

2013 WL 12116417

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United States District Court, D. 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,  
Maria Mendoza, et al., Plaintiffs,  
United States of America, Plaintiff-Intervenor,  
v.  
Tucson Unified School District No. One, et al.,  
Defendants.

CV 74-90 TUC DCB, CV 74-204 TUC DCB

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Signed 12/20/2013

#### Attorneys and Law Firms

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#### ORDER

David C. Bury, United States District Judge

\*1 The District seeks reconsideration of the Court's Order

filed on December 2, 2013, which denied a motion to refer oversight of the USP to a Magistrate Judge filed by the Department of Justice (DOJ) and supported by the District. The District seeks reconsideration of the Court's Order filed on December 16, 2013, which adopted the Special Master's Report and Recommendation Re: University High School (UHS) Admissions Process Revisions. The Court grants reconsideration of the December 2, 2013, Order in part limited to amending the procedure for the Special Master's filing of R&Rs for Plans of Action to allow expedited objections to be filed with the Court. The Court denies reconsideration of the December 16, 2013, Order.

The Court reviewed the assertions in the Shortened Objection pertaining to the merits of the CAIMI, and finds it offers nothing new. The Court finds the remainder of the Shortened Objection to be not relevant. It remains in excess of the page limit because the District removed assertions of collaboration from what was the body of the original 25-page Objection (Doc. 1518 (STRICKEN)) and included it in the Shortened Objection as Exhibit A, an 8-page Statement of Facts. There is no good cause for further delay in implementing the UHS Admissions Process Revisions. The Court strikes the "Shortened Objection and Response to Special Master's Report and Recommendations Regarding University High School."

The DOJ's request for judicial oversight by a Magistrate Judge was, in part, based on a concern that an insufficient record was being kept in respect to the parties' negotiations related to implementing the Unitary Status Plan (USP). The Court denied the requested referral, in part, because it believes that creating a record of every communication, email or otherwise, back and forth between the parties regarding various concerns regarding various aspects of the USP would only serve to impede compromise and cooperation. Accordingly, the Court finds the relevant record exists pertaining to issues that the parties have been unable to resolve and which have required judicial action.

The Order issued December 2, 2013, identified some of the controversies resolved by the Court as examples of the adequate record being created, here.<sup>1</sup> The Court record reflects that the Court has acted at the recommendation of the Special Master relative to two District proposals: 1) the District's budgetary plans for a reading/literacy program that was not supported by some research or best practices evidence, and 2) the CAIMI because it is not based on best practices evidence. (Order (Doc. 1477),

Attachment 1: R&R (Doc. 1469); Order (Doc. 1520), R&R (Doc. 1519)). In both instances, the Special Master recommended the District use other seasoned and tested methodologies while implementing their suggested programs as test or pilot studies to determine the merit for future use by the District. In both instances, the Court based its rulings on the merits of the plans, not on any assertions related to untimeliness or failures to collaborate. To address the parties' concerns regarding the record, the Court issued the December 2, 2013, Order to clarify procedures for objections and collaboration before the Special Master and for bringing unresolved disputes before the Court for resolution, and to establish future reporting provisions for tracking the implementation and monitoring of each Plan of Action called for under the USP. The Court reaffirms its general preclusion of collaborative emails and red-lined draft versions for every USP Plan of Action. In considering a R&R related to objections to the Plans of Action, the record during the 30-day collaborative period is only relevant if it pertains to the merits of an objection. As to any R&R for a Plan of Action, the Court need not consider whether the parties engaged in good faith collaboration at to that Plan; the good faith of the District is relevant in the context of its actions over the course of the next three or four years.

\*2 The Court does not agree that the procedure for reviewing the Special Master's R&R related to the USP Plans of Action, adopted by the Court in the December 2, 2013, Order, deprive the District of procedural due process by denying it an opportunity to be heard on its objections. The Court does not agree the procedure fails to create a reviewable record. Judicial review of a R&R related to a Plan of Action comes after objections are filed in the first instance with the Special Master during a 30-day comment period after the District releases a draft Plan of Action, after the Special Master has worked collaboratively with the parties to resolve the objections, and after the Plan of Action has been finalized by either the Board or the District. The R&R is accompanied by the record made before the Special Master, including memos from the objecting parties and the District's rebuttal memos, with both prepared to identify the relevant record which should accompany the R&R. (Order (Doc. 1510) at 8.) All these documents are filed into the record as attachments to the R&R, which is also filed into the Court's record. *See eg.*, (R&R Re: UHS Admissions Process Revisions (Doc. 1519)).<sup>2</sup>

The Court affirms the procedures adopted by the Court on December 2, 2013, in the context of the USP, Sec. I(D)(1),<sup>3</sup> which expressly provides for expedited review

of "all new or amended plans, policies, procedure or other significant changes contemplated pursuant to this [USP], the District shall solicit the input of the Special Master and the Plaintiffs and submit such items for review before they are put into practice or use. Unless otherwise stipulated by the Parties and/or agreed to by the Special Master, or otherwise specified in this Order, Plaintiffs shall review such items and each provide comments, as appropriate, to the District and the Special Master within thirty (30) days of receipt. The Special Master and the Parties shall work towards voluntary resolution of any disputes. If any disagreements cannot be resolved within thirty (30) days from the date Plaintiffs provide their comments to the District, the Special Master shall report such disagreements to the Court together with his recommendation concerning how the disagreement(s) should be resolved. The Special Master's report shall include as attachments all submissions made to him by the Parties with respect to the item(s) in issue. The Court may order additional briefing as it deems appropriate." The Court deemed in its December 2, 2013, Order that no additional briefing is appropriate.<sup>4</sup>

The Court finds that the procedures adopted by it on December 2, 2013 ensure that review pertaining to the Plans of Action for the USP is expedited so that implementing changes required by the USP does not impede the smooth running of the District, and the parties do not present evidence and/or argument to the Court not first presented to the Special Master.

The District complains that the Special Master's R&Rs have contained recommendations that they are seeing for the first time, and this is why they need further opportunity to object to the R&R. Pursuant to the USP, § I(D)(1), the Special Master reports to the Court any disagreements related to Plans of Action after the parties have fully briefed Plaintiffs' objections before the Special Master and a 30-day time period has run where the parties have worked together to resolve disagreements. The R&R may first be seen by the parties when it is filed<sup>5</sup> with the Court, but the objections and proposed means for resolution of the objections are not new to them. The District also complains that the Special Master should be precluded from short-stopping the collaborative process by filing the R&R. (Motion for Reconsideration (Doc. 1521) at 7.) The District asserts this happened in respect to the R&R for the University High School (UHS) Admissions Revision Process.

\*3 Pursuant to USP, § I(D)(1), the timing of disclosures to the Special Master and the Plaintiffs by the District of a

new or amended plan, policy, procedure or other significant change triggers the 30-day objection period and the 30-day collaboration period to resolve such objections. Until the Court's Order of December 2, 2013, it was arguably unclear at what point in time the collaborative period ended. The Court rejects the District's interpretation of USP, § I(D)(1) to mean that a new 30-day period for collaboration begins anew with each revision responsive to an objection, if a Plaintiff renews and/or revises an objection to the revised provision. The District's approach creates a never-ending collaborative period.

Taking this approach in its Shortened Objection, the District asks the Court to strike the Special Master's R&R Re: the UHS Admissions Review Process as untimely because it was filed on November 22, 2013, less than 30-days after the Plaintiffs and Special Master responded with objections to the Board's approval on October 22, 2013, of the UHS Admissions Review Process. The District complains that beginning in July, it worked collaboratively with the Plaintiffs to resolve objections and after five months of collaboration, the Special Master unfairly cut-off collaborative efforts to resolve objections to the UHS Admissions Review Process by filing the R&R. The Court's Order issued on December 2, 2013, makes it clear that the Special Master may NOT file a R&R until an Action Plan is finalized by either the Board or the District. He filed the R&R after final action by the Board timely approving the UHS Admissions Review Process.<sup>6</sup> Even without the clarification of the December 2, 2013, Order, the R&R filed by the Special Master regarding the UHS Admissions Review Process was not untimely because it was filed after 30 days of collaborative efforts to resolve objections.

The Court appreciates the District's efforts to resolve the objections to the CAIMI even after the Special Master filed the R&R, and encourages all such continued cooperation. The Court considered these efforts as reflected in Exhibit L to the UHS Admissions Review Process, which included the District's plan to pilot the CAIMI methodology and to consider using non-cognitive assessments in the future. The Court reaffirms its adoption of the Special Master's recommendation to use best practices of essays and non-cognitive assessments as a factor for admissions to UHS this year, while piloting the CAIMI.

The Court finds that Federal Rule Civ. P. 53(f), which requires the Court to give the parties notice and an opportunity to be heard in acting on a Special Master's

order, report, or recommendation, is satisfied because there is full briefing by all parties regarding objections before the Special Master files the R&R and because the full record, including the District's responses, is transmitted to the Court with the R&R, and the parties have stipulated to expedited review provisions in the USP, § I(D)(1). The Court does not believe that objections to the R&Rs are necessary for the Court's resolution of objections to USP Plans of Action. Specifically, the Court has reviewed the 26-page Objection to the Special Master's R&R Re: UHS Admissions Review Process, which contains approximately 6 pages of arguably relevant material on the merits of the CAIMI, with the remainder asserting the District's good faith efforts to collaboratively resolve objections, the constitutional sufficiency of the UHS Admission Review Process, and challenges to the authority of the Special Master and the Court to preclude it from using an untested methodology. (Objection (Doc. 1518) at 4-5, 14-16, 23); *see also* (Shortened Objection (similar)). The Objections offer nothing new related to the merits of the CAIMI as a tool to identify non-traditional class-member students. As it struck the original Objection, the Court strikes the Shortened Objection. It too exceeds the page limit if the Court counts the 8 pages in Ex. 1: Statement of Facts, which served to relocate from the memo to an attachment the factual assertions regarding timeliness and collaboration.

\*4 The Court shall reconsider its Order, issued December 2, 2013, (Doc. 1510), to the extent it clarified the procedures called for in the USP, Sec. I(D)(1), for expedited review of "all new or amended plans, policies, procedure or other significant changes contemplated pursuant to this [USP]," including the R&Rs to be submitted by the Special Master for the Plans of Action called for in the USP. The Court shall reconsider its decision to not allow objections and will allow objections to these R&Rs. Any Objection filed to such an R&R regarding a Plan of Action will be limited to 10 pages and filed within 7 days of service of the R&R. LRCiv 7.2(d), (1)(2). Attachments shall exclude materials extraneous to genuine issues of material fact or law; attachments shall be relevant only to the objections addressed in the R&R. The Court will not consider an objection to the R&R which introduces substantively new evidence or argument not first presented to the Plaintiffs or Special Master. *Cf., Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996). There will be no extensions of time or page limit, unless good cause is shown for delaying the expedited resolution of these R&Rs. There shall be no replies unless requested by the Court.

Because the Court reconsiders procedures over which it has total discretion, *see* USP § I(D)(1) (court may order additional briefing as it deems appropriate), it does not call for responses from Plaintiffs to the Motion for Reconsideration of the December 2, 2013, Order. LRCiv 7.2(g)(2). The Court does not reconsider its December 16, 2013, Order.

**Accordingly,**

**IT IS ORDERED** that the Motion for Reconsideration of the Court's Order issued December 2, 2013 (Doc. 1510) is GRANTED IN PART AND DENIED IN PART, to the limited extent that the Court shall allow Objections to be filed on an expedited basis to R&Rs submitted by the Special Master addressing objections to USP Plans of Action, filed pursuant to USP § I(D)(1).

**IT IS ORDERED** that an Objection may be filed to the R&Rs for Plans of Action, which shall be limited to 10 pages and filed within 7 days of service of the R&R. Attachments shall exclude materials extraneous to genuine issues of material fact or law relevant only to the objections addressed in the R&R and should not duplicate documents submitted with the Special Master's R&R, but

may incorporate such documents by reference. There will be no extensions of time or page limit, unless good cause is shown for delaying the expedited resolution of these R&Rs. There shall be no Reply unless requested by the Court.

**IT IS FURTHER ORDERED** that the Motion to Reconsider the Court's December 16, 2013, Order (Doc. 1524) is DENIED.

**IT IS FURTHER ORDERED** that the Shortened Objection and Response to Special Master's Report and Recommendations Regarding University High School (Doc. 1523) is STRICKEN.

**IT IS FURTHER ORDERED** that the Mendoza Motion to Strike the Shortened Objection (Doc. 1526) is DENIED AS MOOT.

#### **All Citations**

Not Reported in Fed. Supp., 2013 WL 12116417

#### **Footnotes**

<sup>1</sup> On reconsideration, the District takes issue with the Court's brief reiteration of the history of the case following remand, which noted that no motion for partial withdrawal of judicial oversight has ever been made since the remand. The District asserts that it has asserted partial withdrawal is appropriate for three *Green* factors: facilities, extra-curricular activities, and transportation. The District is correct. It made this assertion in a status memo filed at the direction of the Court, the *Green* memo, which like the Post-Unitary Status Plan (PUSP) memo, was forwarded to the Special Master upon his assignment. (Order (Doc. 1351).) As noted in the Court's December 2, 2013, Order, the parties, thereafter, agreed to work collaboratively with the Special Master to draft the USP to address all relevant *Green* factors; the USP drafted by stipulation of the parties addressed all the *Green* factors and did not provide for partial withdrawal as to any *Green* factor. The Court reaffirms the finding made in the December 2, 2013, Order, that an adequate record exists in this case for both judicial review and to keep the public informed; there is no confusion regarding what transpired in respect to positions taken by the parties relevant to partial withdrawal for any *Green* factor.

<sup>2</sup> See n. 4.

<sup>3</sup> To the extent procedural provisions in the USP are contrary to or modify procedures set out in the Order Appointing the Special Master, the USP provisions govern. As to the R&Rs being filed by the Special Master related to objections

to the Plans of Action, developed pursuant to the USP, the USP § I(D)(1) applies, not the more general provision in the Order Appointing the Special Master, § V(4)(a), which allows parties 30 days to file objections to any findings of fact or recommendations made by the Special Master. The Order Appointing the Special Master, § V(4)(a), remains in effect, except where the parties have stipulated otherwise.

<sup>4</sup> Neither the USP § I(D)(1) nor the December 2, 2013, Order provided deadlines for the parties to object and request a R&R upon the finalization of a Plan of Action or for the Special Master to submit the R&R to the Court. The parties and Special Master should consider such deadlines and submit them to be set by order of the Court.

<sup>5</sup> Here, as in the Order Appointing the Special Master, the Court uses the term “filed” in the context of a document being filed by the Special Master. The District takes issue with the procedure actually being used by the Court to file the R&R into the record. (Objection and Response to R&R Re: UHS (Doc. 1518) STRICKEN at 10 n. 3.) Because the Special Master is not a party nor an attorney, privy to court’s electronic filing system, the Court has chosen to be responsible for filing every document provided by the Special Master into the record. Order (Doc. 1510) at 10 (clarifying that this Court will file into the record any document to be filed by the Special Master). The Special Master has served these R&Rs on the parties when he has emailed them to the Court.

<sup>6</sup> The Board finalized the UHS Admissions Review Process one-day in advance of the October 23, 2013, deadline.