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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al.,

Plaintiffs,

Plaintiff-Intervenor,

vs.

ANITA LOHR, et al.,

Defendants,

SIDNEY L. SUTTON, et al.,

Defendants-Intervenors,

MARIA MENDOZA, et al.,

Plaintiffs,

UNITED STATES OF AMERICA

Plaintiff-Intervenor,

vs.

TUCSON UNIFIED SCHOOL
DISTRICT NO. ONE, et al.,

Defendants.

No. CV 74-90 TUC DCB

**FISHER PLAINTIFFS REQUEST
FOR REPORT AND
RECOMMENDATION
REGARDING DEFENDANT
TUSD'S 02/14/14 BOUNDARY
REVIEW PROCESS**

Submitted to Special Master Willis
Hawley on 03/06/14

No. CV 74-204 TUC DCB

1. FISHER PLAINTIFFS' REQUEST FOR REPORT AND RECOMMENDATION

COME NOW, Plaintiffs Roy and Josie Fisher (hereinafter the Fisher Plaintiffs), by and through counsel undersigned, Rubin Salter, Jr. to submit the following request for a report and recommendation regarding the below-detailed objections to Defendant Tucson Unified School District's (hereinafter TUSD or District or Defendant) 02/14/14 boundary review process (BRP).

IN SUPPORT WHEREOF, counsel undersigned cites the following facts and authority:

On 04/04/13, counsel for the Fisher Plaintiffs notified TUSD Desegregation Direct Sam Brown and former TUSD counsel Heather Gaines of the Fisher Plaintiffs' categorical opposition to the District's plan to conduct a "bifurcated" boundary review (see Salter 04/04/13 email to Gaines and Brown). The issue remains unresolved and the objection is repeated here:

A review of the proposed revised deadlines for the USP shows that the District has set two boundary-review deadlines: one for schools located East of Country Club Road and one for schools located West of Country Club Road. This is extremely concerning. The establishment of the two separate deadlines suggests that the District intends to review boundaries for the two halves of the District in isolation from one another. This division of labor will place a massive impediment to integration by precluding the possibility of drawing attendance boundaries and establishing feeder patterns that bridge, rather than divide, the two halves of the District. The division would raise a virtual wall at Country Club Road and segregate the District's identifiably White Eastside from its identifiably minority Westside. The Fisher Plaintiffs objected to this exact policy in their 2007 opposition to the PUSP. At that time, the District was in the process of forming a boundary review task force similarly divided into East- and Westside groups. The

1 Fisher Plaintiffs objected to that policy then, as now, as exacerbating residential
2 segregation and thwarting the possibility of District-wide integration. The Fisher
3 Plaintiffs consider the division to be constitutionally suspect and in blatant
4 violation of the language of and the rationale behind the USP. Without
5 reassurance that the boundary review will proceed as contemplated under the USP,
6 the Fisher Plaintiffs will petition the Court for an order restraining the District
7 from dividing the boundary review process into East- and Westside components
8 (see Salter 04/04/13 email to Gaines and Brown emphasis added).
9

10 On 09/27/13, the Fisher Plaintiffs submitted comments on the District's boundary review
11 process (BRP). The majority of these concerns remain unresolved and are repeated here:

12 [In reference to outstanding concerns with the BRP,] [t]he Fisher Plaintiffs
13 incorporate by reference all previously submitted comments relevant to the
14 boundary review process (especially to their ongoing objection to a bifurcation of
15 the boundary review). Those questions remain unresolved and clearly pertain to
16 the proposed boundary review process contemplated here. [In reference to the
17 BRP's compliance with the requirements of the USP,] [t]he Fisher Plaintiffs join
18 the Mendoza Plaintiffs in their observation that the requirements of the magnet
19 plan set forth in Section II (E) (3) of the Unitary Status Plan (USP) are intimately
20 linked to the outcome of the boundary review process and should, therefore, be
21 memorialized in the language of the boundary review plan. The coordination of
22 the timing of the boundary review process with the magnet plan is not evident in
23 the current draft of the boundary review plan where it contemplates the January
24 2014 completion of the comprehensive magnet plan informed by boundary
25 decisions that will not be completed until late May 2014 (see TUSD School
26 Master Plan (SMP) 2013-14 circulated as an attachment to Sam Brown's 09/16/13
27 email to counsel). [In reference to provisions for plaintiff input in the BRP,] [t]he
28 Fisher Plaintiffs join the Mendoza Plaintiffs in their concern that the current draft

1 of the boundary review process does not provide a time frame for reporting the
2 data necessary for informed plaintiff and SM analysis and commentary. As noted
3 by the Mendoza Plaintiffs, the SMP contemplates a demographic study. The
4 scope and intended purpose of that study would be usefully informed by early
5 plaintiff and SM review and input. [In reference to plaintiff participation in focus
6 groups,] [t]he Fisher Plaintiffs likewise join the Mendoza Plaintiffs and the Special
7 Master (SM) where they appreciate the additional opportunity for plaintiff input
8 contemplated in the District's willingness to "invite the Parties/Special Master (or
9 their representatives) to [participate in] Focus Groups in November and February"
10 (see Boundary Review Process circulated as an attachment to Sam Brown's
11 09/16/13 email to counsel). However, like the Mendoza Plaintiffs, the Fisher
12 Plaintiffs believe participation in focus groups "may not be the most effective
13 method for the Special Master and the Plaintiffs to provide feedback and comment
14 to the District" (see Mendoza marginal comments to Boundary Review Process
15 circulated as an attachment to Lois Thompson's 09/19/13 email to counsel). [In
16 reference to the "general timeline" for the BRP,] [t]he Fisher Plaintiffs join the
17 Mendoza Plaintiffs in all of the comments they make on this section of the
18 process, especially the identification of the composition of an advisory team, the
19 need for expert input, the appropriate sequencing of the establishment of a
20 boundary committee, the need to ensure a representative membership of the
21 boundary committee, the justification for treating UHS separately from the rest of
22 the District's schools and finally the above-noted need to coordinate the boundary
23 review process with the development of the comprehensive magnet plan (see
24 Salter 09/27/13 email and attached Fisher 09/27/13 comments on TUSD 09/16/13
25 BRP).

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1 Additionally, the Fisher Plaintiffs note, and object to, the deletion from the “general
2 outline” appearing in the 02/14/14 BRP of the language explicitly stating the District’s
3 intention to “[c]onsult the Special Master and Parties in the development and refinement
4 of objectives and criteria; refine objectives and criteria” (compare the general outlines
5 included in the 09/16/13 and 02/14/14 versions of BRP). The contemplated consultation
6 should have, but never actually occurred. This failure should be rectified by
7 reintroducing the language deleted from the BRP in a timeframe that will allow the
8 contemplated consultation to occur *well prior to* the District’s prematurely scheduled,
9 community-wide “boundary discussion” (see Brammer 02/04/14 email announcing, with
10 less than two weeks’ notice, the District’s unilateral decision to schedule a “boundary
11 discussion” meeting for 03/17/14 to be held with “other participants” at an undisclosed
12 location).

13
14 The Fisher Plaintiffs join the Mendoza Plaintiffs’ objection to the District’s failure to
15 disclose the demographic study conducted in conjunction with the school master plan:

16 [And] object to the Boundary Review Process’ omission of a schedule and
17 commitment for getting the Plaintiffs the information that we will need to make
18 informed comments, such as enrollment projections. As Mendoza Plaintiffs stated
19 in their September 2013 comments: “We note that the SMP includes a
20 demographic study. We urge the District to provide the Plaintiffs and the Special
21 Master information on the scope of that study now so that they can make
22 suggestions about it before it is concluded rather than having us find ourselves
23 having to ask for essential information late in the process.” According to the
24 schedule, the enrollment projections are completed. Presumably, they are part of
25 the demographic study we have requested. This sort of information should be
26 routinely delivered to the Plaintiffs without us having to ask so that we can indeed
27 be responsive in this process (at page 2 of Mendoza 02/25/14 request regarding
28 TUSD BRP emphasis added).

1 The Fisher Plaintiffs also join the Mendoza Plaintiffs in their objection to the District's
2 claims regarding "perceived ambiguities" in the USP. Specifically, the Fisher Plaintiffs
3 join the Mendoza Plaintiffs where they:

4 object to the "Project Team's" role in "defining any perceived ambiguities in the
5 USP." (Page 3.) No such ambiguities can be "defined" without the participation
6 and agreement of the Plaintiffs (at page 3 of Mendoza 02/25/14 request regarding
7 TUSD BRP).

8
9 The Fisher Plaintiffs object to the 02/14/14 BRP where it inappropriately seeks to limit
10 the SM's access to, and communication with, District employees, representatives and
11 staff. The BRP states in relevant part that:

12 At key points the Project Team will update District leadership, the Governing
13 Board and the Plaintiffs and Special Master. All submittals to the Plaintiffs and
14 Special Master will be submitted through the Director of Desegregation and legal
15 counsel; they will provide the Project Team with any responses on same, from
16 same (at page 2 of TUSD 02/14/14 BRP).

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18 The inclusion of this provision in the BRP both impedes the collaborative process
19 envisioned by the Court and directly contradicts the language of Section VIII of the
20 Court's 01/06/12 order appointing the SM, which section explicitly delineates the SM's
21 access to and communications with District representatives, employees and staff and
22 provides in relevant part that:

23 The Special Master [...] may have ex parte communications with Party
24 representatives or employees outside the presence of counsel [;] shall have
25 unfettered access to District staff [; and] may communicate directly with District
26 personnel (i.e. without counsel present). (at pages 15-16 of 01/06/12 order
27 appointing SM).

1 The Fisher Plaintiffs seek not only the deletion of the objectionable language, but seek
2 also the addition of language positively and explicitly affirming the District's
3 commitment to honoring the spirit and letter of the above-cited provisions of 01/06/12
4 order appointing the SM.

5
6 The Fisher Plaintiffs reiterate their objection to the District's stated intention to limit or in
7 any way minimize the scope of the boundary review process where it will impact students
8 affected by the round of school closures in occurring in 2013.¹ In its 03/21/13 notice and
9 request for approval (NaRA) regarding boundaries for closing and receiving schools, the
10 District argued that:

11 As the District moves forward under the USP with a comprehensive review of
12 boundaries throughout the District, including the possibility of magnet schools
13 without attendance boundaries, clustering or pairing schools and otherwise
14 examining boundaries, the District is committed to minimizing the impact of such
15 changes on students whose schools have been closed. Under applicable District
16 policies, students are permitted to continue attending any school in which they are
17 enrolled through the highest grade offered at that school, so no student would be
18 forced to move in the future as a result of a change in boundaries, except in the
19 event of a school closure (at page 7 of 03/21/13 NaRA regarding boundaries).

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25 ¹ In a 03/14/13 email to plaintiff counsel and the Special Master, former TUSD counsel
26 Heather K. Gaines stated that "[w]hen [the District] undertake[s] the comprehensive
27 review of boundaries, [it] will be considering the impact of the above changes as a factor.
28 It takes a few years for the pattern of the change to be established, thus a recent change is
one criterion that is used (as a negative) in the evaluation of boundary options" (see
attached 03/14/13 Gaines email).

1 In their 04/06/13 response to the District's 03/21/13 NaRA, the Fisher Plaintiffs objected
2 to the District's plans, explaining that:

3 [T]he District has prematurely and unilaterally concluded that none of the
4 estimated 14,768 students impacted by the school closures² will be subject to
5 reassignment as a result of the upcoming, District-wide review of school
6 boundaries required under Section II (D) (3) of the USP [...]. In support of its
7 conclusion, the District cites "applicable District policies" permitting students "to
8 continue attending any school in which they are enrolled through the highest grade
9 offered at that school" (idem). This, the District asserts, means that "no student
10 would be forced to move in the future as a result of a change in boundaries, except
11 in the event of a school closure" (idem). The District's apparent readiness to
12 disregard the requirements of the USP illustrates its continued failure to
13 acknowledge its obligations under the USP. Whatever student assignment policies
14 a school district may have in effect must yield where, as is the case here, they
15 stand to impede or otherwise limit the implementation of a federally mandated
16 remedial desegregation plan (at pages 8-9 of Fisher 04/06/13 response to TUSD
17 03/21/13 NaRA).

18
19 In its 04/12/13 reply in support of its 03/21/13 NaRA, the District reiterated its
20 "commitment to minimize future impacts to students impacted by these school closures,"
21 (at pages 6-7 of TUSD 04/12/13 reply) explaining that its "commitment in this regard has
22 been made as a result of the Special Master's specific recommendations and instructions
23 to the District, and the District concurs that this should be a primary concern as the
24 District moves forward with other USP student assignment strategies" (idem). The Court
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27 ² An attachment to the District's 01/02/13 request states that "approximately 14,768
28 students will be directly affected by [the 2013 round of] school closures" (at pages 3-4 of
document number 1419-9 filed 01/02/13).

1 addressed the District's argument in its 04/26/13 order and concluded that "[t]he District
2 is wrong" (at page 5 of 04/26/13 order) explaining that it was the District's failure:

3 to apply the entirety of the boundary change criteria [which was] a dis-service to
4 the students, who now may be subject to further movement to accomplish the goal
5 of integration to the extent practicable in the TUSD. Just to be clear, the Plaintiffs
6 are correct. School policies must yield to the Constitution where they stand to
7 impede or otherwise limit the implementation of the USP. See North Carolina
8 State Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971) (where policy limits a school
9 from operating a unitary school system or impedes disestablishing a dual school
10 system, it must fall) (idem at 5 emphasis added).

11
12 On the basis of the foregoing, the Fisher Plaintiffs strongly object to the omission from
13 the boundary review process of an explicit commitment by the District to adhere to the
14 requirements of the Court's 04/26/13 order).

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16 On 02/14/14, the District provided the plaintiffs and the Special Master with its boundary
17 review process (BRP). Attached to the BRP was a copy of Governing Board (GB) Policy
18 Regulation (PR) JC-R, which policy sets forth guidelines for the review of attendance
19 boundaries and provides in relevant part that:

20 [t]he Superintendent shall direct a review of attendance boundaries [...] where a
21 boundary change is indicated to [...] desegregate schools (at page 9 of TUSD
22 02/14/14 BRP).

1 PR JC-R then identifies ten criteria to be considered “[w]hen the District creates and
2 evaluates attendance boundaries” (idem). Those criteria are ordered and described as
3 shown below:

- 4 a. demographics (i.e., race, ethnicity, current and projected enrollment, current
5 and project development patterns, socioeconomic status)
- 6 b. targeted operating capacities
- 7 c. current and planned instructional programs
- 8 d. compactness of the attendance area and distance to schools
- 9 e. physical barriers and subdivision/neighborhood boundaries
- 10 f. effects on school desegregation
- 11 g. student transportation
- 12 h. feeder patterns
- 13 i. previous, recent boundary changes affecting the area
- 14 j. fiscal impacts

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17 PR JC-R then states that, “[i]n applying these criteria, the District shall propose and
18 evaluate various options in an effort to desegregate schools” (idem). The final page of
19 the District’s 02/14/14 BRP provides a summary of the District’s rationale for its recent
20 revision of GB PR JC-R and claims that:

21 Policy Regulation JC-R implements the [...] USP requirements in Policy JC. It
22 incorporates these requirements with existing procedures in the current Policy JC-
23 R [...]. Key changes are [i]ncorporation of USP stipulations in the following
24 sections [:] Review of Attendance Boundaries[:] Criteria for Drawing Attendance
25 Boundaries [; and] Unitary Status Plan Requirements (idem at 13).

1 The Fisher Plaintiffs strongly dispute the District's claim that its 02/05/14 revision of GB
2 PR JC-R "implements" and "incorporates" the District's boundary review requirements
3 of the USP. This is an issue that came before the district court in the conjunction with the
4 District's 03/21/13 NaRA regarding boundaries for closing and receiving schools. At
5 that time, the Fisher Plaintiffs objected to the District's inappropriate conflation of the
6 boundary review requirements of GB PR JC-R with the boundary review requirements of
7 the USP. The District argued that its adherence to the boundary review requirements of
8 its policy also satisfied the requirements of the USP, because "Policy JC-R, while it
9 should be revised in compliance with the USP, includes the same criteria as set forth in
10 the USP" (at page 5 of TUSD 04/12/13 reply emphasis added). The Court disagreed,
11 explaining that:

12 The Fisher Plaintiffs point out that the District guideline JC-R for making
13 boundary decisions, which was the guideline applied to the boundaries proposed
14 here, is not the same as the guideline under the USP, which includes two of five
15 criteria aimed at assessing integration: demographics (i.e., race, ethnicity, growth
16 projections, socioeconomic status) and effects on school integration, and requires
17 that in applying the five criteria, the District shall propose and evaluate various
18 scenarios in an effort to increase the integration of its schools [...]. The problem is
19 apparent in the District's Reply. It continues to maintain that it has satisfied the
20 conditions of the USP by "factoring the goal of integration into the decisions."
21 The JC-R guideline provides six factors, one of which is natural and legal
22 parameters including neighborhood boundaries, natural boundaries, current and
23 future subdivision growth, and ethnic mix. The District is wrong. This guideline
24 is not the same as what is required under the USP. Even if looking at "ethnic mix"
25 when considering the criteria "natural and legal parameters" is construed the same
26 as considering "demographics (i.e., race, ethnicity, growth projections,
27 socioeconomic status) and effects on school integration," the District has
28 admittedly failed to apply the entirety of the boundary-change criteria by

1 considering various scenarios in an effort to increase the integration of its schools.
2 This is a dis-service to the students, who now may be subject to further movement
3 to accomplish the goal of integration to the extent practicable in the TUSD. Just to
4 be clear, the Plaintiffs are correct. School policies must yield to the Constitution
5 where they stand to impede or otherwise limit the implementation of the USP. See
6 North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971) (where policy
7 limits a school from operating a unitary school system or impedes disestablishing
8 a dual school system, it must fall) (at pages 4-5 of 04/26/13 order emphases
9 added).

10
11 Although the District did subsequently revise GB PR JC-R, its revision, while improved,
12 nevertheless fails to conform with the plain requirements of Section II (D) (2) of the USP,
13 which section provides that:

14 The District shall review and/or redraw its attendance boundaries when it opens a
15 new school; closes, repurposes or consolidates a school; alters the capacity of a
16 school; or designates a school without an attendance boundary. The Parties
17 anticipate that such changes may result in the redrawing of some attendance
18 boundaries. When the District draws attendance boundaries, it shall consider the
19 following criteria: (i) current and projected enrollment; (ii) capacity; (iii)
20 compactness of the attendance area; (iv) physical barriers; (v) demographics (i.e.,
21 race, ethnicity, growth projections, socioeconomic status); and (vi) effects on
22 school integration. In applying these criteria, the District shall propose and
23 evaluate various scenarios with, at minimum, the Plaintiffs and the Special Master
24 in an effort to increase the integration of its schools (at page 9 of 02/20/13 order
25 entering the USP into record).

1 Instead of simply incorporating the USP's express requirement to consider "physical
2 barriers," (idem) as would seem logical, the District has revised GB PR JC-R to require
3 consideration of "physical barriers and subdivision/neighborhood boundaries" (at page 9
4 of TUSD 02/14/14 BRP emphasis added). In so doing, the District has revised GB PR
5 JC-R to misrepresent, rather than accurately implement or incorporate, the requirements
6 of Section II (D) (2) of the USP. Given the District's stated intention to limit the scope of
7 the boundary review process (see above), the Fisher Plaintiffs have good reason to fear
8 that the District's inclusion of GB PR JC-R as an attachment to its BRP and its explicit
9 claim at the final page of its BRP that that policy "implements" and "incorporates" the
10 boundary review requirements of the USP, is indication of the District's continued intent
11 to limit the scope of the boundary review process by applying the requirements of PR JC-
12 R rather than the plain requirements of Section II (D) (2) of the USP, which section
13 requires consideration of six, equally-weighted criteria:

Section II (D) (2) of the USP		TUSD GB PR JC-R
“current and projected enrollment”	... is subordinated to and conflated with ...	“demographics”
“capacity”	... is limited to ...	“targeted operating capacities”
“compactness of the attendance area”	... is expanded to ...	“compactness of the attendance area and distance to schools” (emphasis added)
“physical barriers”	... is expanded to ...	physical barriers and subdivision/neighborhood boundaries
“demographics (i.e., race, ethnicity, growth projections, socioeconomic status)”	... is expanded to subordinate ...	“demographics (i.e., race, ethnicity, <u>current and projected enrollment</u> , current and project[ed] development patterns, socioeconomic status)” (emphasis added)
“effects on school integration”	... is reworded as ...	“effects on school <u>desegregation</u> ” (emphasis added)
N/A	(new)	“current and planned instructional programs”
N/A	(new)	“student transportation”
N/A	(new)	“feeder patterns”
N/A	(new)	“previous, recent boundary changes affecting the area”
N/A	(new)	“fiscal impacts”

1 **2. CONCLUSION**

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3 On the basis of the foregoing facts and arguments, the Fisher Plaintiffs respectfully
4 request a report and recommendation by the Special Master granting the requested relief.
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6 Respectfully submitted this 6th day of March, 2014
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8 s/ Rubin Salter, Jr.

9 RUBIN SALTER, JR., ASBN 01710

10 Counsel for Fisher Plaintiffs
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4. CERTIFICATE OF SERVICE

I declare and certify that foregoing document was transmitted via electronic mail to the following recipients on this 6th day of March, 2014:

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