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7 UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA

9 ROY and JOSIE FISHER, et al., )  
10 )  
11 Plaintiffs, )  
12 )  
13 Plaintiff-Intervenor, )  
14 vs. )  
15 ANITA LOHR, et al., )  
16 )  
17 Defendants, )  
18 )  
19 SIDNEY L. SUTTON, et al., )  
20 )  
21 Defendants-Intervenors, )  
22 )

No. CV 74-90 TUC DCB

**FISHER PLAINTIFFS' OBJECTION  
TO DEFENDANT TUSD'S 05/08/13  
NOTICE OF ADOPTION OF  
DESEGREGATION BUDGET**

23 MARIA MENDOZA, et al., )  
24 )  
25 Plaintiffs, )  
26 )  
27 UNITED STATES OF AMERICA )  
28 )  
Plaintiff-Intervenor, )  
vs. )  
TUCSON UNIFIED SCHOOL )  
DISTRICT NO. ONE, et al., )  
Defendants. )

No. CV 74-204 TUC DCB

1 **1. FISHER OBJECTION IS TIMELY UNDER SECTION X (B) (5) OF THE USP**

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3 This objection to Defendant Tucson Unified School District (TUSD)'s 05/08/13 notice of  
4 adoption of the desegregation budget for the 2013-2014 school year is timely under  
5 Section X (B) (5) of the Unitary Status Plan (USP) insofar as the notice of adoption was  
6 filed on 05/08/13, ten days from that date fell on 05/18/13 (a Saturday) and this objection  
7 was filed in the above-captioned civil rights case on the 05/20/13 (the first business day  
8 following 05/18/13). Section X (B) (5) of the USP provides in relevant part that:

9       Within ten days of the USP Budget's approval by the Governing Board, if any of  
10       the Plaintiffs or the Special Master disagrees with the budget as approved, they  
11       may file objections with the Court and the Court shall resolve the objections on an  
12       expedited basis (Section X (B) (5) of the USP filed 02/20/13).

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14 **2. FISHER MEMORANDUM OF POINTS AND AUTHORITIES**

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16 Pursuant to Section X (B) (5) of the USP, the Fisher Plaintiffs, by and through counsel  
17 undersigned, hereby submit this memorandum of points and authorities in objection to  
18 Defendant TUSD's 05/08/13 notice of adoption of the desegregation budget for the 2013-  
19 2014 school year. In its notice, the Defendant notes that "[t]he USP does not provide any  
20 opportunity for a response by the District," but nevertheless "requests that it be given the  
21 opportunity to respond" to any substantive objections raised by the plaintiffs (at page 2 of  
22 the District's 05/08/13 notice). Without taking a position on the strength of the District's  
23 request, the Fisher Plaintiffs would simply note that both private plaintiff responses to the  
24 District's notice seek further justification from the District for many of the allocations  
25 made in its budget proposal and that affording the District the opportunity to file an  
26 expedited response may serve to further the resolution of disputed portions of the budget.

1 **2.1. In his suggestions for the TUSD desegregation budget, the Special Master failed**  
2 **to incorporate or respond to many of the comments provided by the plaintiffs**  
3

4 As discussed in greater detail below, the TUSD Governing Board (GB)'s decision to  
5 reject four of the nine recommendations made by the Special Master (SM) in his 04/25/13  
6 report to the District was perfunctory and informed less by discussion of the substantive  
7 merit of the recommendations and more by the GB's aversion to adopting  
8 recommendations it feared might possibly limit its authority to act how and when it sees  
9 fit. Further diluting the value of the considerable amount of time, energy and expertise  
10 invested in the comments provided by the plaintiffs is the fact that, in his suggestions for  
11 the TUSD desegregation budget, the SM failed to incorporate or respond to many of the  
12 plaintiffs' comments. This failure prevented the majority of the feedback provided by the  
13 plaintiffs from receiving due consideration by the TUSD GB.<sup>1</sup> The GB's rejection of the  
14 SM's suggestions and failure to respond to the plaintiffs' comments are evidence of the  
15 GB's aversion to providing the kind of reasoned and responsible guidance that would  
16 demonstrate good faith compliance with the District's obligations under the USP. For  
17 these reasons, the Fisher Plaintiffs respectfully seek the increased involvement of this  
18 Court in the evaluation of the merit of the commentary provided by the plaintiffs and the  
19 SM on the District's proposed budget.  
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26 <sup>1</sup> Although video footage of the 05/07/13 GB vote approving the desegregation budget  
27 includes no reference to the plaintiffs' comments whatsoever, a week prior to that vote,  
28 District staff provided plaintiffs with a written response to a synthesis of many, but not  
all, of their comments and concerns, stating that "all [of the plaintiffs'] comments will be  
provided to the [GB] in their entirety" (see TUSD's 04/30/13 final budget response).

1 **2.2. The TUSD GB's casual rejection of the SM's suggestions for, and failure to**  
2 **respond to the plaintiffs' comments on, the District's desegregation budget show a**  
3 **continued lack of good faith and the need for greater judicial involvement with the**  
4 **implementation of the USP**

5  
6 Section X (B) (1) of the USP provides in relevant part that the District will provide the  
7 plaintiffs and the SM with a copy of its proposed desegregation budget for the fiscal year  
8 2013-2014 within at least 30 days prior to its use for the preparation of the District's  
9 2013-2014 budget. Continuing, Section X (B) (1) provides that the plaintiffs:

10 shall have 20 days in which to provide comments on the Plan to the Parties and the  
11 Special Master. Within 10 days of receiving the Plaintiffs' comments, the Special  
12 Master shall communicate to the District and the Plaintiffs his suggestions, if any,  
13 for modifying the Plan (Section X (B) (1) of the USP filed 02/20/13).

14  
15 This initial phase of this process occurred as intended and involved a considerable  
16 investment of the time, expertise and resources of the SM, TUSD administrative staff,  
17 budget consultant Joseph Schneider and legal counsel for the Department of Justice  
18 (DOJ) and the two private plaintiff classes. That investment was made with the  
19 reasonable expectation that the resulting commentary and suggestions would be treated as  
20 valuable feedback that would, at the absolute minimum, warrant a reasoned and detailed  
21 response by the District's leadership. While the District is certainly not obliged under the  
22 terms of the USP to accept this feedback, it is an explicit requirement of the USP, and a  
23 prerequisite to unitary status, that the District will provide a sufficiently reasoned and  
24 particular response to the comments and suggestions to demonstrate a good faith  
25 appreciation of its obligations under the USP. Rather than meeting that showing, the  
26 GB's casual rejection of the majority of the SM's suggestions for, and failure to so much  
27 as respond to *any* of the plaintiffs' comments on, the District's desegregation budget  
28 show a continued lack of good faith and the need for this Court to exercise increased

1 judicial involvement within the framework of the USP. Video footage of the vote on the  
2 desegregation budget shows a GB with little appreciation of the District's obligation to  
3 demonstrate a good faith adherence to the spirit of the USP.<sup>2</sup> Instead, the footage shows  
4 the majority of the GB glossing over the substance of the recommendations and bristling  
5 at the suggestion that it should cede any part of its authority to act how and when as it  
6 sees fit. During the presentation delivered by Desegregation Director Sam Brown, GB  
7 members frequently questioned the SM's authority (rather than the substance of his  
8 recommendations) and declined to follow recommendations viewed as restricting the  
9 GB's authority or perceived as already adequately addressed under the USP. The GB  
10 rejected the majority of the SM's suggestions with little to no discussion of its rationale  
11 for doing so. The GB's lack of reasoned consideration of the feedback provided by the  
12 plaintiffs through the office of the SM is particularly evident in the sum total of the two  
13 paragraphs comprising the District's notice of approval of the desegregation budget. By  
14 contrast, the plaintiffs and the SM provided the District with over 36 pages of detailed  
15 comments and suggestions on the District's proposed desegregation budget. Rather than  
16 providing this Court with a commensurate response showing due consideration of the  
17 feedback provided under the terms of the USP, the District's notice simply states that the  
18 GB chose to reject six of the ten recommendations made by the SM.<sup>3</sup> The GB's actions  
19 show its ongoing failure to appreciate the District's first and foremost obligation under  
20 the USP: "good faith [compliance] with all of its obligations under [the USP]" (Section  
21 XI (A) (1) of the USP filed 02/20/13). In light of this failure, the Fisher Plaintiffs  
22 respectfully seek this Court's increased involvement in the implementation of the USP.  
23 Specifically, the Fisher Plaintiffs ask that this Court to direct the District to *either* modify  
24 its desegregation budget to comply with the plaintiffs' comments and the SM's

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26 <sup>2</sup> Video footage of the 05/07/13 TUSD GB meeting can be viewed at  
<http://www.youtube.com/watch?v=-bzdsAv8og4>.

27 <sup>3</sup> Note that District *staff* did provide the SM and the plaintiffs with approximately 12  
28 pages of substantive responses to the syntheses of many, *but not all*, of the plaintiffs'  
comments and the SM's suggestions (see TUSD's 04/30/13 final budget response).

1 recommendations *or* to provide this Court and the plaintiffs with a reasoned, specific and  
2 compelling justification for pursuing an alternative course of action.

3  
4 **2.3. The District's budget should include an external oversight mechanism to**  
5 **eliminate the perverse incentive for funding recipients to use up or misallocate**  
6 **surplus funds by engaging in unnecessary or low-priority activities**

7  
8 The desegregation budget does not appear to have any kind of external oversight  
9 mechanism to prevent funding recipients from retaining or otherwise misallocating  
10 surplus funds originally budgeted to meet a specific goal. Without such an accountability  
11 or oversight mechanism of this kind in place, the District will be creating a perverse  
12 incentive for funding recipients to engage (an excessive number of employees) in  
13 unnecessary or low-priority activity to use up, rather than leave unspent, previously  
14 allocated funds. The District should ensure that a rational funding recipient will not be  
15 given incentives to allocate surplus funds in unintended ways. The plaintiffs, the SM and  
16 this Court should know if and when a funding recipient has met its performance goals  
17 under budget if we are going to be able to identify and reallocate surplus funds to  
18 alternative or under-funded tasks in future budgets.<sup>4</sup> This should be a high priority given  
19 that a large percentage of the budget is being allocated for entirely new activities that  
20 may prove much more or less costly in practice than currently estimated. The parties  
21 should have a mechanism in place to ensure that any over-budgeting in the budget for  
22 fiscal year 2013-2014 is corrected and reallocated in the budgets for fiscal year 2014-  
23 2015 and thereafter. While it would certainly not make sense to penalize successful  
24 programs for being cost-effective, the budget should ensure that the choice about where  
25 to reallocate surplus funds is transparent and rational and clearly aligned with the various  
26 tasks required under the USP. The District might, for example, want to consider

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28 <sup>4</sup> Here, the Fisher Plaintiffs recognize that any policies addressing the use of  
desegregation funds must comply with state statutory requirements.

1 formalizing a procedure to allow a funding recipient to draw or retain and then reallocate  
2 surplus funds to meet future goals where, and only where, the recipient can show that the  
3 proposed reallocation will be a financially and programmatically reasonable decision  
4 fully aligned with the requirements of the USP. Funding recipients could, for example,  
5 be required to request and receive approval for a budget revision (consistent with the  
6 goals of the USP) or an extension allowing them to retain and reallocate any unspent  
7 funding the following fiscal year. Unspent funds would not be available to “back fund”  
8 previously incurred expenses. As stated, budget revisions and funding extensions should  
9 not be granted automatically. They should only be allowed when and where funding  
10 recipients have met the required showing and funding recipients failing to seek a  
11 reallocation or extension of unspent funds should forfeit their right to the funds.

12  
13 **2.4. The District should not be allowed to allocate *any* funds to cover overhead**

14  
15 The District’s budget proposal allocates five million dollars to cover “overhead” costs.  
16 Unless the District can provide a compelling rationale for so doing, the allocation of  
17 desegregation funding to cover overhead costs is inappropriate. The desegregation  
18 monies at issue here have been levied *to remedy a constitutional violation*. Five million  
19 dollars is a significant percentage of the District’s desegregation funding that can be  
20 better spent elsewhere. It is difficult to understand why a District operating under a  
21 federally mandated desegregation order should be treated as a lucky grant recipient. This  
22 is an allocation that shows the District’s continued failure to appreciate its posture in this  
23 civil rights action and aggregates potentially legitimate desegregation expenditures (like  
24 legal fees to be paid to external counsel) into a lump sum immune to fiscal oversight.

1 **2.5. The District's past allocation of desegregation funding justifies the retention of**  
2 **an external accountant to *proactively* limit the potential misallocation of funding**  
3

4 The District's questionable allocation of desegregation funding in past years justifies the  
5 *advance* retention of an accounting firm familiar with public school finance practices to  
6 review the *proposed* budget and the District's current accounting practices and make  
7 *proactive* recommendations on how to limit the potential misallocation of desegregation  
8 funding. The Court, the SM, the public and the plaintiffs alike should be assured that the  
9 District's allocation of desegregation funds is identical on paper and in practice. To  
10 ensure the impartiality of the review and recommendations, the accounting firm retained  
11 should not be selected by, have a past relationship with or report to the District.  
12

13 **2.6. Where feasible, the allocation of a significant percentage of each desegregation**  
14 **funding item should occur *only subsequent to the satisfaction of (or measurable***  
15 **evidence of reasonable progress towards) explicit and readily assessable**  
16 **performance goals**  
17

18 Where feasible, the allocation of desegregation funding should be linked to an expected  
19 performance outcome with the disbursal of a significant percentage of each funding item  
20 contingent on production of an expected outcome. Those outcomes should be articulated  
21 in the budget in sufficient detail to allow for their review and verification by the external  
22 auditor called for under the USP. The failure to rationalize the desegregation budget by  
23 providing funding recipients with strong financial incentives to reach expected outcomes  
24 on time and at or under budget will tend to limit the District's ability to meet the  
25 requirements of the USP.  
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1 **2.7. The District should not be allowed to subsume fees for external legal counsel**  
2 **into “overhead” inaccessible to public oversight**  
3

4 Without in any way questioning the District’s right to retain external counsel or the  
5 quality of the services provided by that counsel, the Fisher Plaintiffs object to the  
6 District’s attempt to subsume allocations to cover the cost of external legal counsel into  
7 the aggregate category of “overhead.” Permitting the District to do so will only serve to  
8 impede effective public oversight. In a 04/30/13 response to the plaintiffs’ comments on  
9 the previous draft of the desegregation budget, District staff stated that:

10 As a matter of full transparency, the District’s local counsel is funded from the  
11 desegregation budget, as are fees for Plaintiffs’ counsel and the fees for the  
12 Special Master and his experts - all appropriate under 15-910 (g)” (see TUSD’s  
13 04/30/13 final budget response at page 26 emphasis added).  
14

15 While the District is certainly correct in its assertion that legal and expert fees are  
16 properly funded from the desegregation budget, its claim to full transparency is belied by  
17 its decision to subsume the legal fees it pays external counsel into the \$5,000,000 amount  
18 it seeks to allocate to cover “overhead,” a collection of undefined expenditures that the  
19 District claims it is somehow incapable of disaggregating into separate, and therefore  
20 readily assessable allocations. Like the plaintiffs’ legal fees, the SM’s expert fees are  
21 itemized at a level of detail that permits meaningful judicial scrutiny and ensures that the  
22 desegregation monies at issue are being reasonably allocated and will contribute directly  
23 to their intended purpose: the timely resolution of the constitutional violation underlying  
24 this case. In contrast, the District seeks to shield a significant portion of the  
25 desegregation budget from public scrutiny and instead expects this Court to rest assured  
26 in the knowledge that it will allocate *some* amount (assumedly less than \$5,000,000) to  
27 cover the cost of the external legal fees to be incurred by the District (possibly to argue  
28 *inter alia* that the District should not have to disclose the exact amount or nature of its

1 external legal fees). The District's assumption appears to be that some undisclosed  
2 amount to be paid for external legal fees is appropriately considered overhead, because  
3 legal fees properly belong to that category of costs "not easily traceable to a specific  
4 function" (see TUSD's 04/30/13 final budget response at pages 23 and 26). This  
5 assumption is directly contradicted by the District's demonstrated ability to allocate in its  
6 budget the very specific amounts of \$125,000 to cover the cost of the legal services  
7 provided by Maree Sneed, \$320,000 to cover expert fees to be paid to the SM and other  
8 consultants and \$500,000 to cover the plaintiffs' legal fees. Like the plaintiffs, the SM  
9 regularly submits detailed hourly records showing hourly billing rates and the amount of  
10 time spent on given tasks. This level of detail represents the degree of transparency any  
11 institutional client should expect from a contractor. Such transparency is all the more  
12 important in the context of the District's questionable allocation of desegregation funds in  
13 past years. In light of the foregoing facts and arguments, the Fisher Plaintiffs respectfully  
14 ask this Court to direct the District to *fully* disclose the amount and nature of *all*  
15 desegregation funding to be allocated for legal fees in this and future budgets.

16

17 **2.8. The Fisher Plaintiffs object to the District's failure to link the \$8,968,470**  
18 **allocated to the District's magnet program to specific performance outcomes**

19

20 Specifically, the Fisher Plaintiffs object to allocation of \$8,968,470 to the District's  
21 magnet program without further information linking the disaggregated portions thereof to  
22 specific performance outcomes, as discussed in general terms above. In its final budget  
23 response of 04/30/13, District staff explained that the total allocation for magnets had  
24 been "split into individual expenditures" in the budget submitted for the GB's approval  
25 (see TUSD's 04/30/13 final budget response). While representing significant progress  
26 over the previous version of the budget, individually disaggregated expenditures must  
27 still be linked to individual performance outcomes if the budget is going to offer the  
28 public a reasonably accessible measure of the efficacy of the allocated amounts.

1 **3. CONCLUSION**

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On the basis of the foregoing facts and arguments, the Fisher Plaintiffs respectfully move this Court to exercise its discretion to direct the Defendant in the above-captioned civil rights proceeding to *either* modify its desegregation budget in response to the plaintiffs' objections and the SM's recommendations *or* provide this Court with a reasoned, specific and compelling justification for pursuing an alternative course of action.

Respectfully submitted this 20th day of May, 2013

s/ Rubin Salter, Jr.

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Counsel for Plaintiffs Roy and Josie Fisher, et al

1 **4. CERTIFICATE OF SERVICE**

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2  
3 I declare and certify that foregoing document was electronically transmitted to the  
4 CM/ECF system for filing and transmittal of a notice of electronic filing to the following  
5 CM/ECF registrants on this 20th day of May, 2013:

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9  
10 Respectfully submitted this 20th day of May, 2013

11 s/ Rubin Salter, Jr.

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