

2014 WL 12596466

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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 07/15/2014

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Filed 07/17/2014

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#### ORDER

David C. Bury, United States District Judge

**\*1** On June 10, 2014, the Special Master requested permission for him to retain legal counsel, pursuant to Section VII(6) of the Order Appointing the Special Master. (SM Request (Doc. 1628)); (Order (Doc. 1350)). The Defendant, Tucson Unified School District (TUSD), and the Plaintiff-Intervenor, the United States, object. The Class-Plaintiffs Fisher and Mendoza respond to the objections and support appointing counsel for the Special Master. The Court grants the request for the reasons stated by the Special Master, the Class-Plaintiffs, and for the reasons identified by the Plaintiff-Intervenor regarding the “need for assistance, and the urgency and importance of that need.” (P-Intervenor Objection (Doc. 1632) at 3-4.) **The Court grants the Special Master’s request because of the aggressive, legalistic positions recently asserted by TUSD.**

Given the Court’s familiarity with the amount of case-management required to oversee this case, it rejects the Plaintiff-Intervenor’s suggestion to appoint a magistrate judge instead of counsel to assist the Special Master. This Court’s magistrate judges carry a demanding case load, with an array of responsibilities. Overseeing this case would require a greater time commitment than their demanding schedules would allow. More importantly, the Court is not convinced that such an appointment would serve any purpose except to further delay adjudication of the various disputes between the parties. It is this Court’s experience that even procedural rulings, some so minor as counting the number of days for purposes of applying an already stipulated expedited briefing schedule, are being litigated by TUSD through all available avenues, including interlocutory appeal to the Ninth Circuit Court of Appeals. The Court believes this same approach would be taken in regard to any rulings from a magistrate judge. Nondispositive pretrial matters decided by a magistrate judge are subject to objections, which must be considered by this Court for clear error. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Dispositive matters may be considered by a magistrate judge for a Report and Recommendation (R&R) to this Court, which is subject to objection and *de novo* review by this Court. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(B)-(C). Consequently, a magistrate judge’s involvement in this case could delay disposition of disputes, which would be especially inappropriate because the parties stipulated to an expedited structure during implementation of the USP for briefing in the first instance to be made to the Special Master with expedited review by the Court. Assigning this case to a magistrate judge for case management and/or R&Rs on dispositive

issues would not be a judicious use of the Court's limited resources.

To the extent the Plaintiff-Intervenor notes that some of the tasks included in the Special Master's request are already being managed by the Court, specifically, by the clerk of this Court, (at 4.), this Court's Order filed June 13, 2014, precludes any further emails between the Court's law clerk and the parties (Doc. 1624) and there will not be the type of informal telephonic communications by the law clerk to the parties regarding scheduling matters, which is this Court's typical practice. Court directives will be issued by formal order.

\*2 The Court has the same concern as all the parties, which was succinctly expressed by TUSD, that money spent for counsel appointed for the Special Master "makes less available to educate the children sought to be benefitted." (TUSD Objection (Doc. 1631) at 9.) But, this is true regarding all the attorney fees being incurred by all the parties.<sup>1</sup> The expense of litigation was one reason the Court appointed a Special Master and chose Mr. Hawley, with his expertise in academic best practices and school desegregation experience, instead of a litigation background. The Court has appreciated Mr. Hawley's firm commitment to work cooperatively with all the parties in this case to reach consensus whenever possible. The Court chose a structure for developing, adopting, and implementing the Unitary Status Plan (USP) that would afford the parties the maximum opportunities to work cooperatively. Specifically, the Court has repeatedly rejected the idea that every email or other communication evincing disagreement between the parties be filed into the record. The Court has sought to allow free unfettered communication between the parties during designated collaborative periods so as to not create a counter productive atmosphere where debate and discussion might become evidence of bad faith.

On January 8, 2013, the TUSD School Board adopted the USP, with minimal objections noted. On February 20, 2013, the Court adopted the USP, resolving the objections. The USP provides a road map to unitary status in respect to the substantive provisions to be implemented in TUSD, which are necessary to attain unitary status. During implementation of the USP, the parties' disagreements involve the merits of one program choice versus another to satisfy the already agreed to provisions in the USP. As recognized by the Plaintiff-Intervenor, the critical factor at this stage of the case is the District's compliance with its desegregation obligations, pursuant to the Unitary Status Plan. (Gov't Objection (Doc. 1632) at

4.) "[W]hat is needed here is an orderly, proper, and consistently managed record of good-faith compliance, or lack thereof, with the USP..." at 5. Good faith is one prong of the test used to determine when unitary status has been achieved, which is: whether the constitutional violator has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable. *Fisher v. TUSD*, 652 F.3d 1131, 1134-1135 (9th Cir. 2011).

Because good faith in this case is a critical legal assessment, the Court believes that counsel is best tasked with assessing the legal posture of the case, such as identifying when actions by the District, or non-action, evidences a lack of good faith which is of legal significance and should be brought to the Court's attention, identifying evidence relevant to the question of good faith, and ultimately determining when and how to present the question of good faith within the context of implementing the USP. While the Court has encouraged the parties to work cooperatively, it has in no way limited the Plaintiffs' access to this Court to bring legal matters to its attention. And, the Court agrees with TUSD that this is the responsibility of the Plaintiffs' attorneys. Nevertheless, the Special Master must also work within the context of applicable legal standards. While the R&Rs to date have addressed primarily academic subjects, they may also involve subjects where legal standards play a role in the Special Master's analysis, especially as the end of the implementation period draws nearer. To retain his neutrality, the Special Master must not be forced to turn to the parties for legal advice.

As noted by TUSD, the Court appointed the Special Master based on his academic expertise related to school desegregation and equal education issues unique to minority students. It was the Court's intention that the Special Master and other experts working with him would be a resource for TUSD, which it might otherwise lack. This worked well during preparation of the USP. The Court believes the Special Master's approach has been conservative, and the Court has agreed, with recommendations to adopt the vast majority of TUSD's proposals for implementing the USP. At his recommendation, the Court has disallowed two: 1) the Children's Academic Intrinsic Motivation Inventory (CAIMI) as the admission tool for University High School (UHS) (Order (Doc. 1520)) and 2) the MASS reading program. In both instances, the Special Master objected to proposals by TUSD that were not considered best practices or were not research based. The Court finds

that the Special Master has worked hard to strike a delicate balance between being a resource and letting TUSD lead, but not being a rubber stamp.

\*3 Since the adoption of the USP, there have been staff changes at TUSD and a change in counsel. This past year, TUSD has decidedly moved away from collaboratively working with the Plaintiffs and the Special Master to resolve issues.<sup>2</sup> This shift requires a corresponding shift by the Special Master away from his collaborative operational style: more R&Rs will likely be presented to the Court for adjudication, and if TUSD's past filings are any example of what is to come, the R&Rs will include legal challenges both procedural and substantive. The Court agrees with the Class-Plaintiffs and the Intervenor-Plaintiff that given the recent shift in this case, legal counsel is necessary to assist the Special Master. The Court finds these changes have stymied the expeditious implementation of the USP, upon which a three-year operational period hinges for attaining unitary status. The Court finds appointing counsel for the Special Master is urgently needed for the Special Master to move this case forward.

The attorney's role will be very limited. He will provide legal advice to the Special Master, not the Court. The Special Master may seek advice regarding applicable law, substantive and procedural.<sup>3</sup> The attorney should file *pro bono* documents on behalf of the Special Master, but the documents will remain the work product of the Special Master, not the attorney.<sup>4</sup>

The Court rejects TUSD's assertion that appointing counsel for the Special Master is beyond the authority of this Court and unprecedented in the law. *See* (Mendoza Response (Doc. 1635) at 2-5) (distinguishing cases relied on by TUSD and citing supporting cases for the appointment). The Court will not abdicate its judicial responsibility to adjudicate this case to either the Special Master or counsel. And, it is inappropriate for the Court, as suggested by TUSD, to provide legal counsel to the Special Master. *Cf.*, *Pliler v. Ford*, 542 U.S. 225, 231 (2004) (district judges have no obligation to act as counsel or paralegal to litigants because this undermines the judge's role as impartial decision-maker). While the Special Master is not a litigant in the case, the Court, like TUSD, is sensitive to its obligation to make a *de novo* review of the Special Master's R&Rs. If the Court were to act as counsel for the Special Master, it would undermine the Court's impartiality. Anyway, the Court doubts it could play such a role, here, where TUSD has objected even to procedural directives given by the Court to all the

parties as overreaching and being manifest error.

Finally, TUSD ignores that appointing counsel for the Special Master was contemplated by the parties and provided for by the stipulated Order Appointing the Special Master (Doc. 1350), Section VII.

The Court has one serious concern, which is the cost of the proposed appointment of Andrew H. Marks. As noted by the Mendoza Plaintiffs, Mr. Mark's hourly rate is relatively high, but the Court notes it is reduced from the \$650 rate he usually charges. All parties, including TUSD, have no objections to his credentials and expertise, and the Court finds he is an exceptional candidate. Mr. Mark's discounted fee of \$475, is in excess of the Special Master's original proposed candidate, who intended to charge \$325. He too was undisputedly qualified for the task, but the Government objected to his appointment due to a conflict of interest it was not inclined to waive.

\*4 In spite of its concern regarding the hourly rate, the Court makes the appointment because of the urgency of the Special Master's need for counsel. Currently, there are three R&Rs pending before the Court and multiple R&Rs in the pipeline. The Special Master has a track record of using his resources conservatively. He has routinely discounted his own fees by not billing for approximately 20 percent of his time. He has kept his use and costs for the experts assisting him within the limits he identified when he requested their assistance. The Court has reviewed the factual recitations in TUSD's memorandum regarding fees paid to date and finds that Plaintiffs Mendoza more accurately describe the work performed by the Special Master in this case and his responsible allocation of the public's funds. *See* (Mendoza Response (Doc. 1635) at 8-10.).

**Accordingly,**

**IT IS ORDERED**, pursuant to the Appointment Order § VII(7), that the Motion to Appoint Counsel (Doc. 1628) filed by the Special Master is GRANTED and approved as to Andrew H. Marks to be paid at \$475.00 per hour to perform the scope of services requested by the Special Master.

#### **All Citations**

Not Reported in Fed. Supp., 2014 WL 12596466

### Footnotes

- <sup>1</sup> The Court referred the parties to a settlement conference to discuss placing a cap on attorney fees, but no such agreement was reached.
- <sup>2</sup> These individuals are not, however, the Defendants in the case. TUSD is administered by the School Board, and it alone is responsible for implementing the USP. See *Oliver v. Kalamazoo Bd. of Education*, 368 F. Supp. 143, 164 (Mich. 1973) (question is whether school board by its actions and inactions, including each individual School Board action and evolving pattern of policy, intentionally contributed to creation or perpetuation of segregated schools); *Bradley v. School Bd. of City of Richmond*, 325 F. Supp. 828 (Va 1971) (both expertise and responsibility are the School Boards, and the Court looks to their proposals for legal sufficiency).
- <sup>3</sup> This should alleviate TUSD's concerns regarding the Special Master's attorney having *ex parte* access and contact with the Court.
- <sup>4</sup> This should resolve TUSD's repeated objections to the law clerk filing documents on behalf of the Special Master, which has necessarily precluded the use of the Court's electronic filing system (CM/ECF) for effecting service.
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