the R&R about the Supplemental Petition⁴ are
16 more ambiguous, or are improperly conditioned on recommended actions not required by the USP.
17 The R&R indicates that the District has agreed to the Special Master’s post-unitary
18 recommendations on three topics (measuring academic growth of magnets, *id.* at 8; “school
19 improvement plans,” *id.* at 12; and “definition of integration,” *id.* at 12) and proposes to the Court
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21 ² In this Response, the United States refers to these recommendations by the Special Master as “post-unitary
22 recommendations.”

23 ³ The R&R uses the term “partial unitary status” to refer to the District’s satisfactory compliance with any section or
24 subsection of the USP. The United States uses the term in that same way in this Response.

⁴ Because the Court previously granted the District unitary status regarding some provisions of the USP, the Supplemental Petition does not address the entire USP.

1 a reorganization plan for the District’s African-American and Mexican-American student services
2 departments. However, the R&R does not make a recommendation regarding compliance findings
3 or “unitary status” in any of these four areas. With respect to teacher diversity, the R&R concludes
4 that if the District “agrees to implement” the Special Master’s post-unitary recommendation, a
5 finding of partial unitary status is appropriate. Finally, the R&R makes a post-unitary
6 recommendation regarding “ELL dropout prevention” and states that the “District should
7 otherwise be awarded partial unitary status.” *Id.* at 39.

8 II. LEGAL STANDARD

9 The goal of a school desegregation case is to promptly convert a *de jure* segregated school
10 system to a system without racially identifiable schools. *Green v. County Sch. Bd. of New Kent*
11 *Cnty., Va.*, 391 U.S. 430, 442 (1968). To obtain a declaration of unitary status, the District must
12 show that it has: (1) fully and satisfactorily complied with the Court’s decrees for a reasonable
13 period of time, (2) eliminated the vestiges of prior *de jure* discrimination to the extent practicable,
14 and (3) demonstrated a good-faith commitment to the whole of the Court’s decrees and to those
15 provisions of the law and the Constitution that were the predicate for judicial intervention in the
16 first instance. *See Missouri v. Jenkins*, 515 U.S. 70, 87-89 (1995); *Freeman v. Pitts*, 503 U.S. 467,
17 491-92, 498 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 248-50
18 (1991).

19 Thus, in order to obtain unitary status, a school district must demonstrate both its
20 “affirmative commitment to comply in good faith with the entirety of a desegregation plan,” and
21 that it has not “acted in bad faith or engaged in further acts of discrimination since the
22 desegregation plan went into effect.” *Freeman*, 503 U.S. at 499. *See also NAACP v. Duval Cnty.*
23 *Sch.*, 273 F.3d 960, 974 (11th Cir. 2001) (“To be entitled to unitary status, not only must a school
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1 system eliminate the vestiges of *de jure* segregation to the extent practicable, but ‘local authorities
2 [must] have in good faith fully and satisfactorily complied with, and shown a commitment to, the
3 desegregation plan.’” (quoting *Dowell*, 498 U.S. at 249-50 (1991))). The District is therefore
4 incorrect in arguing in its Supplemental Petition that “[a]s a matter of law, good faith in the context
5 of this case is *not* whether the District has done all it can to comply with the decree or even all it
6 can to promote integration.” Supplemental Petition at 84, ECF No. 2406 (emphasis in original).
7 To the contrary, the District’s good faith compliance with the requirements of the USP is a critical
8 basis on which its Supplemental Petition for unitary status must be assessed. *See Jenkins*, 515
9 U.S. at 87-89; *Freeman*, 503 U.S. at 491-92, 498; *Dowell*, 498 U.S. at 248-50.⁵ This is true not
10 only because good faith compliance with all of the Court’s orders is a requirement for unitary
11 status, but also because the USP was specifically designed to eliminate the vestiges of prior *de jure*
12 discrimination to the extent practicable; therefore, compliance with the USP is required to
13 eliminate those vestiges.

14 Nonetheless, when assessing the District’s compliance with the remaining requirements of
15 the USP, “[t]he focus is on the school board’s pattern of conduct, and not isolated events, because
16 the purpose of the good-faith finding is to ensure that a school board has accepted racial equality
17 and will abstain from intentional discrimination in the future.” *Manning ex rel. Manning v. Sch.*
18 *Bd. of Hillsborough Cnty.*, 244 F.3d 927, 946 n.33 (11th Cir. 2001). Additionally, the District may
19 only be held responsible for achieving particular outcomes if it is within the District’s power
20 through reasonable efforts to achieve them. *See Morgan v. Nucci*, 831 F.2d 313, 324 (1st Cir.

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22 ⁵ Notwithstanding the District’s current arguments about the procedural history and legal basis for the USP, the plan
23 is unquestionably law of the case in this matter. *See Rocky Mt. Farmers Union v. Corey*, 913 F.3d 940, 951 (9th Cir.
24 2019) (“The law of the case doctrine generally precludes reconsideration of an issue that has already been decided by
the same court, or a higher court in the identical case.” (internal quotation marks omitted)).

1 1987) (“[I]t is maximum practicable desegregation that the law requires. This is a practical, not a
2 theoretical standard. A court should not remain involved in the assignment process indefinitely
3 merely because some further degree of compliance with assignment standards is conceivable.”).

4 Additionally, the Supreme Court has identified six areas, commonly known as the “*Green*
5 factors,” that must be addressed as part of the determination of whether a school district has
6 fulfilled its desegregation duties and eliminated vestiges of the prior dual system to the extent
7 practicable: (1) student assignment, (2) faculty, (3) staff, (4) transportation, (5) extracurricular
8 activities, and (6) facilities. *Green*, 391 U.S. at 435; see *Manning* 244 F.3d at 942 (“For a district
9 court to determine whether the vestiges of discrimination have been eliminated to the extent
10 practicable, it must examine . . . the so-called *Green* factors”). The Supreme Court also has
11 approved consideration of other indicia, such as “the quality of education being offered to the
12 [different racial] populations,” and student discipline, as important factors for determining whether
13 a district has fulfilled its desegregation obligations. *Freeman*, 503 U.S. at 492-93; see *Lee v.*
14 *Etowah Cnty. Bd. of Educ.*, 963 F.2d 1416, 1426 (11th Cir. 1992). Thus, the broad range of non-
15 *Green* factors encompassed by the USP must be evaluated in determining whether the District has
16 fulfilled its desegregation obligations.

17 When the Court finds that the District has attained unitary status on all remaining
18 provisions of the USP, federal court oversight of the District ends in its entirety. See *DeKalb Cnty.*
19 *Sch. Dist. v. Schrenko*, 109 F.3d 680, 692 (11th Cir. 1997) (“Once a local school district has
20 achieved unitary status, the role of the district court comes to an end.” (citing *Pasadena City Board*
21 *of Education v. Spangler*, 427 U.S. 424 (1976))). That is, once a school district attains unitary
22 status, the district court may no longer oversee the operations of the district, nor impose upon it a
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1 “post-unitary status plan” or other such ongoing legal obligation.⁶ *See Lee v. Talladega County*
2 *Bd. of Education*, 963 F.2d 1426, 1430 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993) (“The
3 attainment of unitary status means that the school authorities have remedied their constitutional
4 violation. The transition to a racially non-discriminatory school system is complete and the federal
5 judiciary’s remedial authority has come to an end.”); *United States v. Overton*, 834 F.2d 1171,
6 1177 (5th Cir. 1987) (“[T]he idea that a school district can be declared unitary and yet be
7 answerable to the federal courts for failure to abide by desegregation plans, regardless of
8 segregative purpose, is at war with itself. When the federal court . . . declared [the district] unitary,
9 it released the school district from federal judicial superintendence, leaving it on the same footing
10 with other state actors.” Consistent with these principles, the USP provides that, “[t]he Court
11 shall maintain jurisdiction over this case until the District complies in good faith with all of its
12 obligations under this Order and all Orders of the Court entered in this matter and has eliminated
13 the vestiges of its past segregation to the extent practicable.” USP § XI(A).

14 III. ANALYSIS

15 In determining whether the District is entitled to partial unitary status and the termination
16 of judicial supervision with respect to any portion of the USP, the Court should examine whether
17 the District has complied in good faith with the relevant USP requirements.⁷ In the Court’s
18 appointment order, the Special Master was directed to advise the Court in the R&R whether
19 “unitary status should be granted and judicial oversight terminated,” Order Appointing Special
20 Master § IV(3), and to make recommendations to aid the District in continuing to act in a

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22 ⁶ Of course, any such school district remains “subject to the mandate of the Equal Protection Clause of the Fourteenth
Amendment.” *Dowell*, 498 U.S. at 251.

23 ⁷ This includes complying with any Court orders interpreting those provisions. As discussed above, because the USP
24 was designed to eliminate the vestiges of segregation, compliance with the USP is sufficient to eliminate those
vestiges.

1 nondiscriminatory manner after attaining unitary status, *id.* § IV(4). Consistent with desegregation
2 caselaw, *see supra* at 6-7, and the Court's appointment order, the District's agreement to or
3 compliance with these additional post-unitary recommendations does not create a basis for
4 extending judicial oversight of the District.

5 Applying these principles, the United States does not object to any of the recommendations
6 in the R&R that the Court grant the District partial unitary status in the identified areas. The United
7 also does not object to those portions of the R&R in which the Special Master reaches no
8 conclusion about partial unitary status, but notes that the R&R has raised no compliance issues
9 that should prevent a determination of unitary status in those areas. Finally, the United States
10 objects to those portions of the R&R that improperly advise the Court to withhold or condition a
11 finding of partial unitary status on the District taking specific actions not required by the USP.

12 **A. Areas Where the R&R Recommends a Determination of Partial Unitary Status**

13 The United States does not object to and believes the Court should accept the findings in
14 the R&R that support a grant of partial unitary status. In regard to each of those areas, the Special
15 Master has not identified any failures by the District to meet the requirements of the USP or any
16 other relevant Court order, and the United States is aware of no facts that demonstrate the Special
17 Master erred in finding the District in compliance. The United States objects to neither those areas
18 in which the Special Master concludes that the District should be awarded unitary status, nor to
19 those in which the Special Master advises the Court to award unitary status and also makes post-
20 unitary recommendations to the District on the same subjects.⁸ It is within the Court's judgment

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23 ⁸ The Special Master is free to provide post-unitary recommendations that go beyond ensuring that the District
24 continues to operate in a non-discriminatory manner after it is declared unitary. While the Court's grant of complete
unitary status may not be conditioned on the District agreeing to these recommendations, the United States has no
objection to the Special Master going beyond his charge in the Order Appointing Special Master by providing advice
he believes will aid the District in its educational mission.

1 to endorse or reject each of these recommendations; however, consistent with the legal principles
2 discussed above, the District's agreement to or compliance with these additional post-unitary
3 recommendations does not create a basis for extending judicial oversight of the District.⁹
4 Therefore, the Court should award unitary status and terminate its supervision of the District in all
5 of the areas where the R&R recommends the District be granted unitary status.¹⁰

6 **B. Areas Where the R&R Makes No Recommendation Regarding Partial Unitary**
7 **Status**

8 The United States also has no objection to the R&R's discussion of "measuring academic
9 growth of magnets," "school improvement plans," and "definition of integration." The Special
10 Master does not cite any provision of the USP or other Court order with which the District has not
11 complied in these areas, nor does he discuss unitary status. Rather, the R&R provides post-unitary
12 status recommendations in each of these areas and concludes each section by stating that the
13 District has agreed to his recommendations. The United States understands these sections of the
14 R&R to be intended solely to document the Special Master's recommendations for how the District
15 should address these outstanding measurement and planning issues after unitary status is granted.¹¹

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17 ⁹ The order appointing the Special Master allows the parties to object to such recommendations, when responding to
18 this R&R, and provides "that any disputes shall ultimately be adjudicated by the Court prior to the grant of unitary
19 status." Order Appointing Special Master § IV(4).

20 ¹⁰ These areas are: "identification of potential magnets and planning for transportation to foster integration," "retention
21 of teachers and administrative staff," "advanced learning experiences," "inclusiveness and civility," "family and
22 community engagement activities," "extracurricular activities," "support for beginning teachers," "administrative
23 diversity," "grow your own" leadership programs, culturally responsible curriculum, culturally responsible pedagogy
24 and multicultural curriculum, dual language programs, discipline, and technology.

21 ¹¹ The Court's June 4, 2020, Order, ECF No. 2471, confirms this interpretation. In that Order, the Court, in
22 adjudicating objections that were previously filed to the Special Master's magnet schools R&R, makes clear that these
23 are post-unitary recommendations that will be up to the District to implement without the supervision of the Special
24 Master or the Court. *See id.* at 2 ("[T]he District has relied on the Special Master to recommend and this Court to
determine which existing magnet programs should remain and which should be terminated. Post-unitary status, this
difficult task shifts to the District. To ensure the District is prepared for this undertaking, the Court asked the Special
Master to share the criteria he was using to make these hard decisions."); *id.* at 17 (noting that whether or not the
District follows the recommendations is irrelevant to whether the District should receive unitary status because
"following what may or may not be good advice does not, however, necessarily defeat unitary status").

1 The United States does not object to these portions of the R&R, which provide no barrier to the
2 Court awarding unitary status and terminating judicial supervision.

3 Similarly, the post-unitary recommendations in the R&R regarding the reorganization of
4 the student services departments do not provide a basis for the Court to withhold a declaration of
5 unitary status in regard to the USP's requirements for supporting African-American and Mexican-
6 American student achievement. As the Special Master notes in the R&R, he was tasked in the
7 Court's November 6, 2019, order, ECF No. 2359, with developing such a reorganization plan.
8 R&R at 33. However, he also notes that the USP ultimately authorizes the District to organize
9 these programs at its discretion.¹² The R&R does not address unitary status in this area, nor does
10 it identify any failure of the District to comply with the USP or other Court order. Thus, the United
11 States interprets this portion of the R&R as intended to comply with the Special Master's
12 obligations under the November 6, 2019, order, not as a finding that the District has failed to
13 comply with any requirements of the USP. Based on this understanding, the United States has no
14 objection to this portion of the R&R.

15 **C. Areas Where the R&R Appears to Condition a Recommendation Regarding**
16 **Partial Unitary Status**

17 The United States objects to the R&R's conclusions regarding "ELL dropout prevention."
18 The R&R states: "In its plan for ELL dropout prevention, the District should identify the office or
19 offices responsible for monitoring and addressing any problems with respect to ELL dropouts.
20 The District should otherwise be awarded partial unitary status for those sections of the USP related

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22 ¹² The USP provides that, "[t]he District, by and through the Superintendent or through other delegations of
23 authority as appropriate, may establish the organizational relationships and lines of responsibility for the
24 various offices and positions provided for in this Order." USP § I(D)(8). Thus, the R&R states that "[t]he
USP provides that the superintendent can determine the organizational structures for the various programs
and activities of the District. As noted, the specific duties of these positions would be determined by the
District in consultation with the plaintiffs but not determined by the plaintiffs or the Special Master." R&R
at 38.

1 to ELL dropout prevention.” *Id.* at 39. The Special Master has not explained why identifying the
2 office or offices responsible for this monitoring is required for a determination of unitary status.
3 No such requirement can be found in the text of the USP provisions governing the District’s ELL
4 dropout prevention plan. *See* USP § V(E)(2)(b)(i). Moreover, in the R&R, the Special Master
5 “notes that the Court did not direct the District to spell out in its filings how it monitored dropout
6 or graduation rates.” R&R at 39. Based on the Special Master’s review of compliance with the
7 existing USP provisions on ELL dropout prevention, a grant of unitary status of that area is
8 appropriate.

9 In regard to the portions of the R&R addressing teacher diversity, the United States objects
10 to the Special Master’s suggestion that a grant of unitary status be conditioned on the District
11 accepting his three post-unitary recommendations. The R&R states that, “[t]he Special Master
12 recommends that the Court adopt the recommendations being made in his November 19, 2019
13 R&R cited above. If the District agrees to implement these recommendations, it should be awarded
14 unitary status for school level teacher diversity.” *Id.* at 16. However, two of these
15 recommendations do not involve improving teacher diversity, but rather the measurement of that
16 diversity.¹³ The third suggests maintaining incentives for teacher diversity even if they are not
17 currently being used, and gives advice to the District about which schools to target for increased

18 ¹³ The two recommendations are:

- 19 1. White teachers were to be counted in assessing diversity,
- 20 2. That schools be accepted as racially diverse with respect to teachers when they were
21 within 2% of the 15% plus or minus provisions of the USP or the second largest group
22 of teachers were 50% or more of white or Latino teachers. Because there are so few
23 African American teachers in the District, the 15% plus or minus rule would not apply.
However, African American teachers can be counted along with teachers of other races
to make up to 50%. In larger schools, if African American or Latino teachers do not
meet the criterion, but there are a significant number of other teachers of color such as
Native Americans, Asians, Pacific Islanders, and multi-race teachers, this would
satisfy the diversity requirement of the USP.

24 *Id.* at 15-16.

1 diversity efforts. *Id.* While this third post-unitary recommendation may offer useful guidance to
2 the District, this recommendation, like the first two, cannot be a condition for unitary status unless
3 it is required by the USP or is necessary to correct an area of non-compliance or discrimination.¹⁴
4 The Special Master has identified no provisions of the USP or other Court order regarding teacher
5 diversity that the District has not satisfied, nor has he indicated that these post-unitary
6 recommendations must be followed to comply with the USP or other Court order. Therefore, the
7 District should be awarded unitary status in the area of teacher diversity, and the Court should no
8 longer exercise judicial supervision over that area.

9 **III. CONCLUSION**

10 For the reasons set forth above, the United States concludes that the District has met the
11 legal standards for a declaration of unitary status and the termination of judicial supervision.

12 Dated: June 16, 2020

13 Respectfully submitted,

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¹⁴ The United States takes no position on whether any of the post-unitary recommendations in the R&R are needed to ensure the District continues to act in a non-discriminatory status, or will otherwise assist the District in its operations. In this regard, the United States defers to the expertise of the Special Master and the District.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2020, I served copies of the foregoing pleading to counsel of record via the United States District Court for the District of Arizona’s electronic filing system.

/s/ Peter W. Beauchamp
PETER W. BEAUCHAMP